[ORAL ARGUMENT NOT SCHEDULED]

No. 19-5304

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

DAMIEN GUEDES, et al.

Plaintiffs-Appellees,

FIREARMS POLICY COALITION, INC., CA 18-3083

Plaintiff-Appellant,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Defendants in district court were Matthew G. Whitaker, in his official capacity as Acting Attorney General; the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); William P. Barr, in his official capacity as Attorney General; Regina Lombardo, in her official capacity as Acting Director of ATF; and the United States. All defendants except for Whitaker are listed as appellees here. Plaintiff in district court, appellant here, is the Firearms Policy Coalition, Inc.

Plaintiff's suit was consolidated in district court with a separate suit challenging the same Department of Justice rule at issue here. *See* Minute Order (Jan. 8, 2019), *Guedes v. ATF*, No. 18-cv-2988. After that date, all pleadings in this case were filed on the docket for case 18-cv-2988 as the lead case, and all docket citations in this brief are to that docket unless otherwise specified. The plaintiffs in that suit—Damien Guedes, Shane Roden, the Firearms Policy Foundation, the Firearms Policy Coalition, Inc., Florida Carry, Inc., and the Madison Society Foundation, Inc.—are listed as plaintiffs-appellees on the docket here.

No amici appeared in district court, and none have appeared in this Court.

B. Ruling Under Review

The ruling under review is the district court's (Friedrich, J.) memorandum opinion and judgment issued October 31, 2019, granting defendants' motion to dismiss plaintiff's second amended complaint for lack of standing. Dkt. No. 51 (judgment); Dkt. No. 52 (memorandum opinion). The memorandum opinion is published at 419 F. Supp. 3d 118 and reproduced at JA 93-107.

C. Related Cases

This case was previously before this Court as No. 19-5043 as an appeal from a district court order denying a preliminary injunction. Plaintiff voluntarily dismissed that appeal after oral argument before this Court, though issues presented by plaintiff's prior appeal were resolved by this Court in *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The same issue presented in this case is currently pending before the Fourth Circuit in *Patrick v. Whitaker*, No. 20-1079, and the Ninth Circuit in *Koster v. Whitaker*, No. 20-15077.

/s/ Brad Hinshelwood
Brad Hinshelwood

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Federal Vacancies Reform Act	FVRA

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331 to decide its claims under the Administrative Procedure Act, the Federal Vacancies Reform Act (FVRA), and the Constitution's Appointments Clause. JA 83. The district court entered final judgment dismissing plaintiff's second amended complaint on October 31, 2019. JA 92. Plaintiff filed a timely notice of appeal on November 1, 2019. Dkt. No. 53; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether the district court properly held that plaintiff lacks standing to challenge an alleged "policy" of noncompliance with various provisions of federal law governing acting officers, where plaintiff identified no injury-in-fact stemming from that alleged policy.
2) Whether plaintiff may challenge the President's designation of Matthew Whitaker to serve as Acting Attorney General based on Whitaker's promulgation of a rule, where the rule was later ratified by Attorney General William Barr and plaintiff failed to challenge the ratification in district court.
3) Whether the FVRA and the Appointments Clause permit the President to direct a senior employee of the Department of Justice to serve as Acting Attorney General in the event of a vacancy, as the district court previously concluded when denying a preliminary injunction.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Constitutional and Statutory Background

The Appointments Clause of the Constitution generally provides that "Officers of the United States" must be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. But, in contrast to principal officers who answer solely to the President, the power to appoint "inferior Officers" may be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* The Clause does not expressly address whether and in what circumstances an individual may perform the duties of a principal officer temporarily in an acting capacity when the office becomes vacant.

Since 1792, Congress has provided for non-confirmed persons to serve temporarily as acting principal officers in the event of vacancies. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). A vacancy provision passed in 1792 authorized the President to designate "any person" to serve as an acting Secretary of State, Treasury, or War in the event of death, illness, or absence from the seat of government. *Id.* at 935. In 1795, Congress expanded the President's authority by authorizing him to choose any person to serve as Acting Secretary regardless of the reason for the vacancy, while "impos[ing] a six-month limit on acting service." *Id.*

In 1868, Congress enacted the Vacancies Act, which set a default rule that in the case of a vacancy "of the head of any executive department of the government, the first or sole assistant thereof shall … perform the duties of such head." Act of July 23, 1868, ch. 227, § 1, 15 Stat. 168. The Act also authorized the President to bypass the "first assistant" and designate a different Senate-confirmed official. *See id.*

Congress also has enacted myriad agency-specific vacancy statutes. In particular, 28 U.S.C. § 508 provides that, when the office of Attorney General is vacant, "the Deputy Attorney General may exercise all the duties of that office," and for the purpose of the Vacancies Act—and now the FVRA—the Deputy Attorney General "is the first assistant to the Attorney General." *Id.* § 508(a). If both offices are vacant, "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b). Notably, the President's authority under the Vacancies Act to bypass the first-assistant default was expressly made inapplicable "to a vacancy in the office of Attorney General." 5 U.S.C. § 3347 (1994); *see* Rev. Stat. § 179 (1st ed. 1875).

