**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 19-5304**

DAMIEN GUEDES; FIREARMS POLICY FOUNDATION; MADISON SOCIETY FOUNDATION, INC.; FLORIDA CARRY, INC.,
*Plaintiffs-Appellees*,

FIREARMS POLICY COALITION, INC., CA 18-3083
*Plaintiff-Appellant*,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; REGINA LOMBARDO, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; UNITED STATES OF AMERICA,
*Defendants-Appellees*.

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On Appeal from the United States District Court for the District of Columbia (No. 1:18-cv-02988-DLF)

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# OPENING BRIEF

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), Plaintiff-Appellant Firearms Policy Coalition, Inc. (FPC) certifies as follows:

**(A) Parties and *Amici*.** The defendants in district court, and appellees here, are: Matthew G. Whitaker, in his official capacity; the Bureau of Alcohol, Tobacco, Firearms and Explosives; William P. Barr, in his official capacity; Regina Lombardo, in her official capacity; and the United States of America. The plaintiff in district court, and appellant here, is FPC. No *amicus curiae* or intervenor appeared in the district court, and FPC is not aware of any intervenors or *amici* in this Court at this time.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, FPC states that it has no parent companies and no publicly held company has a 10% or greater ownership interest in the entity. The general nature and purpose of FPC insofar as relevant to the litigation is defending the U.S. Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

**(B) Rulings Under Review.** Under review in this appeal are the order and memorandum opinion entered on February 25, 2019, in the U.S. District Court for the District of Columbia, No. 1:18-cv-02988-DLF, DE26 and DE27, and the order and memorandum entered on December 31, 2019, No. 1:18-cv-02988-DLF, DE51 and DE52. The matter was before U.S. District Judge Dabney L. Friedrich. The memorandum opinion at DE27 is published in the *Federal Supplement* at 356 F. Supp. 3d 109. The memorandum opinion at DE52 is not yet published in the *Federal Supplement* but is available at 2019 WL 5653684.

**(C) Related Cases.** The case on review was previously before this Court in consolidated interlocutory appeals, resolved against other parties, and the opinion is published in the *Federal Reporter* at 920 F.3d 1. The following cases involve some of the same parties and/or the same or similar issues as presented in this appeal: *In re Grand Jury Investigation* (D.C. Cir. No. 18-3052, oral argument held Nov. 8, 2018, before Judges Henderson, Rogers, and Srinivasan); *United States ex rel. Landis v. Tailwind Sports Corp.* (D.C. Cir. No. 18-7143); *Koster v. Whitaker* (9th Cir. No. 20-15077); *Patrick v. Whitaker* (4th Cir. No. 20-1079); *Blumenthal v.*

*Whitaker* (D.D.C. No. 1:18-cv-02644); *O.A. v. Trump* (D.D.C. No. 1:18-cv-02718); *Michaels v. Whitaker* (D.D.C. No. 1:18-cv-02906).

FPC is not aware of any other related cases pending before this Court, any other U.S. court of appeals, or any local or federal court in the District of Columbia.

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## GLOSSARY

| | |
|---|---|
| AG | Attorney General |
| AG Act | Attorney General Succession Act |
| DE | Docket Entry |
| FPC | Firearms Policy Coalition, Inc. |
| FVRA | Federal Vacancies Reform Act |
| GAO | Government Accountability Office |
| GSA | General Services Administration |
| HHS | Department of Health and Human Services |
| HUD | Department of Housing and Urban Development |
| JA | Joint Appendix |
| OLC | Office of Legal Counsel |
| *OMB OLC Op.* | *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) |
| SSA | Social Security Administration |
| VA | Department of Veterans Affairs |
| *Whitaker OLC Op.* | *Designating an Acting Attorney General*, 42 Op. O.L.C. __ (Nov. 14, 2018), slip op. |

## INTRODUCTION

Plaintiff-Appellant Firearms Policy Coalition, Inc. filed this action in response to a regulation that took effect because it was signed by Matthew G. Whitaker in his role as Acting Attorney General. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (the Rule). Whitaker was designated to serve in that role in violation of federal law and the Constitution. The Rule is thus invalid.

The district court denied Plaintiff's motion to preliminarily enjoin the Rule. Just as this Court was set to consider Plaintiff's interlocutory appeal, Attorney General William Barr purported to ratify the Rule. Currently, Plaintiff seeks relief related to the Rule and challenges the President's broader policy of unlawfully installing individuals like Whitaker as acting officers. The district court dismissed the complaint, holding that it does not have jurisdiction to reach the merits of Plaintiff's challenge.

That was wrong. The general vacancies law prohibits ratifying the kind of agency action at issue here, so there is still a live challenge to the Rule. And in any event, the district court erred in holding that Plaintiff fails to establish standing to challenge the President's unlawful designation policy.

Because the district court also decided the merits in denying the preliminary injunction, this Court should reach the substance of Plaintiff's claims. The district court held that Whitaker's designation was lawful as both a statutory and constitutional matter. Again, that was wrong. By directing an employee to exercise the powers of an office, and by displacing an available first assistant to act as a principal officer, the President violated the Appointments Clause and the general vacancies and office-specific designation statutes.

This Court should vacate the district court's judgment, reverse, and remand for entry of an order granting the relief Plaintiff seeks.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 and equity. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). The district court entered a final order of dismissal on October 31, 2019. JA92. Plaintiff timely noticed its appeal the next day. DE53. This Court has jurisdiction under 28 U.S.C. §1291.

## ISSUES PRESENTED

Whether the district court erred in holding that it is without jurisdiction to reach the merits.

Whether the President's designation of Matthew Whitaker to serve as Acting Attorney General was unlawful or unconstitutional.

## STATUTES AND REGULATIONS

The relevant statutes are reproduced in the Addendum.

## STATEMENT OF THE CASE

### I. Constitutional And Statutory Framework

1. The Constitution's Appointments Clause distinguishes "officers" from "employees." An officer is a (1) non-temporary official who (2) exercises significant discretion in administering the laws of the United States. *Lucia v. SEC*, 138 S. Ct. 2044, 2051-52 (2018). Employees can be hired. But the Constitution requires that officers be "appointed." U.S. Const. art. II, §2, cl. 2. In turn, there are two types of officers—principal and inferior—which can require two different forms of appointment. The appointment of principal officers requires nomination by the President and confirmation by the Senate. For inferior officers, Congress can either require Senate confirmation or it can permit the President, courts, or heads of executive departments to appoint them directly. *Id.*; *see Lucia*,

138 S. Ct. at 2051 n.3. Principal officers are those who only report directly to the President. *Edmond v. United States*, 520 U.S. 651, 662-63 (1997).

2. Federal statutes govern service by acting officials when a Senate-confirmed officer is unavailable or the office is vacant. Roughly three dozen statutes govern specific offices. Most are strict, designating a Senate-confirmed "first assistant"—the officer's second in command—to serve with no time limits; the President has no power to designate anyone else. *See, e.g.*, 28 U.S.C. §508 (Attorney General); 42 U.S.C. §7132(a) (Secretary of Energy). A few designate the first assistant by default, but then grant the President the authority to pick someone else—sometimes specifically under the general vacancies law, called the Federal Vacancies Reform Act (FVRA). *See, e.g.*, 10 U.S.C. §7017 (Secretary of Army); *id.* §8017 (Navy); *id.* §9017 (Air Force).

The FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" almost all of the roughly 1,200 Senate-confirmed offices "unless" an exception applies. 5 U.S.C. §3347(a)(1). One exception occurs when an office-specific statute "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* §3347(a)(1)(B). A

statute that merely allows the delegation of an official's responsibilities does not qualify. *Id.* §3347(b).

When it applies, the FVRA provides that the first assistant serves by default. 5 U.S.C. §3345(a)(1). However, the President may designate someone else: either another Senate-confirmed officer or a senior agency employee. *Id.* §3345(a)(2)-(3). Service under the FVRA is subject to various restrictions, including time limits. *Id.* §§3345(b), 3346.

3. The Attorney General Succession Act (AG Act) is an office-specific vacancies statute, 28 U.S.C. §508, which "designates" the officers who "perform the functions and duties of a specified office temporarily in an acting capacity," 5 U.S.C. §3347(a)(1)(B).

The AG Act provides that the Deputy Attorney General will automatically perform "all the duties" of the Attorney General during a "vacancy," "absence," or "disability." 28 U.S.C. §508(a). The AG Act also specifies a further order of succession of Senate-confirmed officers: The Associate Attorney General "shall" serve next, then the Attorney General "may designate the Solicitor General and the Assistant Attorneys General"—all Senate confirmed officers—"in further order of succession, to

act as Attorney General." 28 U.S.C. §508(b). Nothing in the statute permits the President to override that chain of succession, as is the case with other office-specific statutes, like those governing vacancies in the General Services and Social Security Administrations and Department of Veterans Affairs. *See* 38 U.S.C. §304 (VA); 40 U.S.C. §302 (GSA); 42 U.S.C. §902(b)(4) (SSA).