In 1998, Congress enacted the FVRA, 5 U.S.C. §§ 3345-3349d, to replace the Vacancies Act. By default, when a Senate-confirmed officer dies, resigns, or is otherwise unable to perform the "functions and duties of the office," the "first assistant" to the office shall perform them temporarily as the acting officer. *Id.* § 3345(a)(1). The President may depart from that default rule by directing another

Senate-confirmed officer to act. *Id.* § 3345(a)(2). Alternatively, the President may designate an officer or employee within the same agency whose salary is equivalent to or greater than GS-15 and who has been in the agency for at least 90 days in the year preceding the vacancy. *Id.* § 3345(a)(3).

The FVRA specifies how its provisions for filling vacant offices interact with office-specific vacancy statutes like 28 U.S.C. § 508(a). The FVRA provides that it is the "exclusive means for temporarily authorizing an acting official," unless a "statutory provision expressly" either "authorizes" the President, a court, or a Department head to designate an acting official or itself "designates" an acting official. 5 U.S.C. § 3347(a)(1). The FVRA expressly applies to Department heads. *See id.* §§ 3345(a), 3348(b)(2). The FVRA further identifies specific offices to which the statute "shall not apply." *Id.* § 3349c. Unlike the Vacancies Act, the FVRA does not contain any express exceptions for the office of Attorney General.

B. Factual and Procedural Background

1. In December 2018, then-Acting Attorney General Matthew Whitaker issued a final Rule explaining that a rifle with a so-called "bump stock" is a "machinegun" under 18 U.S.C. § 922(o), which prohibits the transfer and possession of such weapons by the general public. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018). The Rule instructed possessors of bump stocks to destroy or abandon their devices by the Rule's effective date, which was March 26, 2019. *Id.* at 66,514, 66,530.

Whitaker was expressly designated by the President, pursuant to the FVRA, to serve as Acting Attorney General after the resignation of Attorney General Jefferson B. Sessions III on November 7, 2018. At the time of his designation, Whitaker was the Attorney General's Chief of Staff. Whitaker served until William P. Barr was appointed Attorney General, with the Senate's consent, on February 15, 2019. On March 11, 2019, Attorney General Barr ratified the Rule. *Bump-Stock-Type Devices*, 84 Fed. Reg. 9239 (Mar. 14, 2019).

2. Plaintiff is Firearms Policy Coalition, Inc., a non-profit organization. JA 83. Plaintiff's original complaint sought a declaration that the Rule was invalid and an injunction against its enforcement. No. 18-cv-3083, Dkt. No. 1, at 5-8. Plaintiff also sought a preliminary injunction, arguing that (i) Whitaker's designation violated the FVRA because it conflicted with 28 U.S.C. § 508, and (ii) that, if upheld under the FVRA, the designation would violate the Appointments Clause. No. 18-cv-3083, Dkt. No. 2, at 14-33. The district court denied that motion, holding in relevant part that Whitaker's designation was lawful under both the FVRA and the Appointments Clause. JA 49-80.

Plaintiff appealed that decision, but while the appeal was pending, Attorney General Barr ratified the Rule. Plaintiff initially urged that this Court could still consider the validity of Whitaker's designation despite Barr's ratification of the Rule, but plaintiff moved to voluntarily dismiss its appeal immediately after oral argument. *Guedes v. ATF*, 920 F.3d 1, 10 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).

Although the Court granted plaintiff's motion, another appellant in that consolidated appeal had "presse[d] the same challenge to Whitaker's authority to promulgate the Rule" and incorporated plaintiff's arguments by reference. *Id.* The Court thus proceeded to reject plaintiff's arguments, holding that the ratification of the Rule cured any alleged defect in its initial promulgation, thereby obviating the need to address the validity of Whitaker's designation as Acting Attorney General. *Id.* at 12-13.

3. After dismissing its appeal, plaintiff filed the now-operative amended complaint. JA 81-91. The complaint no longer seeks to enjoin the Rule or to obtain a declaration that the Rule as ratified by Attorney General Barr is unlawful, but instead asserts two different claims resting on alternative theories of injury. JA 89-91.

First, plaintiff seeks injunctive and declaratory relief against an alleged "explicit executive policy of using the FVRA to designate an employee like Mr. Whitaker as any officer, including a principal officer, and even when the principal officer's first assistant is available to serve and an office-specific designation statute automatically designated the first assistant to act" as the acting principal officer. JA 89-90; *see* JA 85. Second, plaintiff's complaint seeks a declaration that the Rule was invalid for a short period in the past—between its issuance and its ratification—because Whitaker's designation allegedly was not permitted under the FVRA and the Appointments Clause. JA 90-91.

4. The district court dismissed plaintiff's second amended complaint, holding that plaintiff's theories of standing both failed.