The AG Act defines the Deputy Attorney General as the "first assistant" for purposes of the predecessor general vacancies law. 28 U.S.C. §508(a). Because the general vacancies law at the time the "first assistant" provision was created already expressly excluded the office of the Attorney General altogether, §508's "first assistant" reference never had any substantive effect. *Infra* pp.62-64. That remains true today.

## II. Factual And Procedural Background

1. In 2017, the Senate confirmed Jefferson Sessions III as Attorney General. Sessions recused himself from the ongoing investigation into matters related to whether the President or his campaign had colluded with Russia. By operation of the AG Act, Sessions' first assistant—the Senate-confirmed Deputy Attorney General, Rod Rosenstein—automatically became Acting Attorney General with respect to the investigation.

In 2018, the President requested and received Sessions' resignation. Rosenstein automatically began serving indefinitely as Acting Attorney General, again by operation of the AG Act. The next day, the President purported to designate Matthew Whitaker as Acting Attorney General pursuant to the FVRA. *See* JA108. At the time, Whitaker was a department employee—not an officer—serving as the Attorney General's Chief of Staff.

Whitaker took almost no formal public actions, as the Department of Justice consciously sought to evade judicial review of his designation. *See* Sadie Gurman & Aruna Viswanatha, *Declining to Recuse, Whitaker Extends Reputation for Political Instinct*, Wall St. J. (Dec. 22, 2018), https://on.wsj.com/2Vi3r7g; *e.g.*, Order, *In re Motion for Appointment of Thomas C. Goldstein as* Amicus Curiae, Misc. 18-04 (FISA Ct. Apr. 11, 2019) (Whitaker never exercised the Attorney General's authority to seek a warrant from the FISA Court); *In re M-S-*, 27 I. & N. Dec. 509 (2019) (immigration order signed by AG Barr on issue that had been pending during Whitaker's entire tenure, *see In re M-S-*, 27 I. & N. Dec. 476 (2018)). Whitaker did finally take a single public formal action: he signed

a Final Rule regulating certain so-called "bump-stock" devices on firearms. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,554 (Dec. 26, 2018); Devlin Barrett, *Senior Justice Dept. Officials Told Whitaker Signing Gun Regulation Might Prompt Successful Challenge to His Appointment*, Wash. Post (Dec. 21, 2018), https://wapo.st/2CEjTHE.

Plaintiff—a bump-stock owner and an organization with thousands of members who owned bump-stocks—filed suit, alleging that the President's designation of Whitaker violated the FVRA and the Appointments Clause. That suit was consolidated with another, and the district court denied the respective plaintiffs' requests for preliminary injunctions, holding in relevant part that Whitaker's designation complied with the statutes and Constitution. JA17-80.

2. The district court's decision was subject to an interlocutory appeal. *See Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019). In the midst of heavily expedited briefing—after Plaintiff's opening brief, but just before the Government filed its response—Attorney General Barr purported to "ratify" Whitaker's Rule. *Id.* at 10. He avowedly did so in response to the challenges to Whitaker's authority. Bump-Stock-Type Devices, 84 Fed. Reg. 9239, 9240 (Mar. 14, 2019). Thus, Plaintiff filed a motion to dismiss

its appeal to file an amended complaint, "to secure a final judgment in the district court," and "to then appeal from that judgment." No. 19-5043, Doc. #1779005 at 1 (Mar. 22, 2019). This Court granted the motion over the Government's opposition. No. 19-5042, Doc. #1779025 (Mar. 23, 2019).

However, another party that remained on appeal had nominally adopted the arguments based on Whitaker's unlawful designation but accepted the validity of the ratification. *See Guedes*, 920 F.3d at 12. Thus, this Court reasoned that it did not need to "wade into th[e] thicket" of the merits. *Id.* With "that act of ratification and the concession," this Court held that the appellant's "likelihood of success on the merits of his challenge to the rule based on Acting Attorney General Whitaker's role in its promulgation reduces to zero." *Id.* No mootness exception applied, the Court reasoned, because "ratification is generally treated as a disposition on the legal merits of [an] appointments challenge." *Id.*

3. Plaintiff filed an amended complaint, seeking injunctive and declaratory relief against the President's policy of using the FVRA to designate an employee to act as an officer, to designate a non-Senate confirmed

official or employee to act as a principal officer during an absence or vacancy when that officer's first assistant is available to serve, and to displace the acting principal officer designated by an office-specific designation statute. JA82 ¶1. Plaintiff also seeks declaratory relief related to the Rule, including that "issuance of the Final Rule by Mr. Whitaker on December 18, 2018, wholly apart from Mr. Barr's ratification on March 14, 2019, was illegal." JA88 ¶22.

The district court granted the Government's motion to dismiss, rejecting Plaintiff's argument that the court should forgo an advisory opinion on standing given that it had previously rejected Plaintiff's arguments on the merits. JA99-100. The court found that Plaintiff lacks standing to challenge the unlawful designation policy and that a declaratory judgment in Plaintiff's favor would provide no redress for the alleged harms related to the Rule. JA100-106.

## STANDARD OF REVIEW

The district court's dismissal for lack of jurisdiction and legal conclusions are reviewed de novo. *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 786 (D.C. Cir. 2010).

## SUMMARY OF THE ARGUMENT

I. This Court has jurisdiction for two independent reasons.

*First*, under the terms of the FVRA, Attorney General Barr could not validly ratify the Rule. The FVRA prohibits ratifying agency action under the circumstances present here. *See* 5 U.S.C. §3348(d). Thus, a ruling in Plaintiff's favor would invalidate the Rule and provide Plaintiff all the relief it seeks for itself and its members. Any other reading of the FVRA's anti-ratification provision makes it a nullity as to the highest official in every executive department, and, contrary to congressional intent, would allow the Government always to escape judicial review of this issue by ratifying an action subject to an appointments challenge.

*Second*, Plaintiff has standing to challenge the President's policy of unlawfully designating acting officers. On top of the harm Plaintiff and its members already suffered from the Rule, there is a realistic probability that further *ultra vires* gun-control regulations will be promulgated and cause them additional injury. Those additional impending injuries are sufficient for this Court to reach Plaintiff's broader policy claim.

II. Whitaker's designation violated the Constitution. The Appointments Clause prohibits the President from directing an employee to

exercise the powers of any officer, let alone the powers of a principal officer, without following formal appointment procedures. And even if Whitaker were a non-Senate-confirmed inferior officer—which he was not—the Appointments Clause would prohibit bypassing Rosenstein with Whitaker while Rosenstein was available to serve. In situations like this, the only non-confirmed officer who may constitutionally act as a principal officer is the principal's "first assistant." By law, the parties agree, that officer is the Senate-confirmed Deputy Attorney General.

III. The Court need not and therefore should not decide the case based on this constitutional infirmity, because Whitaker's designation also violated the FVRA and AG Act. To the extent there is any statutory ambiguity, it should thus be resolved in Plaintiff's favor.

The President invoked the FVRA to displace a first assistant who was performing the functions of a principal officer. But the FVRA does not apply when, as here, an office-specific statute like the AG Act designates an acting official. The district court's contrary ruling cannot be reconciled with the statutes' text and structure, or with the well-settled role of office-specific designation statutes as exceptions to the President's au-

thority under the general vacancies law. Indeed, the district court's ruling inverts Congress's intent to limit the President's authority to choose between the FVRA and departments' organic statutes.

## ARGUMENT

### I. The Court Has Jurisdiction To Reach The Merits.

1. Whitaker signed the bump-stock Rule while serving in violation of the FVRA. *Infra* Part III. And the FVRA prohibits attempts to ratify such agency action. Thus, Attorney General Barr's attempted ratification is itself invalid, and Plaintiff's challenge to the Rule is obviously a controversy over which this Court has Article III jurisdiction.

The FVRA's anti-ratification provision provides that an action "taken by any person" serving in violation of the statute "may not be ratified" if it is a function or duty "established by statute" and required "to be performed by the applicable officer (and only that officer)." *See* 5 U.S.C. §3348(a)(2), (d). The National Firearms Act is just such a statute: It vests the duty to promulgate firearms regulations with the Attorney General alone. *See Guedes*, 920 F.3d at 7 ("Congress expressly charged the Attorney General with the 'administration and enforcement' of the National Firearms Act, 26 U.S.C. §7801(a)(1), (a)(2)(A), and provided that

the Attorney General 'shall prescribe all needful rules and regulations for the enforcement of' the Act, *id.* §7805; *see id.* §7801(a)(2)(A)."). Thus, by §3348's express terms, Attorney General Barr could not validly ratify the rule.

In passing dicta, this Court previously suggested that the FVRA's ratification prohibition only applies to nondelegable duties. *See* 920 F.3d at 12. But that is wrong, and this Court should not hesitate to depart from that suggestion on a non-dispositive and unbriefed issue. *Cf. Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 511 (D.C. Cir. 1984) (dicta is not part of the law of the case).