The court rejected plaintiff's primary theory that it could challenge the alleged "policy" of unlawful acting appointments because plaintiff had failed to allege any actual or imminent injury-in-fact from that policy. The court explained that plaintiff's "supposed future injury from the alleged FVRA policy—that some future invalidly designated officer will promulgate other gun-control measures that affect the Coalition or its members—is fraught with 'quixotic speculation,'" JA 101 (quoting *Guedes*, 920 F.3d at 15), because it depended on "a tenuous chain of uncertain events," JA 101-02.

The district court further reasoned that plaintiff could not show standing by relying on a statistical probability that one of its members would be injured in the future without identifying a particular member who faced an imminent injury. The court observed that plaintiff had failed to identify "any specific member that would suffer from some 'imminent and concrete harm.'" JA 102 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009)). This failure was significant, the court explained, because plaintiff could not rest on "'a statistical probability that some of [an organization's] members would be threatened with concrete injury' at some unknown point in the future" to establish standing. JA 103 (quoting *Summers*, 555 U.S. at 497).

The district court also concluded that plaintiff failed to demonstrate an injury to its own interests. The most plaintiff alleged was that that it would "be forced to

expend resources to respond to the alleged executive policy," but that allegation depended on the same speculative chain of events as its members' purported injuries. JA 103. Moreover, the court noted, "divert[ing] some unidentified resources to counteract these future regulations" would be a "self-inflicted" harm insufficient to establish standing. *Id.* And the court observed that plaintiff's challenge to the alleged FVRA policy amounted to a generalized grievance about government conduct "shared in substantially equal measure by all or a large class of citizens." JA 104.

Likewise, the district court rejected plaintiff's alternative theory that it had standing to seek a declaratory judgment that "for a time in the past the bump stock rule was briefly unlawful and that Barr's ratification did not cure any harm to those members who were unable to alienate their bump stocks during that period." JA 105. As the district court explained, a declaration would not redress that purported injury, as plaintiff did "not even appear to contest." *Id.* And the court again observed that plaintiff had failed "to allege specific facts that any of its members ever attempted or even considered alienating a bump stock," and that "it is not enough to aver that unidentified members have been injured." JA 106.

SUMMARY OF ARGUMENT

I. Plaintiff lacks standing.

A. Plaintiff's primary theory below—that it or its members face an imminent future injury from an alleged "policy" of unlawful acting appointments—rests on a "highly attenuated chain of possibilities" that cannot suffice for standing. *Clapper v.*

Amnesty Int'l USA, 568 U.S. 398, 410 (2013). In order for plaintiff or its members to suffer any injury from this alleged policy, a vacancy would have to occur; the vacancy would have to be subject to an office-specific designation statute that provided for the office's "first assistant" to fill the vacancy; the office's "first assistant" would have to be available to serve; the President would have to direct that someone other than the first assistant perform the duties of the office; and that acting officer would not only need to have authority to issue a gun-control regulation, but also would need to exercise that authority, and in a manner that injured plaintiff or its members. In a related context, this Court has already described this chain of events as "quixotic speculation." *Guedes v. ATF*, 920 F.3d 1, 12 (D.C. Cir. 2019). And plaintiff's suggestion that it can rest on the statistical probability of a future injury rather than identify any actual injury is foreclosed by *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009).

B. Plaintiff presses a new theory on appeal that Attorney General Barr's ratification of the Rule was invalid under 5 U.S.C. § 3348, but it forfeited that theory below. Moreover, that theory of *present* injury from Acting Attorney General Whitaker's initial promulgation of the Rule would not be redressed by the declaratory relief sought in plaintiff's operative complaint, which addressed only the *past* injury of a purported inability to alienate a bump stock in the period between Whitaker's promulgation and Barr's ratification. *See Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). To the extent plaintiff belatedly claims that its members suffer *continuing* injury

from Whitaker's promulgation of the Rule due to the invalidity of Barr's ratification, that alleged injury, legal claim, and request for relief are nowhere in plaintiff's operative complaint.

In any event, Attorney General Barr's ratification was valid. Although 5 U.S.C. § 3348 bars ratification of actions taken by a person not acting in conformity with the FVRA when performing a "function or duty" of a vacant office, *id.* § 3348(d), it narrowly defines a "function or duty" for that purpose as one that is "required … to be performed by the applicable officer (and only that officer)," *id.* § 3348(a)(2). The relevant rulemaking authorities here can be exercised by multiple officials—including the ATF Director and the Deputy Attorney General—whether or not the Attorney General's office is vacant. Issuance of the Rule thus was not "required … to be performed by the [Attorney General] (and only the [Attorney General])." By providing this narrow definition of "function or duty," Congress limited § 3348(d) to "non-delegable" duties, ensuring that the "normal functions of government" would continue during a vacancy. S. Rep. 105-250, at 18 (1998). Plaintiff's argument that the term encompasses any statutory duty that identifies by name only a single official, regardless of whether another official could also validly perform the duty pursuant to pre-existing delegations, is contrary to the statute's plain text and would create the administrative paralysis Congress sought to avoid.