*First*, the text, on its face, applies to delegable functions and duties. Section 3348 does not say "nondelegable." Rather, it defines functions and duties as those, by statute, that are assigned to "the applicable officer (and only that officer)," regardless of whether those functions and duties can be delegated. *See* 5 U.S.C. §3348(a)(2)(A)(ii). As just noted, the duty to issue firearms regulations is assigned to the Attorney General "and only that officer." *See Guedes*, 920 F.3d at 7. On the other hand, §3348 would not apply, for example, to any number of statutes that authorize multiple officers to carry out a duty or function, *e.g.*, 18 U.S.C. §2332(d)

(multiple officers may authorize prosecutions for offenses described in this section); *id.* §2336(b) (multiple officers may object to discovery of investigative files); *id.* §2516 (multiple officers may authorize wiretaps), or statutes that assign functions or duties to agencies, *e.g.*, 15 U.S.C. §6804 (CFPB and SEC may prescribe regulations).

*Second*, the anti-ratification provision's history confirms Plaintiff's reading. As described in the Senate Report, it was the *minority* view of just two Senators—who were concerned this enforcement mechanism would otherwise "prevent the Executive Branch from doing its job"—that it should apply "only [to functions or duties] that are *expressly deemed nondelegable* by statute or regulation." S. Rep. No. 105-250, at 36 (1998) (emphasis added). *Cf.* 144 Cong. Rec. S11,026, S11,026 (Sept. 28, 1998) (in stating his opposition to the FVRA, Senator Levin warned that §3348 would apply to "any duties assigned just to that position by statute"). But Congress ultimately *rejected* such language.

Rather, as this Court recognizes, Congress enacted the anti-ratification provision to overrule *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), which involved an appointments challenge under the previous general vacancies law:

> [I]n response to *Doolin*, the FVRA renders actions taken by persons serving in violation of the Act void *ab initio*. *See id.* §3348 (d)(1)-(2) ("An action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified."); *see also* 144 Cong. Rec. S6414 (explaining that the FVRA "impose[s] a sanction for noncompliance," thereby "[o]verruling several portions of [*Doolin*]"); S. Rep. No. 105-250, at 5 ("The Committee . . . finds that th[e ratification] portion of [*Doolin*] demands legislative response. . . .").

*SW Gen., Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) (alterations in original).

In *Doolin*, the petitioner challenged a final agency order, arguing that it was void because the acting Director who initiated the proceeding and the temporary Director who issued the order were serving in violation of the pre-FVRA general vacancies law. 139 F.3d at 204. This Court declined to reach the merits of the appointments challenge, though, finding instead that a subsequent Senate-confirmed Director "effectively ratified" the challenged action. *Id.* at 213-14. Critically, just like the bump-stock Rule here, the agency action ratified in *Doolin* was pursuant to authority granted solely to the Director, 12 U.S.C. §1464(d)(1)(A) (1998), but otherwise *entirely delegable*, *id.* §1462a(e)(1), (h)(4) (1998).

Thus, Congress avowedly did *not* intend the anti-ratification provision only to apply to nondelegable duties. As stated in the Senate Report,

Congress was explicit that "the ratification approach taken by the court in *Doolin* would render enforcement of the [FVRA] a nullity in many instances." S. Rep. No. 105-250, at 20. "[I]f any subsequent acting official or anyone else can ratify the actions of a person who served [in violation of the FVRA], then no consequence will derive from an illegal acting designation." *Id.* at 8. But if §3348 applies only to nondelegable duties, the action in *Doolin* could still be ratified today, and Congress would not have accomplished its express purpose in enacting the provision.

*Third*, only Plaintiff's reading makes sense. If the ratification prohibition applies only to nondelegable duties, §3348 would be a nullity for the highest official in every executive agency. As the Government agrees, No. 19-5042, Doc. #1777426 at 73 (Mar. 13, 2019), essentially all of the Attorney General's functions are delegable, *see* 28 U.S.C. §510. The same is true for the head of *every* executive department. *See* 5 U.S.C. Appendix (identifying statutes that vest essentially all the functions of executive departments in agency heads and empower them to delegate their duties). It is thus no surprise that the Government has not pointed to a single statute that makes any such officer's duty nondelegable, in any of

these cases. Plaintiff has independently scoured through the U.S. Code and has been unable to find a single one.

If the anti-ratification provision truly does nothing to prevent ratifying the actions taken by invalidly acting principal officers, query why the White House issued a veto threat over the provision, describing it as "draconian" and believing it would result in "administrative paralysis." Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 Ga. St. U. L. Rev. at App.A-91 (2020 Forthcoming), http://bit.ly/2EvHhXj (Migala). Indeed, although bill co-sponsor Senator Byrd disagreed with the White House's characterization, he conceded that §3348 is an "effective, and admittedly tough enforcement mechanism." 144 Cong. Rec. S12,824 (Oct. 21, 1998).

Ultimately, if §3348 applies only to nondelegable duties, then the Government will always prevent judicial scrutiny of this issue by pulling the same stunt—installing new officers who then ratify anything that is challenged as an appointments violation, before the courts can rule. But the text and history of the provision, as well as common sense, require that Whitaker's Rule could not be validly ratified to avoid addressing

Plaintiff's appointments challenge. This Court must therefore reach the merits of Plaintiff's challenge to the Rule.

2. Plaintiff also has standing to challenge the President's unlawful designation policy—an issue the Court need not reach if it agrees with Plaintiff's interpretation of §3348. The district court found that Plaintiff failed to identify a sufficiently imminent injury resulting from the policy, describing a chain of seven events that would have to occur for Plaintiff or its members to be injured again. JA100-101. But the district court's "chain" of causation boils down to just two: the President installs an invalid officer pursuant to the unlawful designation policy, and that invalid officer issues a gun-control regulation. Plaintiff and its members face a realistic probability of such harm.

Plaintiff's "concern is with repeated violations" of the FVRA and Appointments Clause, "not merely with repetition of the same offensive conduct here." *TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981) (case not moot even though specific illegal conduct of specific party had ceased); *see also Conservation Law Found. v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004) (correction of substantive violation did not moot challenge to procedural policy that would apply to other actions going forward). Again,

the upshot of the Government and district court's position is that the issue can never be resolved by the courts because the Government can always ratify a specific agency action that is subject to an appointments challenge.

This Court has previously held that the connection "between the procedural requirement at issue and the substantive action" of the Government is "not very stringent." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Plaintiff has sufficiently pled "that one or more members . . . will be adversely affected" by future gun-control regulations promulgated by unlawfully designated acting officers. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

At this stage, "general factual allegations of injury" are enough, because the Court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation and brackets omitted). As pleaded in the Complaint, Plaintiff "has hundreds of thousands" of gun-owning "members and supporters across the United States." JA83 ¶6. Gun measures are regularly promulgated by the Government, *see* 27 C.F.R. ch. I, subch. C; *id.* ch. II, subch. B, and all it takes for Plaintiff to

have standing is for at least one member to be affected (even indirectly) by one regulation promulgated by one invalidly designated acting officer.

The district court rejected Plaintiff's contention that it has organizational standing. JA102-104. But "given the organization's large membership," it is "reasonable to infer that at least one member will suffer injury-in-fact" from further gun regulations. *Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1339-40 (D.C. Cir. 2006) (declining to follow jurisdictions that "reject reliance on mathematical likelihood," because "that viewpoint overlooks the reality that all empirical issues are matters of probability").

The district court also erred in finding that Plaintiff failed to establish standing in its own right. Plaintiff's mission is to "defend[] the United States Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms." JA83-84 ¶6. As part of that effort, Plaintiff "serves its members and the public through direct legislative advocacy, grassroots advocacy, legal efforts, research, education, operation of a Hotline, and other programs" in protecting fundamental rights.

*Id.* Those efforts are frustrated when gun-control measures are authorized by invalid acting officials.

When such rules are promulgated by an invalid officer, Plaintiff must make additional expenditures and further deplete its funds to counteract the Government's *ultra vires* regulations. Plaintiff has already done so, in response to Whitaker's bump-stock Rule. And because Plaintiff has suffered and will continue to suffer a "drain on the organization's resources" in responding to the executive policy, "there can be no question that the organization has suffered injury in fact" sufficient to establish standing in its own right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organization had standing to challenge policy based on allegation that organization "had to devote significant resources to identify and counteract the defendant's" practices). Indeed, Plaintiff has standing to sue even if those invalidly authorized regulations would not bind Plaintiff directly, because those *ultra vires* rules will still require Plaintiff to expend resources in counteracting them. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-56 (2010); *Texas v. United States*, 809 F.3d 134, 155-60 (5th Cir. 2015).

Plaintiff's concern is well founded. The constant refrain from the Government, throughout this litigation, is that "Presidents have consistently and explicitly invoked their FVRA authority to make acting officer designations that would be barred" if Plaintiff is correct on the merits. JA85 ¶13 (quoting from Government's briefs on the issue). For example, even before Whitaker's designation, President Trump violated the Appointments Clause by designating Peter O'Rourke, a former employee in the VA, as Acting Secretary of the Department. *See* Cristiano Lima, *Trump Taps O'Rourke as Acting VA Secretary Ahead of Wilkie Confirmation*, Politico (May 30, 2018), https://politi.co/2VKmZE9. And the President has violated the FVRA even since Plaintiff filed the operative complaint, by installing Kevin McAleenan as Acting Secretary of Homeland Security upon former Secretary Kirstjen Nielsen's resignation, thus displacing the acting Secretary who was serving pursuant to an office-specific designation statute.[1]

[1] At the time President Trump purported to designate McAleenan as Acting Secretary of Homeland Security, *see* Donald J. Trump (@realDonaldTrump), Twitter (Apr. 9, 2019, 6:02 PM), http://bit.ly/2Lgrn9X, there was no Deputy Secretary, and Claire M. Grady was still serving as the Under Secretary for Management. By statute, Grady automatically

The Government further argues that Presidents have "long" done so in Executive Orders governing succession, as well as in specific designations that "bypassed the extant deputy designated in the office-specific statute." JA85 ¶13. And the President regularly has the opportunity to install acting officers in violation of the FVRA and the Appointments Clause. The rate of turnover in this administration, including in high-level positions, eclipses the last five. *See* Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, Brookings Inst. (Feb. 2020), https://brook.gs/2HX2fys. As of this filing, there are 129 vacant federal offices subject to the FVRA that are currently filled by an acting official, according to tracking done by the GAO. GAO, *Federal Vacancies Reform Act: Search Vacancies*, http://bit.ly/2WiZPSl (last visited Feb. 26, 2020) (results for search of "Vacant Positions with Acting Official"). Those include the Cabinet offices of Secretary of Homeland Security and Secretary of Defense, as well as numerous "first assistant" positions. *Id.* There

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became Acting Secretary. 6 U.S.C. §113(g)(1). Grady resigned shortly after the President announced that McAleenan would be the Acting Secretary. *See* Ted Hesson, *Nielsen: Acting DHS Deputy Grady Offers Resignation*, Politico (Apr. 9, 2019), https://politi.co/2PFqgiG; *see also* Josh Gerstein & Stephanie Beasley, *Legality of Trump Move to Replace Nielsen Questioned*, Politico (Apr. 9, 2019), https://politi.co/2IRTASB.

are 40 more vacancies waiting to be filled, including first assistant and high-level offices such as the Deputy Secretaries of Homeland Security and HUD; the Associate Attorney General; 6 Under Secretary positions in the Departments of Homeland Security, Agriculture, Commerce, and Education; and 12 Assistant Secretary positions in the Departments of Justice, Homeland Security, State, Treasury, Education, Commerce, HHS, and HUD. *Id.* (results for search of "Vacant Positions with No Acting Official"), http://bit.ly/2VaoqfQ. Given the President's proclivity for using "acting" officers because he "can move so quickly" and they give him "more flexibility," JA86 ¶14, and the several examples of unlawful designations he has already made, it is likely that another invalidly acting official will soon be in a position to issue regulations that affect Plaintiff.

And it is likely that such acting official will promulgate gun-control regulations, as the facts of this case illustrate. Gun measures are regularly promulgated by the Government. *See supra* p.20. Add that Whitaker was advised *not* to authorize the bump-stock regulation at all; officials in the Department of Justice believed it would give litigants like

Plaintiff standing to bring lawsuits such as this one, to challenge his designation as Acting Attorney General. *See supra* pp.7-8. Yet despite the Government's herculean efforts to evade judicial review of the lawfulness of Whitaker's designation, the bump-stock rule was promulgated under his signature. It is certainly plausible that Plaintiff and its members have a realistic probability of facing the same harm.

Thus, a decision in Plaintiff's favor on its challenge to the President's unlawful designation policy would provide meaningful relief by preventing *ultra vires* regulations that affect the organization or its members, even if the same regulations could be validly promulgated. *See City of Waukesha*, 320 F.3d at 234-35 (to have standing, plaintiff need not plead that the substantive result would change if the procedure had been properly followed); *see also Landry v. FDIC*, 204 F.3d 1125, 1130-32 (D.C. Cir. 2000) (plaintiff may bring an Appointments Clause challenge regard-

less of whether plaintiff can show that a different, lawfully appointed official would have made a different substantive decision) (collecting authorities).[2]

## II. The President's Designation Of Matthew Whitaker Violated The Appointments Clause.

President Trump forced out the Attorney General, then designated the Attorney General's Chief of Staff to serve on an acting basis, displacing the Deputy Attorney General. The President thereby designated an employee to serve indefinitely as an acting principal officer, despite the availability of a Senate-confirmed first assistant. So far as can be determined, no President had ever done that before, in all of American history. "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

[2] The Court has jurisdiction to reach the merits for the additional reason that Attorney General Barr's appointment and also his ratification of the Rule were attempts to evade judicial review and fall within the voluntary cessation exception to mootness. However, this Court previously rejected this argument. *Guedes*, 920 F.3d at 15-16. Although that holding is wrong for a number of reasons, it is law of the case. Plaintiff preserves the argument here should this Court reject Plaintiff's other jurisdictional bases, necessitating en banc review.

According to the district court, the Constitution permits the President to remove every principal officer—for example, the entire Cabinet—and assign all of their responsibilities to "any person." JA60-80. The universe of candidates would not be limited to officers, or even employees. The President could pick personal friends to take over the responsibilities of all of the Nation's most sensitive offices, which the Constitution expressly requires be subject to Senate confirmation.

Moreover, according to the district court, the President could do so at any time—and in particular, in the absence of any exigency preventing the position from being filled by an officer who the Senate confirmed specifically anticipating that he would step in if the principal officer was unavailable. Here, the Senate confirmed Rosenstein as the Deputy Attorney General, knowing that he would serve as Acting Attorney General—as the Deputy does regularly in cases of the Attorney General's recusal.

The only limitation the district court recognized was that, as of some unidentified date, the acting official would have served so long as to be no longer "temporary." JA76-77. But the court indicated that the outer time limitations would be determined by Congress. *Id.* And the FVRA, for example, permits the President to designate acting officials for

nearly two years. *See* 5 U.S.C. §3346 (designation may last through at least three periods of 210 days each). If the Senate then confirmed a permanent principal officer, the President would presumably be able to remove that person and start the clock over once again. The Senate's essential power to reject principal officers would be largely illusory.

The district court's position is fundamentally inconsistent with the role of the Appointments Clause in maintaining the separation of powers, as envisioned by the framers. The Senate's role is vital, "serv[ing] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond*, 520 U.S. at 659-60 (quoting *The Federalist No. 76*, at 386-87) (internal citations omitted). For the founders, the "'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power, because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (quoting G. Wood, *The Creation of the American Republic 1776-1787*, at 79, 143 (1969)).

Even the Office of Legal Counsel recognizes that there is significant constitutional doubt that the President may direct an employee to temporarily perform all the functions of *any* officer—much less a principal officer. *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 124-25 (2003) (*OMB OLC Op.*). The district court disagreed. Despite OLC's own views and the absence of any historical precedent, the court found no "serious doubt" that Whitaker's designation satisfied the Appointments Clause. JA60.

That is not correct, and the authorities on which the court relied do not support its conclusion. Whitaker's designation violated the Appointments Clause because: (1) only an officer may serve as Acting Attorney General, but Whitaker was only an employee; and (2) even assuming he was appointed as an officer by FVRA designation, he was appointed to a principal office requiring Senate confirmation.

### A. The President Unconstitutionally Assigned The Attorney General's Responsibilities To An Employee.

The President assigned an employee, Whitaker, to temporarily perform the functions of a principal officer, the Attorney General. That is forbidden by the Constitution. The only non-confirmed official who may act as a principal officer is the "first assistant" to the office, and while the

first assistant is available to serve, the President cannot constitutionally bypass the first assistant with another non-confirmed official or employee.

1. An Acting Attorney General is an officer of the United States. Whatever the "acting" label, that person exercises the authority of the United States; only an officer may do that. *Buckley v. Valeo*, 424 U.S. 1, 124-32 (1976); *OMB OLC Op.* 124-25. Indeed, OLC has been exceedingly careful not to argue that the Appointments Clause permits an employee to perform the functions of an officer.

Recognizing this fatal feature of 5 U.S.C. §3345(a)(3), the *Whitaker OLC Opinion* tersely asserts that Whitaker was never an employee at all.[3] *Designating an Acting Attorney General*, 42 Op. O.L.C. __ (Nov. 14, 2018), slip op. at 9 (*Whitaker OLC Op.*). According to OLC, he "was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional

[3] The Government took the opposite view in parallel litigation, conceding that Whitaker was an employee as Chief of Staff. *See* Hearing on Pl.'s Mot. for Prelim. Inj., *Maryland v. United States*, No. 1:18-cv-02849-ELH (D. Md. Dec. 19, 2018).

duties." *Id.* The *Whitaker OLC Opinion* cites to the *OMB OLC Opinion* for support, which in turn argued that an "employee" directed to "act in the vacant position of a Senate-confirmed officer" pursuant to §3345(a)(3) "is, temporarily, a properly appointed inferior Officer of the United States." *OMB OLC Op.* 124. Of course, the two OLC Opinions are inconsistent—Whitaker cannot both have been an inferior officer as the Chief of Staff, and also an employee who became an inferior officer when the President directed him to act as Attorney General under the FVRA. But either way, the arguments are meritless.