II. Regardless, plaintiff's challenges to the designation of Acting Attorney General Whitaker (and any similar future designation) are meritless.

A. The plain language of the FVRA covers the office of Attorney General, and expressly authorizes the President to "direct" a senior "officer or employee" within the agency "to perform the functions and duties of the vacant office." 5 U.S.C. § 3345(a)(3). Nor is the FVRA displaced by 28 U.S.C. § 508. Where there is "a statutory provision [that] expressly … designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," such as § 508, Congress provided that the FVRA is not the "*exclusive* means for temporarily authorizing an acting official." 5 U.S.C. § 3347(a) (emphasis added). But the FVRA continues to be *a* means for filling the vacancy in that circumstance, and "the President is permitted to elect between these two statutory alternatives" for the acting official. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016). Plaintiff's contention that the list of possible acting officials under § 508 must be exhausted before the FVRA becomes "applicable" is contrary to the statute's text and structure and finds no support in the statute's history.

B. Nor did Whitaker's temporary service as Acting Attorney General violate the Appointments Clause. The text of the Clause is silent on who may serve as an acting officer and whether an individual temporarily performing the duties of a vacant office must be appointed as an officer. Historical practice and precedent from all three branches of government, though, makes clear that the temporary designation of an individual as acting agency head does not require Senate confirmation because the individual does not thereby become a principal officer, and that an employee may be

designated to serve in that role. Plaintiff's contrary arguments have no basis in the text of the Appointments Clause or longstanding historical practice. And regardless, if necessary to avoid a constitutional problem, the President's designation of Whitaker to serve as Acting Attorney General under the FVRA can be understood as an appointment of an inferior officer in compliance with the Clause. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring).

STANDARD OF REVIEW

This Court reviews de novo an order dismissing a case for lack of standing. *Young America's Found. v. Gates*, 573 F.3d 797, 799 (D.C. Cir. 2009).

ARGUMENT

I. Plaintiff Lacks Standing

Having abandoned its prospective challenge to Acting Attorney General Whitaker's promulgation of the Rule after Attorney General Barr ratified the Rule, plaintiff principally contended below that the government has a "policy" of using the FVRA "to designate a non-Senate confirmed officer … to act as a principal officer during an absence or vacancy when that officer's 'first assistant' is available to serve" and "an office-specific designation statute automatically designate[s] the first assistant to act during the absence or vacancy." JA 82, 85; *see* Br. 19. Plaintiff asserts that it has standing to challenge this alleged policy both on behalf of its members (who it suggests may be affected by some future gun control regulation issued by some hypothetical future acting official) and in its own right (because of its possible future

expenditure of resources to counteract those hypothetical regulations). As the district court correctly recognized, this utterly speculative chain of events fails to demonstrate that plaintiff or its members face the imminent harm required for standing. And plaintiff's attempt to resurrect its challenge to Whitaker's promulgation of the Rule—by questioning the validity of Barr's ratification—was forfeited below, fails to demonstrate redressability, and is meritless regardless.

A. Plaintiff Has Not Alleged An Imminent Or Impending Injury To Its Members Or Itself From The Alleged Policy Of Unlawful Appointments

1. To demonstrate standing, plaintiff must allege an "actual or imminent, not conjectural or hypothetical" injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The requirement of an "imminent" injury "ensure[s] that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Thus, the Supreme Court has "repeatedly reiterated" that "'allegations of *possible* future injury' are not sufficient" to demonstrate an injury in fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore*, 495 U.S. at 158). Allegations establishing an "objectively reasonable likelihood" of injury at some future time do not meet the standard, particularly where those allegations rest on a "highly attenuated chain of possibilities." *Id.* at 410. As this Court has summarized, when a plaintiff seeks declaratory and injunctive relief for a "predicted future injury" that may never occur,

the plaintiff "bears a more rigorous burden to establish standing." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)

Here, as the district court rightly concluded (JA 101-02), any injury to plaintiff from the alleged appointments policy depends on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. First, an "absence or vacancy" would have to occur in an undetermined office requiring Presidential appointment and Senate confirmation. Second, the vacant office would have to be subject to "an office-specific designation statute" that "automatically designate[s]" an individual "to act during the absence or vacancy." Third, the "first assistant" designated by the office-specific statute would need to be "available to serve" at the time the vacancy occurs. Fourth, the President would have to replace the designated individual and invoke his discretionary authority under the FVRA to temporarily appoint another unspecified acting officer—himself an employee or non-Senate-confirmed official. Fifth, the acting officer would have to possess some statutory authority to promulgate gun-control regulations—the only type of regulation germane to plaintiff's organizational interests. Sixth, the unknown acting officer would have to actually exercise her discretion to issue such a regulation. Seventh and finally, "by sheer coincidence, that rule would … adversely affect [the Coalition's or its members'] legal rights." JA 101-02 (quoting *Guedes*, 920 F.3d at 15).