The *Whitaker OLC Opinion*'s position is easily refuted. A critical feature of any officer is that s/he exercises "significant discretion" in administering the laws of the United States. *Lucia*, 138 S. Ct. at 2051-52 (citation omitted). The Chief of Staff does not have any *de jure* responsibility to administer the laws at all. And contrary to the *OMB OLC Opinion*'s position (at 124), Whitaker cannot be, "temporarily, a properly appointed inferior Officer of the United States," for two reasons.

*First*, and most fundamentally, there is no such thing as a "temporary" officer; the other critical feature of any officer is that s/he "hold[s] a continuing office." *Lucia*, 138 S. Ct. at 2053; *see id.* at 2051 (the "basic

framework for distinguishing between officers and employees" is whether "their duties were 'occasional or temporary' rather than 'continuing and permanent'") (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1878)); *Germaine*, 99 U.S. at 511-12 (doctors hired to perform various physical exams were mere employees because duties were "occasional or temporary"). The *Whitaker OLC Opinion*'s constant refrain (at 8-26) is that FVRA designations are temporary. Thus, Whitaker was not appointed an "officer" under the FVRA.

*Second*, by its terms, the FVRA does not provide for the appointment of officers. Rather, it leaves the Senate-confirmed office vacant. OLC itself characterizes the President's use of the FVRA as a "designat[ion] . . . . to perform additional duties." *Whitaker OLC Op.* 9. "Congress [has] repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer." *Weiss v. United States*, 510 U.S. 163, 172 (1994). And when Congress provides that the President may "assign," "detail," or, in this case, "direct" an offi-

cial to take on other functions or duties, such command is not an "appointment." *Id.* OLC's reasoning to the contrary, *OMB OLC Op.* 124-25, is simply unpersuasive in light of *Weiss*.

The FVRA, and Presidential designations under the Act, draw the same contrast between directing someone to perform a function and actually making an appointment. The statute applies to the unavailability of an officer "whose appointment to office" requires Senate confirmation, and it permits the President to "direct" another Senate-confirmed officer or "an officer or employee" to "perform the functions" of a "vacant office" and "in an acting capacity." 5 U.S.C. §3345(a). In turn, the President's memorandum to Whitaker expressly contrasts what Whitaker was "directed" to do with an "appointment or subsequent designation." JA108.

Historically as well, Presidents have directed either first assistants or Senate-confirmed officials to perform the functions of an officer, distinguishing that service from an actual appointment. *See, e.g.*, Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), *Founders Online*, National Archives, http://bit.ly/2PT2TRi (authorizing Chief Clerk John Smith "of the Department of War, to perform the duties of the said office, until a successor be appointed"). Those have never been regarded

as separate appointments. OLC has no response, except to limit its implausible interpretation to employees who hold no office to begin with. *See OMB OLC Op.* 124 & n.6.

2. The district court believed that "if the temporary nature of Whitaker's service prevented him from becoming an officer, then the President was not constitutionally obligated to appoint him." JA20. But that elides two distinct issues: who is an officer, and who may temporarily exercise the powers of an office. That there is no such thing as a "temporary officer" does not, of course, compel the conclusion that literally anyone can exercise the powers of a principal office. *See OMB OLC Op.* 122 ("employees who serve in acting positions" that "exercise [significant] authority" are "subject to [the Appointments Clause]") (citing *Edmond*, 520 U.S. at 662; *Buckley*, 424 U.S. at 126).

There is, however, an appointed officer permanently assigned by law to fill in for the principal officer: the first assistant. As required by the Constitution, the first assistant is appointed as an inferior officer by either the President or the department head. When that first assistant automatically exercises the responsibilities of the principal officer during an absence or vacancy, no further appointments issue arises. The first

assistant need not be appointed again to fulfill the principal officer's responsibilities, because those responsibilities are germane to—indeed, are a part of—their original job. *Shoemaker v. United States*, 147 U.S. 282, 301 (1892).

The Constitution does not require that a first assistant be confirmed, because the first assistant is an inferior officer—including during a time when the first assistant steps in for a principal officer who is unavailable. *United States v. Eaton*, 169 U.S. 331, 336-38 (1898) (addressing "vice consuls" appointed by the Secretary of State, who served while consuls-general were sick, absent, or dead). The first assistant remains an inferior officer because the job is defined from the outset to require the temporary performance of the principal's duties, after which the first assistant automatically reverts to the role of reporting to the principal. The principal, in turn, may reverse any decisions the first assistant made in the interim. Those requirements "so limit the period of duty to be performed . . . and thereby deprive them of the character of [principal officers] in the broader and more permanent sense of the word." *Id.* at 343-44. Indeed, under any other rule, it would be impossible to delegate a principal officer's responsibilities. *Id.*

The first assistant remains an inferior officer despite the prospect that there will be a temporary period in which the office of the principal is vacant altogether, so that there actually is no supervisor for a time. The first assistant's job includes performing the responsibilities of the principal officer during what is essentially an exigency—"for a limited time, *and* under special and temporary conditions," 169 U.S. at 343 (emphasis added), in order to ensure the "unbroken performance of [the principal officer's] duties," *id.* at 339. Thus, even then, first assistants are not converted into principal officers, because "[g]enerally speaking" they still have a supervisor. *Edmond*, 520 U.S. at 662.

When the first Congress created the original first assistant in several departments—known as the "Chief Clerk"—it explicitly defined the position as an inferior officer. *See* 520 U.S. at 663-64. The "first assistant" has encompassed offices with varying titles since, but the fact that the first assistant is the second in command is also a critical limiting principle that prevents the President from evading the Appointments Clause.

Historical practice is illuminating. In applying the original general vacancies statutes passed in 1792 and 1795, Act of May 8, 1792, ch. 37,

§8, 1 Stat. 279, 281; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415, Presidents almost never bypassed a principal officer's first assistant to designate some other non-confirmed official of his own choosing during either an absence or vacancy. The term "first assistant" has been included expressly in the general vacancies laws since 1868, which mandated that the "first or sole assistant" "shall" step in for the head of certain executive departments "in case of [] death, resignation, absence, or sickness," unless the President designated another Senate-confirmed officer within the department or "the head of any other executive department." Act of July 23, 1868, ch. 227, 15 Stat. 168, 168; *see also* 40 Cong. Globe 3765 (1868); Rev. Stat. §§177-181 (1873) (codifying federal law).

That historical practice is inconsistent with the district court's holding that the Appointments Clause permits the President to designate "any person" to fulfill all the responsibilities of a principal officer, in any circumstances. Presidents themselves plainly did not believe that they had such authority. If that had been their view, they would have exercised the power regularly. Instead, Presidents consistently designated officers, whether the first assistant or some other Senate-confirmed official.

OLC's explanation for why the President's designation of Whitaker "was not completely novel" is that Chief Clerks, "who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795" general vacancies statutes. *Whitaker OLC Op.* 24. Indeed, the district court read these statutes to establish that the Appointments Clause allows the President to designate any person for any office at any time. JA67-72.

But the most historically relevant provision, the original 1792 version, *Golan v. Holder*, 565 U.S. 302, 321 (2012) ("the 'construction placed upon the Constitution by'" the Second Congress "'is of itself entitled to very great weight'" (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)), was both under-inclusive—because it neither applied to most officers nor applied if a department head was removed—and over-inclusive—because it did not limit the length of an acting officer's service. Congress in these early statutes simply did not account for the precise requirements of, and powers created by, the Appointments Clause. *See, e.g.*, 1 Op. Att'y Gen. 65, 65-66 (May 26, 1796) (AG Lee) (statutes omitted requirement of Senate confirmation); 7 Op. Att'y Gen. 186,

194 (May 25, 1855) (AG Cushing) (statutes omitted power to appoint ministers and consuls); Lucy M. Salmon, *History of the Appointing Power of the President* 16-17 (1886) (statutes omitted President's removal power).

The early vacancies statutes are instead best understood to have given Presidents broad power that accounted for the possibility of exigencies, such as when a department head's Chief Clerk was unavailable. That is apparent from the record of how Presidents actually applied the statutes. Despite their broad language, as just discussed, it was essentially unheard of for a President to designate "any person" as an acting official.

Nor did Congress in those statutes consider whether the President may displace an available Senate-confirmed deputy, for the simple reason that at the time the department head's first assistant (the Chief Clerk) was not a confirmed position. *E.g.*, Act of July 27, 1789, ch. 4, §2, 1 Stat. 28, 29 (Department of State Chief Clerk appointed by Secretary); Act of Aug. 7, 1789, ch. 7, §2, 1 Stat. 49, 50 (Department of War Chief Clerk appointed by Secretary). As discussed, once Senate-confirmed deputy positions became more common, Presidents did not bypass those officers with other acting officials.