As the district court correctly recognized, this "tenuous chain of uncertain events" is "precisely the type of 'reli[ance] on a highly attenuated chain of possibilities'

that the standing inquiry proscribes." JA 101-02 (quoting *Clapper*, 568 U.S. at 410). Indeed, this Court has already rejected a similar suggestion in addressing plaintiff's contention that Attorney General Barr's ratification of the Rule did not moot its challenge to Whitaker's designation: the claim that such a dispute was capable of repetition yet evading review depended on the "quixotic speculation" that some hypothetical future official akin to Whitaker would promulgate a hypothetical rule that by "sheer coincidence" adversely affected plaintiff. *Guedes*, 920 F.3d at 15.

Plaintiff argues that it need not meet the usual threshold for establishing standing because it "has hundreds of thousands of gun-owning members and supporters across the United States," and "[g]un measures are regularly promulgated by the Government," so "one member" may at some point be affected "by one regulation promulgated by one invalidly designated acting officer." Br. 20-21. But the Supreme Court has rejected this "reliance on 'a statistical probability that some of [an organization's] members would be threatened with concrete injury' at some unknown point in the future." JA 103 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)). Instead, organizational plaintiffs must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers*, 555 U.S. at 498. Plaintiff has failed to identify any particular member who faces imminent or certainly impending harm from the alleged policy.

Plaintiff makes no attempt to distinguish *Summers*, instead relying on a pre-*Summers* case, *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006), for

the proposition that it is "reasonable to infer that at least one member will suffer injury-in-fact" from a hypothetical future regulation. *Id.* at 1340; *see* Br. 21. It is doubtful that the premise of *Utility Air*—one adopted even then "with some hesitation," 471 F.3d at 1339—survives *Summers*. This Court has applied *Summers* to reject attempts to establish standing that do not actually identify a particular member who faces an injury-in-fact. *See Swanson Grp. Mfg. v. Jewell*, 790 F.3d 235, 244 (D.C. Cir. 2015) ("[A] statistical probability of injury to an unnamed member is insufficient to confer standing."); *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199-200 (D.C. Cir. 2011) (similar). Anyway, the petitioner in *Utility Air*, unlike plaintiff here, submitted affidavits from specific members concerning the probability of a future injury. 471 F.3d at 1339-40.

Plaintiff fares no better in contending that it has established standing based on an injury to the organization itself. As a threshold matter, plaintiff's asserted harm on this basis—that it will be required to "make additional expenditures and further deplete its funds to counteract" regulations issued "by an invalid officer," Br. 22—appears nowhere in its complaint (even after two amendments). Plaintiff has not identified any actual resources that have been diverted based on the mere alleged existence of the FVRA policy, and it cannot claim standing based on its efforts to litigate over the Rule itself. *See National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

More fundamentally, as the district court correctly observed, any future harm to the organization depends on the same speculative chain of events as its members' claims of future injury. JA 103. Any unidentified expenditures to counteract hypothetical regulations would not suffice to create standing because any injury "results not from any actions taken by [the defendants], but rather from the [organization's] own budgetary choices." *Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *see also Clapper*, 568 U.S. at 418, 422 (citing cases and holding that plaintiffs "cannot manufacture standing by incurring costs in anticipation of non-imminent harm"); *Food & Water Watch v. Vilsack*, 808 F.3d 905, 919-20 (D.C. Cir. 2015). Plaintiff has alleged nothing more here.

B. Plaintiff's Attempt To Challenge Whitaker's Designation By Contesting Barr's Ratification Of The Rule Is Both Forfeited And Meritless

Apart from its challenge to the purported appointments "policy," plaintiff's only other theory of standing below was that it could seek a declaratory judgment essentially condemning "its inability to sell bump stocks during the period between the Rule's issuance and its ratification." JA 105. The district court correctly rejected that theory because any such past injury could not be redressed by the prospective remedy of a declaratory judgment. *Id.* Plaintiff does not seriously contest this reasoning, but now attempts to repackage its claim, asserting for the first time on appeal that it has standing to contest the validity of Whitaker's promulgation of the

Rule as Acting Attorney General because "the FVRA prohibits attempts to ratify" agency action taken by an official "serving in violation of the FVRA," and therefore "Attorney General Barr's attempted ratification" of the Rule is "invalid." Br. 13. This claim of standing was forfeited below. Indeed, it would not even redress the injury alleged in plaintiff's complaint. In any event, the ratification objection is meritless.

1. "[T]he ordinary rules of forfeiture apply" to establishing standing. *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019). Plaintiff's complaint does not allege that Attorney General Barr's ratification of the Rule was invalid, and neither the complaint nor plaintiff's opposition to the motion to dismiss cites or mentions the FVRA provisions at issue, 5 U.S.C. § 3348(a)(2) and (d). The decision to advance certain theories of standing, but not others, "is textbook forfeiture" of theories not presented. *Government of Manitoba*, 923 F.3d at 179. Plaintiff's attempt to "roll out an entirely new argument for standing for the first time on appeal … dooms [its] case." *Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016).