Thus, the district court and the Government miss the point. The parties agree that President's consistently designated a single non-confirmed official—the Chief Clerk.[4] But as just set forth, the feature of the office of Chief Clerk in all of those instances was that the officer was the second in command, i.e., the "first assistant." *See, e.g.*, Official Register of the United States 9-15 (1817), https://bit.ly/2MyJncI.

The history is the same with respect to the Office of the Attorney General. Early in the Nation's history, there was no Department of Justice. *Whitaker OLC Op.* 16-17. At the time, the Assistant to the Attorney General was the first assistant. That official repeatedly stepped in when the Attorney General was ill or away; no other official did. *Id*. There were also a number of periods in which the Office of the Attorney General was

[4] The Government has identified hundreds of examples consistent with that tradition. *Whitaker OLC Op.* 12-16. Thus far, however, the Government has only been able to identify two counter-examples in all of American history, both involving President Andrew Jackson. *Id.* at 14. Neither was challenged in court. And neither appears to have been based on any consideration of the Appointments Clause. A "handful" of examples "that lack any contemporaneous explanation," even had they been from the founding, are "not convincing evidence of the [Appointments Clause]'s original meaning." *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2611 (2014) (Scalia, J., concurring in the judgment).

vacant. Once, the President named a non-confirmed official to fill a vacancy: the Assistant to the Attorney General, i.e., the first assistant. *Id.* at 17. Then, in 1870, Congress created the Department of Justice and Office of the Solicitor General, which required Senate confirmation, and specified that the Solicitor General would serve during an absence or vacancy. Act of June 22, 1870, ch. 150, §§1-2, 16 Stat. 162, 162. Now, of course, the "first assistant" is the Deputy Attorney General, 28 U.S.C. §508(a), an office for which Congress continues to require Senate confirmation, *id.* §504.

By contrast, the job responsibilities of the Chief of Staff do not involve performing the functions of the Attorney General. Indeed, the Chief of Staff and other employees are forbidden by statute from doing so. 28 U.S.C. §508. The President's order nonetheless directing Whitaker to do so did not maintain the Department of Justice's unbroken operations—it broke them. And when the Deputy Attorney General is available—as in this case—there is no exigency necessitating designating anyone else.

Presidents have never deviated from this understanding in any Executive Order governing succession: not once has the President ever placed a chief of staff ahead of the first assistant to be the acting head of

an executive agency. *E.g. infra* pp.47-48. And before this Administration, the President never—in all of American history—designated a chief of staff to serve as a principal officer.

Contrast *Eaton*: There, the job responsibilities of the vice-consul included filling in for an absent consul general. 169 U.S. at 336 (noting that by statute, "'[v]ice consuls . . . shall be substituted, temporarily, to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty'") (quoting Rev. Stat. §1674). That is precisely the feature missing here: the statutory scheme makes the Deputy Attorney General, not the Chief of Staff, the official who acts as Attorney General during an absence or vacancy.

The Government goes to great lengths to identify a handful of times in American history when a non-confirmed official served as a principal officer as long as Whitaker. *Whitaker OLC Op.* 13-14, 16-18. But that is no excuse, because the length of time is not the issue. The Appointments Clause has no exception for short violations of its requirements and near misses. The President may not bypass an available "first assistant" to authorize a non-confirmed officer or employee to perform the functions of

a principal officer for two hours, two days, or two months—for any reason, personal or otherwise. To do so violates the Appointments Clause.

### B. The President's Designation Of Whitaker Violated The Appointments Clause Because He Served As A Principal Officer.

Even assuming contrary to the foregoing that under the FVRA the President makes an "appointment," that would not have made the appointment constitutional. Here, the President would have been appointing a "principal officer" who must be Senate confirmed.

In the course of his service as Acting Attorney General, Whitaker did not "generally" have a relationship with a superior officer, the defining feature of an inferior officer. *Edmond*, 520 U.S. at 662. Indeed, he did not *ever* have that relationship. As an "officer," he never reported to the Attorney General. During every single day of the appointment, he *was* the Attorney General. And when Barr was confirmed as Attorney General, Whitaker's days as a supposed officer ended. He did not even go back to being the Chief of Staff.

Contrast Whitaker with the Deputy Attorney General. Unlike Whitaker, the Deputy is an inferior officer as the first assistant, 28 U.S.C.

§508(a), because the Deputy holds the subordinate role of filling in whenever the Attorney General is unavailable, *Eaton*, 169 U.S. at 343. That official, in the ordinary course of the job to which the Deputy was appointed, "[g]enerally speaking" has "a relationship with [the] higher ranking officer." *Edmond*, 520 U.S. at 662.

That remains true when the office is vacant altogether, because a "special and temporary condition[]" necessitates an inferior officer stepping into the principal's role temporarily. *Eaton*, 169 U.S. at 343. By contrast, when the first assistant *is* available to serve, there is no other exigency that might require directing someone else to fill in and maintain the unbroken operations of the office. *Cf. id.* Rather, departing from the statutory chain of succession—as here—affirmatively breaks the office's ordinary operations.

That conclusion is strongest with respect to the Office of the Attorney General, for two reasons. *First*, the AG Act has its own further order of succession after the first assistant, obviating any need to substitute someone else: the Associate Attorney General "shall" serve next, followed by still others. 28 U.S.C. §508(b). *Second*, all the officials in the AG Act's chain of command are themselves Senate-confirmed. By electing to make

the successors subject to confirmation, Congress specifically prevented the President from installing any person of his choosing.

Thus, even assuming that the President "appointed" Whitaker to the position of Acting Attorney General, his service violated the Appointments Clause because the Constitution required that the Senate confirm him as a principal officer. Again, the length of the service is immaterial: The President cannot "appoint" an employee to a principal office without Senate confirmation, for any length of time.

## III. The President's Designation Of Matthew Whitaker Was Contrary To Statute.

At the very least, the President's unprecedented designation of a departmental employee as an acting principal officer is the subject of great constitutional doubt. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."). The Court can avoid that doubt by holding that the designation was not authorized by statute. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *see also Shelby County v.*

*Holder*, 570 U.S. 529, 540-41 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-05 (2009).

The Government argues—and the district court held—that the FVRA permits the President to override the AG Act at any time. *See* JA49-60. Plaintiff argues, by contrast, that the President may invoke the FVRA only when the AG Act does not "designate" the Acting Attorney General because the officials specified by the AG Act are unavailable. 5 U.S.C. §3347(a)(1)(B); 28 U.S.C. §508.[5]

Until recently, the Executive Branch agreed with Plaintiff's interpretation. The White House Counsel adopted that reading in official guidance. Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto R. Gonzales, Counsel to the President, *Re: Agency Reporting Requirements Under the Vacancies Reform Act* 2 & n.2 (Mar. 21, 2001), http://bit.ly/2EDmAdC. So did subsequent Executive Orders providing

[5] This case does not present the question whether the President's authority under the FVRA applies (1) whenever the officials designated by statute (the Deputy Attorney General and Associate Attorney General) are unavailable (*see* 5 U.S.C. §3347(a)(1)(B); 28 U.S.C. §508), or instead (2) only when the further successors designated by the Attorney General are unavailable as well (*see* 5 U.S.C. §3347(a)(1)(A); 28 U.S.C. §508(b)).

the order of succession for the Attorney General. Exec. Order No. 13,787, 82 Fed. Reg. 16,723 (Apr. 5, 2017); Exec. Order No. 13,775, 82 Fed. Reg. 10,697 (Feb. 14, 2017); Exec. Order No. 13,762, 82 Fed. Reg. 7619 (Jan. 19, 2017); Exec. Order No. 13,557, 75 Fed. Reg. 68,679 (Nov. 9, 2010); Exec. Order No. 13,481, 73 Fed. Reg. 75,531 (Dec. 11, 2008). It was not until November 2017 that the Department of Justice first expressly took the position that the President could use the FVRA to override a statute specifically designating an available acting official. *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __ (2017), https://bit.ly/2XAM7v5.

Plaintiff's reading is more consistent with the statutory text and structure, as well as the purpose and history of the FVRA.

### A. The FVRA Does Not Apply When A Specific Statute Designates An Acting Official For An Office.

The FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" almost every Senate-confirmed officer, "unless" an exception applies. 5 U.S.C. §3347(a). One exception is if "a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office

temporarily in an acting capacity." *Id.* §3347(a)(1). The AG Act unquestionably does so. *See* 28 U.S.C. §508(a); *see also In re Grand Jury Investigation*, 916 F.3d 1047, 1056 (D.C. Cir. 2019).