Nor did plaintiff preserve this theory by stating in district court that it "does not waive any of its arguments as to ratification" by "incorporat[ing] by reference" its arguments from the preliminary injunction motion and its prior appeal to this Court. Dkt. No. 47 at 3 n.2; *accord id.* at 19. Plaintiff's standing to sue was not at issue in the preliminary-injunction litigation. Neither plaintiff's preliminary-injunction papers nor its briefs on appeal referenced § 3348(a)(2) and (d), much less contended that Attorney General Barr's ratification was impermissible on that basis. *See* No. 18-cv-

3083, Dkt. No. 2-1; No. 18-cv-2988, Dkt. No. 17; Appellant's Opening and Reply Briefs, *Firearms Policy Coal. v. ATF* (D.C. Cir. No. 19-5043). The government did brief the issue, *see* Appellees' Br. at 73-74, *Firearms Policy Coal. v. ATF* (D.C. Cir. No. 19-5043), plaintiff's reply brief ignored the issue, and this Court thus recognized that plaintiff "accept[ed] the validity of Attorney General Barr's ratification," citing § 3348(d) as addressing "only" "nondelegable duties." *Guedes*, 920 F.3d at 12. Plaintiff now dismisses that conclusion as "passing dicta" on an "unbriefed issue." Br. 14. In so doing, plaintiff admits that it never raised the argument it now presses.

2. Relatedly, the relief plaintiff seeks does not redress the injury actually alleged in its operative complaint (even after two amendments).

To establish redressability, a plaintiff must allege facts showing "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). These principles dictate that where a plaintiff seeks "declaratory" relief, "past injuries alone are insufficient to establish standing," *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011); where a plaintiff "cannot obtain compensation to himself for a past injury, he has failed to show its redressability," *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998).

The operative complaint alleges only a past injury. It asserts that during the period between Whitaker's issuance of the Rule on December 18, 2018, and Attorney General Barr's ratification of the Rule on March 14, 2019, plaintiff and its members could not "alienate their bump stocks." JA 88, ¶¶ 21-23; *see* JA 105. The complaint

seeks declaratory relief regarding the validity of the Rule during this three-month period. JA 88, 90. The complaint does not allege that the ratification was invalid, and does not allege that plaintiff or its members suffer or have suffered any ongoing harm from the Rule as ratified. Indeed, the complaint is explicit that the ratification is *not* relevant to the relief plaintiff seeks. JA 88 (seeking declarations that Whitaker's issuance of the rule was unlawful "wholly apart from Mr. Barr's ratification" and that "ratification does not cure the harm that plaintiff and its members already suffered" in that interim period).

As the district court recognized, plaintiff lacks standing to seek declaratory relief for this purely past injury, "because the requested declaratory judgment would not enable the Coalition to obtain redress for its inability to sell bump stocks during the period between the Rule's issuance and its ratification." JA 105. And even aside from redressability, plaintiff has never alleged "specific facts that any of its members ever attempted or even considered alienating a bump stock." JA 106.

Plaintiff nowhere disputes the district court's analysis of its standing to seek declaratory relief for a past injury. To the extent plaintiff now wishes to contend that its members suffer *continuing* injury from Whitaker's promulgation of the Rule due to the invalidity of Barr's ratification, that alleged injury, legal claim, and request for relief that might redress it are nowhere in plaintiff's complaint.

3. a. In all events, plaintiff's newly-minted ratification theory is wrong. As this Court previously recognized, Attorney General Barr's ratification of the Rule was

lawful because the limitation on ratification in § 3348 addresses "only" "nondelegable duties." *Guedes*, 920 F.3d at 12.

The FVRA generally prescribes that "[a]n action taken by any person" who is not properly acting under the applicable FVRA provisions "in the performance of any function or duty of a vacant office … shall have no force or effect," and that such an action "may not be ratified." 5 U.S.C. § 3348(d)(1), (2). But the FVRA defines "function or duty" narrowly for these purposes, as "any function or duty of the applicable office that is established by statute" or "regulation" and that "is *required* by statute" or "regulation" "to be performed by the applicable officer *(and only that officer)*." *Id.* § 3348(a)(2)(A)(i), (ii). It thus does not encompass functions or duties that are vested in multiple officers, whether directly or by delegation pursuant to statute or regulation. *Cf. id.* § 3345(a)(2)-(3) (providing that "the President (and only the President)" may direct someone other than the first assistant to serve as acting officer, and thereby prohibiting the President from delegating that power, *see* 3 U.S.C. § 301).

Here, issuance of the Rule was not "required … to be performed by the [Attorney General] (and only the [Attorney General])," and therefore was not a "function or duty" under § 3348. To the contrary, Congress has provided that "*any* function of the Attorney General" may be delegated to "any other officer, employee, or agency of the Department of Justice." 28 U.S.C. § 510 (emphasis added). And none of the statutes or regulations underlying the Rule prohibits the Attorney General from delegating or re-delegating his rulemaking functions under those authorities. *See*

18 U.S.C. § 926; 26 U.S.C. §§ 7801(a)(2) and 7805(a); 22 U.S.C. § 2778; Exec. Order No. 13,637, 78 Fed. Reg. 16,129, 16,130 (Mar. 8, 2013). To the contrary, since shortly after ATF was transferred from the Department of the Treasury to the Department of Justice in 2002, the Attorney General has delegated the relevant rulemaking responsibilities to the ATF Director, *see* 28 C.F.R. § 0.130(a)(1)-(2); 68 Fed. Reg. 4923, 4926 (2003). Moreover, at the time of that transfer, not only did the Attorney General have statutory authority to delegate any of his functions, but regulations had already long made clear that "all the power and authority" of the Attorney General could be exercised by the Deputy Attorney General. 28 C.F.R. § 0.15. Given that this power could have been exercised by the ATF Director or the Deputy Attorney General at the time the Rule was issued, such a function plainly was not "required … to be performed by" the Attorney General "and only" the Attorney General.

That § 3348's narrower definition covers "only" "nondelegable duties," *Guedes*, 920 F.3d at 12, is confirmed the FVRA's legislative history. The Senate Report on an earlier version of the bill, addressing a definition of "function or duty" materially identical to that now found in § 3348(a)(2), explains that "[t]he functions or duties of the office" are "defined as the non-delegable functions or duties of the officer." S. Rep. 105-250, at 18; *see id.* at 27 (proposed text). This restricted definition ensures that "[d]elegable functions of the office could still be performed by other officers or employees" in the absence of a properly serving acting official, and that "[a]ll the

normal functions of government thus could still be performed." *Id.* at 18; *accord id.* at 31 (views of supporting Senators); *id.* at 36 (views of opposing Senators).

b. Plaintiff contends that because the statutes underlying the Rule grant rulemaking authority solely to the Attorney General, those powers are "assigned to 'the applicable officer (and only that officer).'" Br. 14. That argument rewrites § 3348. That provision is not triggered whenever a task is "assigned" by statute only to the relevant officer, but rather when the task is "required" by statute or regulation "to be performed by" the relevant officer "(and only that officer)." Plaintiff does not appear to dispute that, even if the Attorney General's office had not been vacant, the ATF Director or the Deputy Attorney General could have issued the Rule pursuant to pre-existing delegated authority. But the logic of plaintiff's position is that as soon as Attorney General Sessions resigned, the ATF Director lost the ability to exercise this delegated authority because this concededly delegated power purportedly is a "function or duty" of the Attorney General alone. Indeed, under plaintiff's reading of § 3348(d)(2), *any* grant of statutory power or duty to the Department of Justice that mentions only the Attorney General—which is quite common, from the weighty (the duty to "supervise all litigation to which the United States, an agency, or officer thereof is a party," 28 U.S.C. § 519), to the mundane (the power to exchange and sell "law books, reference books, and periodicals," *id.* § 525)—could no longer be carried out during a vacancy by a subordinate official who indisputably had been properly delegated that responsibility.

Plaintiff's view of the statute—which essentially treats all otherwise-valid preexisting delegations of an officer's responsibilities as rescinded in the event of a vacancy—would thus create precisely the sort of administrative paralysis that Congress sought to avoid. Plaintiff's observation that most duties of agency heads are delegable (Br. 17) misses the point: that is precisely why the Senate Report declares that "[a]ll the normal functions of government … could still be performed," S. Rep. 105-250, at 18, in response to concerns that § 3348 might "cause an unintended shutdown of the Federal agency within which the vacancy exists due to administrative paralysis," *id.* at 31; *accord id.* at 36.

Plaintiff's focus (Br. 15-16) on the relationship between the FVRA and *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), is a non sequitur. Although the Senate Report indicates displeasure with *Doolin* as part of its general discussion of why revisions to the Vacancies Act were needed, those concerns arise from the fact that one of the acting officials in that case had served in an acting capacity for four years, despite the time limitations of the Vacancies Act. S. Rep. 105-250, at 8. The Report also asserted that the Court's ratification discussion "demand[ed] legislative response," raising concerns that there would be no consequence if ratification could cure "the actions of a person who served beyond the length of time provided by the Vacancies Act." *Id.* But Congress's "response" to that concern is set out in § 3348, and both the parts of the Report specifically addressing

that provision and the provision's plain text make clear that the bar on ratification encompasses only non-delegable duties. *Id.* at 18, 31, 36.

Plaintiff's reliance on dicta in *L.M.-M. v. Cuccinelli*, __ F. Supp. 3d __, 2020 WL 985376 (D.D.C. Mar. 1, 2020), is likewise misplaced. The *L.M.-M.* court (unlike plaintiff here) focused on § 3348(b)(2)'s requirement that "only the head of such Executive agency may perform any function or duty" of a sub-cabinet office in the event of a vacancy. The *L.M.-M.* court reasoned that unless § 3348(a)(2) were taken to encompass any duty assigned to a particular office by statute or regulation, including delegable duties, § 3348(b) would be of limited application in light of statutes that "generally vest[] the department head with all functions of the department" and permit the agency head to delegate responsibilities to subordinates. 2020 WL 985376, at *21 (emphasis omitted). But any function that by statute can be performed by both an inferior officer and the agency head is by definition not a task "required" to be performed by a single officer (and only that officer). And as discussed above, Congress's limitation of "function or duty" to non-delegable functions was a deliberate choice, made to avoid the administrative paralysis that would result from a rule that prevented officials from carrying out the responsibilities of a vacant office.