The district court assumed without explanation that, in §3347(a), the word "unless" modifies "exclusive." JA51. On that basis, it held that when an exception applies, the FVRA continues to apply as well, but is "non-exclusive." *Id.* In turn, the district court held, the President can choose whether to apply the FVRA or instead the office-specific designation provision. *Id.* In other words, it read the exception to broaden the President's authority, rather than narrow it. Strikingly, the district court's analysis on this central question consists of a single, unelaborated sentence: "Where, as here, an agency-specific statute designates a successor, the FVRA is no longer the *exclusive* means of filling a vacancy, but it remains *a* means of filling the vacancy." *Id.*

The district court erred in its assumption of how the exception is structured. In fact, "unless" modifies "means." When the exception applies, the FVRA is not a "means" to authorize an acting official. The FVRA therefore does not apply. That is the better reading of the statute for seven reasons.

*First*, statutes are read as a whole, and the exceptions to §3347(a) are unambiguous. The FVRA is also "exclusive . . . unless" "the President makes an appointment to fill a vacancy in such office" under the Constitution's Recess Appointments Clause. 5 U.S.C. §3347(a)(2). Plainly, when that exception applies, the FVRA does not; there is not even a vacancy left to address. The FVRA is also "exclusive" with respect to offices "other than the Government Accountability Office." *Id.* §3347(a). The obvious purpose of that provision is to exclude the GAO altogether.

So too, the obvious structure of the office-specific designation exception is to narrow—not expand—the President's options. There are three possibilities under the FVRA: (1) the first assistant serves; (2) the President selects a Senate-confirmed officer; or (3) the President selects a senior department employee. 5 U.S.C. §3345(a). The office-specific designation statutes uniformly track possibility (1)—the first assistant serves. Thus, §3347(a)(1)(B) reads as: "The three options provided by the FVRA are the exclusive means of selecting an acting official, unless a statute designates the first option." It makes little sense to say that Congress gave the President a choice between three options and also the first option.

*Second*, the whole purpose of office-specific designation statutes like the AG Act is to exempt the office from the general vacancies statute in order to prevent the President from displacing the officer's deputy with someone else. When, as here, the purpose of a "designation" is to narrow the available options, it is controlling. The point is illustrated by parallel hypotheticals, such as: (a) the general venue statute is the exclusive means to determine where a suit may be filed, unless the statute providing the cause of action expressly designates a venue; (b) the "wheel" is the exclusive means to specify the district judge to whom a case is assigned, unless the case is expressly designated as related to another matter; or (c) the Federal Rules of Civil Procedure are the exclusive means to determine the deadlines for serving a complaint, unless the local rules expressly designate a deadline.

In each of those examples—and innumerable others—the word "unless" modifies "means," such that the "designation" provision is controlling. Those hypotheticals are analogous to the exception at issue in this case. The office-specific statutes were enacted in parallel with the general vacancies law, and were intended to eliminate the President's power under the general vacancies statute, *i.e.*, to depart from its default rule. By

giving the President the choice whether to follow the AG Act, the Government's reading fundamentally changes the statute's operation. The AG Act's very point is thus to ensure that by default the Nation's highest law enforcement official is a Senate-confirmed officer within the chain of command of the Department of Justice—one whom the Senate has already considered with the possibility of such performance of the Attorney General's functions in mind—and to forbid the President from appointing a hand-picked employee to that role whenever he likes.

Notably, Congress has *never* permitted the President to invoke the FVRA to displace the second in command to the Attorney General. The original general vacancies laws did not apply to the Attorney General. Act of May 8, 1792, ch. 37, §8, 1 Stat. 280, 281; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415. When Congress later created the Department of Justice in 1870, it designated the Solicitor General to serve as Acting Attorney General. Act of July 20, 1870, ch. 150, §2, 16 Stat. 162, 162. Recognizing Congress's intent to override the general vacancies statute, the codifiers of federal law expressly exempted the Attorney General from it.

Rev. Stat. §179 (1st ed. 1874). That provision remained until it was supplanted by the current, *broader* exception for all office-specific designation statutes.

The district court's construction is strongly disfavored because it amounts to an implied repeal of office-specific designation statutes such as the AG Act. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-58 (1976) (plaintiff suing a national bank under the securities laws could not choose between the non-exclusive general venue provision applicable to securities suits and a specific provision applicable to suits against national banks, even though the bank-specific provision would remain fully effective outside the securities context).

The district court in this case reasoned to the contrary that its interpretation still left the AG Act some function. But the court's interpretation is still subject to the presumption against implied repeals, despite the fact that it leaves the AG Act some nominal role to fill. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) ("[W]e have repeatedly recognized that implied amendments are no more favored than implied repeals."). The fundamental point is that the district

court's reading takes a statute intended to eliminate the President's discretion and flips it into a statute that expands that discretion.

*Third*, when Congress intends to give the President the power to override an office-specific designation statute, it both (1) says so expressly, and (2) specifies a default rule for the common circumstance in which the President does nothing. That is specifically true when Congress intends to permit the President to use the FVRA to override a default designation for a particular office. 10 U.S.C. §7017 (President may use the FVRA to override default designation of Acting Secretary of the Army); *id.* §8017 (Navy); *id.* §9017 (Air Force); *see also* 38 U.S.C. §304 (President may override default designation for Secretary of VA); 40 U.S.C. §302(b) (same for Administrator of GSA); 42 U.S.C. §902(b)(4) (same for Commissioner of SSA). The Government's reading ignores the congressional design, and moreover impermissibly renders all those provisions superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Those regimes enacted by Congress are moreover coherent in an important way that the Government's position is not. Those statutes designate a default official, then allow the President to pick *someone else*. By contrast, the court reads the AG Act to designate the Deputy Attorney

General, then the FVRA inexplicably to allow the President to designate the *same* official. Further, the President's "choice" between the FVRA and the AG Act has nonsensical consequences. Most obvious, if the President opts not to subject the Deputy Attorney General to the time limits of the FVRA, then the President loses the power to designate another official. The district court was unable to identify any *reason* that Congress would have created such a ham-fisted regime—where the President gets to choose whether to follow statutory time limits, in turn triggering consequences that are logically unrelated.

Faced with the absence of any provision applicable here that grants the President a choice, the district court simply granted him that power by *ipse dixit*. But there is no support for the district court's assumption that when two statutes apply to a given circumstance, the President can choose between them. The bedrock rule is instead that when two statutes apply to given facts they must be reconciled—including when "a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). To the extent they cannot, the more-specific provision con-

trols. *Id.* Only Plaintiffs' interpretation is consistent with those principles. *See, e.g.*, *United States v. Giordano*, 416 U.S. 505, 513-23 (1974) (AG could not choose to delegate wiretap authority using general delegation power when wiretap statute provided AG more specific and limited delegation authority); *Halverson v. Slater*, 129 F.3d 180, 181-82, 185-87 (D.C. Cir. 1997) (general delegation provision is not an "alternative source of delegation power" to a specific delegation provision, as Secretary argued).

*Fourth*, the implications of the district court's reading are so sweeping that if Congress intended them it would have implemented them expressly, not indirectly. The district court held that Congress intended to permit the President to displace the Deputy Attorney General and Associate Attorney General with any of roughly 6,000 attorneys in the Department of Justice who would qualify under the FVRA, or with any of the more than 1,000 Senate-confirmed officials in other departments. But the district court's decision sweeps even more widely. Congress designated a Senate-confirmed official to serve on an acting basis in not just the AG Act but also in provisions governing other critical offices. These include the Secretary of Defense, 10 U.S.C. §132(b), Chairman of the Joint Chiefs of Staff, *id.* §154(d), and Director of National Intelligence, 50

U.S.C. §3026(a)(6). Those provisions date to the 1800s. *See, e.g.*, Act of Aug. 7, 1789, ch. 7, §2, 1 Stat. 49, 50 (succession in Department of War Organic Act); Act of June 22, 1870, ch. 150, §2, 16 Stat. 162, 162 (succession in Department of Justice Organic Act).

Congress was well aware of the office-specific statutes and their function. *See, e.g.*, S. Rep. No. 105-250, at 15-17. The Executive Branch had expressly construed the prior general vacancies law as non-exclusive. *E.g.*, *Application of Vacancy Act Limitations to Presidential Designation of an Acting Special Counsel*, 13 Op. O.L.C. 144, 145 (1989), https://bit.ly/2NwFBko. It specifically took that position with respect to the Department of Justice in 1973. *See id*. But no Administration had ever taken the position that the general vacancies statute allowed the President to override an express statutory designation of an acting official. If Congress in fact intended to fundamentally alter the operation of the AG Act and other office-specific designation provisions by allowing the President to override them, it would have said so expressly. Courts do not lightly conclude that Congress departed from well-settled practice. *E.g.*, *Epic*, 138 S. Ct. at 1626-27 (no "elephants in mouseholes") (citation omitted).

*Fifth*, the district court's reading inverts Congress's principal purpose in enacting the FVRA, including particularly its use of the word "exclusive." Congress sought to reject OLC's position that the President could choose whether to designate an acting official under either the general vacancies statute or instead the organic statute of a department. Congress specifically used the word "exclusive" to reject OLC's reliance on delegation statutes. The draft legislation provided that the FVRA would be "applicable" to various offices. S. Rep. No. 105-250, at 26. But that language arguably would have permitted OLC to continue to maintain its prior position, so the bill was amended to use "exclusive" to block the maneuver:

> The phrase "applicable to" is replaced by "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" in §3347(a) to ensure that the [FVRA] provides the sole means by which temporary officers may be appointed unless contrary statutory language as set forth by this legislation creates an explicit exception. . . . Thus, the organic statutes of the Cabinet departments do not qualify as a statutory exception to this legislation's exclusivity in governing the appointment of temporary officers.

144 Cong. Rec. S12,822, 12,823 (Oct. 21, 1998) (floor statement of bill's principal sponsor).

*Sixth*, and relatedly, Congress substituted the office-specific designation exception for draft language that would have operated exactly as the Government reads the statute, but which Congress removed. The initial draft legislation provided that the FVRA and office-specific statutes were both "applicable" to an office unless the latter *explicitly* provided otherwise. *See* S. 1761 §3 (Mar. 16, 1998); S. 1764 §3 (Mar. 16, 1998); S. 2176 §2 (June 16, 1998); S. Rep. No. 105-250, at 26. But Congress removed that provision and adopted instead the current office-specific designation exception. 5 U.S.C. §3347(a)(1)(B). "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

*Seventh*, the legislative history is unambiguous that Congress intended to continue to treat office-specific designation statutes as controlling over the general vacancies law. Senator Lieberman explained the provision's purpose when he introduced it in committee: "it is not our intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act." *See* Migala 34-35, App.A-76. Senator Thompson agreed. *Id.* at 36, App.A-80. He then

repeated the same thing on the floor in explaining the legislation. 144 Cong. Rec. S11,022-23 (Sept. 28, 1998); 145 Cong. Rec. S33 (Jan. 6, 1999).

The district court addressed none of that history and instead placed dispositive weight, JA58-59, on part of one sentence in one Senate Report, that "the [FVRA] would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105-250, at 17. But the district court failed to recognize that the Senate Report corresponded to a bill that *did not include* the designation exception. Nor did it even include the "exclusivity" provision. Instead, the bill at that time provided that the FVRA would be "applicable" unless an office-specific statute expressly provided otherwise—the language Congress later rejected. *See id.* at 26 (§3347(a)).[6]

[6] The district court misunderstood even the part of the one sentence it quoted. The Senate Report stated *unequivocally* that office-specific statutes would be "exceptions" to the FVRA. S. Rep. No. 105-250, at 2. The bill at that time also expressly excluded the Attorney General, meaning that the FVRA could not have been an "alternative" procedure. *Id.* at 17. The Report could not have meant that the general vacancies statute would "continue" to provide an alternative even if those specific laws remained on the books: the general statute had *never* before been read as an alternative to office-specific designation statutes, so there was no such practice to "continue." The language quoted by the district court instead referred to what "would" happen if Congress were to "repeal" the office-specific designation statutes. *Id.*

### B. The Arguments Invoked By The District Court Lack Merit.

1. The district court believed that its ruling was supported by two provisions of the AG Act. But the FVRA looks to only one characteristic of an office-specific statute: Does it "designate" an acting official? The AG Act unquestionably does. The precise manner in which it does so is irrelevant under §3347(a)(1)(B). Moreover, there is no serious argument that Congress would have intended the FVRA to apply to the Attorney General because of the precise language of the AG Act, but not to apply to other important offices that are similarly subject to specific designation statutes.

In any event, neither provision of the AG Act cited by the district court indicates Congress's intent to allow the President to override the statutory designation of the Deputy Attorney General.

*First*, the district court relied on the fact that the AG Act states that "the Deputy Attorney General 'may' assume the responsibilities of the Attorney General during a vacancy," which "'customarily connotes discretion,' rather than a mandatory requirement." JA55 (quoting *Jama v. ICE*, 543 U.S. 335, 346 (2005)). But even the Government agrees that the Deputy's service is automatic and mandatory—as when Sessions recused

from the Russia investigation. The original version of the AG Act provided that in the case of a vacancy, the Solicitor General "shall have [the] power to exercise all the duties of" the Attorney General. *See* Rev. Stat. §347 (1st ed. 1874); *see also* Rev. Stat. §347 (2d ed. 1878) (same); 5 U.S.C. §293 (1925) (same); 5 U.S.C. §293 (1952) (same). In 1953, the Solicitor General's power was transferred to the Deputy Attorney General, *see* Reorganization Plan No. 4 of 1953, §1(a), 67 Stat. 636, 636; *see also* 5 U.S.C. §§293 & note, 294 & note (1958), and when Titles 5 and 28 were codified in 1966, the codifiers merely shortened the phrase "shall have [the] power to" by using the more concise "may," *see* H.R. Rep. No. 89-901, at 184 (1965) ("The word 'may' is substituted for 'have the power.'"); S. Rep. No. 89-1380, at 203 (1966) (same). That change in verbiage did not substantively change the law. H.R. Rep. No. 89-901, at 1; *see Doolin*, 139 F.3d at 210.

*Second*, the district court noted that the AG Act identifies the Deputy Attorney General as the "first assistant" "for the purpose of [§]3345 of title 5." JA54. This looks solely to the text of the AG Act as it exists *now—i.e.*, only the vestigial "first assistant" cross-reference. That is error. The 1953 reorganization plan for the Department of Justice included

in the AG Act a statement that "for the purposes of" the general vacancies statute, "the Deputy Attorney General shall be deemed to be the first assistant." Reorganization Plan. No. 4 of 1953, §1(a), 67 Stat. 636, 636. But the Government understands this provision to have had no substantive effect at the time, because the Attorney General was *already expressly excluded* from the President's power under the general vacancies statute to designate an acting official. *See* Rev. Stat. §179 (1st ed. 1874); Rev. Stat. §179 (2d ed. 1878).

Under the "reference canon," the AG Act's targeted cross-reference to §3345 of a previous general vacancies law retains its original meaning, notwithstanding the latter's subsequent amendment. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019). The FVRA replaced the targeted exclusion of the Office of the Attorney General with the broader exception for all such office-specific designation statutes. *See* 5 U.S.C. §3347(a)(1)(B); Migala 38-39 (staffers asking to "Delete 3345(c)," the AG Act exemption, "because it is included in 3347(a)"); *see, e.g.*, *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (substitution of broader provision for prior enumerated offenses is naturally read to include, not exclude, those offenses).

The "cross-reference" in the AG Act did not change meaning when that happened.

2. The district court, JA53, believed that if Congress intended to exempt the Office of the Attorney General from the FVRA altogether, it would have listed that office in a separate provision identifying certain offices to which the FVRA "shall not apply." 5 U.S.C. §3349c. Section 3349c, however, does not purport to be exhaustive. *E.g.*, 5 U.S.C. §3347(a) (separately excluding GAO). Rather, that provision is directed to a very specific kind of office: multi-member bodies, which Congress already believed had "always been" excluded from the FVRA. S. Rep. No. 105-250, at 22. But in any event, the district court was attacking a straw man. Plaintiff's position is *not* that the Office of the Attorney General is categorically exempt from the FVRA. If Congress had included the Office of the Attorney General in §3349c, or used the "shall not apply" language contained there (and in §3348(e)), the statute would not have operated as intended.

The district court believed that under Plaintiff's interpretation the FVRA would never apply to the Office of the Attorney General. It rea-

soned that "the AG Act would always 'designate' or 'chose' the First Assistant—or another successor listed in the AG Act—and the FVRA would never apply, even when all of the AG Act successors are unavailable." JA56. The district court's reading is hard to follow, but it apparently regarded the exception provided by §3347(a)(1)(B) as categorically applying to an office, no matter what the circumstances. On that view, the AG Act is a *type* of statute that "designates" a successor, such that the Office of the Attorney General is always subject to §3347(a)(1)(B).

That is plainly wrong. In fact, as the Executive Branch acknowledged in its longstanding adoption of plaintiff's reading, whether the exception applies depends on the availability of the listed officers. That must be true: the statute identifies different officials who will serve, depending on their respective availability. No one would fairly say that the AG Act designates *both* the Deputy Attorney General *and* the Associate Attorney General. In turn, when the Deputy Attorney General and the Associate Attorney General are unavailable the AG Act does not "designate" either.

3. Finally, the district court cites two other decisions as supporting its reading. JA52-53 (citing *Hooks v. Kitsap Tenant Support Servs., Inc.*,

816 F.3d 550 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018)). For the reasons given in the amicus brief filed by Morton Rosenberg in the previous appeal in this case, No. 19-5043, Doc. #1777102 at 20-23 (Mar. 12, 2019), those cases do not support the district court's reasoning.

## CONCLUSION

This Court should vacate the district court's judgment, reverse, and remand for entry of an order granting the relief Plaintiff seeks.

Respectfully submitted.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on February 26, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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