II. The Designation Of Acting Attorney General Whitaker Was Lawful

Even if plaintiff had standing, its claims fail as a matter of law. The FVRA provided express authority for the President to designate Whitaker (or another similar official) to temporarily serve as Acting Attorney General. Nothing in 28 U.S.C. § 508 or the Appointments Clause precluded the President from exercising that statutory authority (or doing so again in the future).

A. The Federal Vacancies Reform Act Authorized Whitaker's Designation

1. The FVRA's plain text applies to an Attorney General vacancy

The FVRA authorizes the President to fill a vacancy in a covered Senate-confirmed office by designating, among other individuals, a senior "officer or employee" within the same agency "to perform the functions and duties of the vacant office." 5 U.S.C. § 3345(a)(3). The FVRA applies to all "Executive agenc[ies]," 5 U.S.C. § 3345(a), which includes the Department of Justice, *see id.* §§ 101, 105, and it applies to any officer in an Executive agency "whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate," including the agency head, *see id.* § 3345(a). This expressly includes Department heads. *See id.* §§ 3345(a), 3348(b)(2). Where Congress intended to exclude an office from the FVRA's scope in whole or in part, it said so expressly, identifying specific offices to which the FVRA "shall not apply" *id.* § 3349c, or which are exempt from

specific provisions, *id.* § 3348(e). The office of Attorney General is not subject to any exclusion or exemption.

The prior Vacancies Act, by contrast, expressly excluded the office of Attorney General from the President's authority to fill vacant offices with persons other than the office's first assistant. *See* 5 U.S.C. § 3347 (1994) ("This section does not apply to a vacancy in the office of Attorney General"). In enacting the FVRA, Congress eliminated that exclusion, while retaining 28 U.S.C. § 508's specification that the Deputy Attorney General is the "first assistant" under § 3345, the operative FVRA section here. It is thus indisputable that the FVRA gives the President the statutory authority to designate a senior officer or employee of the Department of Justice to temporarily perform the functions and duties of the Attorney General during a vacancy.

2. The President's authority under the FVRA is not displaced by 28 U.S.C. § 508

28 U.S.C. § 508, which long predates the FVRA, does not displace the President's FVRA authority to designate an Acting Attorney General. It provides that when there is "a vacancy in the office of Attorney General … the Deputy Attorney General may exercise all the duties of that office," *id.* § 508(a), and that, if the Deputy Attorney General is also unavailable, the Associate Attorney General shall act instead, followed by an order of succession designated by the Attorney General comprising the Solicitor General and the Department's 11 Assistant Attorneys General, *id.*

§ 508(b). Plaintiff contends that § 508 deprives the President of his authority under the FVRA to designate someone other than the Deputy Attorney General to serve as Acting Attorney General unless the Deputy Attorney General and the Associate Attorney General (and perhaps all others listed in § 508) are unavailable. The FVRA's text and basic canons of statutory interpretation foreclose this argument. JA 49-60.

a. In enacting the FVRA, Congress recognized the existence of office-specific vacancy statutes like § 508. The text and structure of the FVRA make clear that Congress intended for the FVRA and office-specific statutes to co-exist and complement each other, rather than for office-specific statutes to displace the FVRA.

Congress provided that "unless" a specified exception applies, the FVRA is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office [requiring Senate confirmation] of an Executive agency." 5 U.S.C. § 3347(a). One of the specified exceptions is the existence of "a statutory provision [that] expressly … designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," such as § 508(a). *Id.* § 3347(a)(1)(B). In that case, the FVRA ceases to be "the *exclusive* means of filling a vacancy, but it remains *a* means of filling the vacancy." JA 51. In other words, § 3347(a) provides that office-specific statutes such as § 508 are exceptions to the FVRA's generally exclusive applicability, not that they supersede or displace the FVRA. As the Ninth Circuit has put it, in these circumstances "the President is permitted to elect between these two statutory alternatives to designate"

an acting official. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016).

The structure of the statute reinforces this reading. Section 3347's proviso that the FVRA is not the "exclusive" means of addressing vacancies in specified circumstances stands in marked contrast with § 3349c, which provides that the FVRA "shall not apply" to specified offices. Had Congress wanted to make the FVRA inapplicable to offices for which an office-specific statute designated an acting official, it would have listed such statutes in § 3349c, not § 3347. Section 3347(a) also stands in contrast with § 3348(e), which provides that specific provisions of the FVRA "shall not apply" to specified offices. At a minimum, if Congress had meant to provide that the FVRA's provisions are inapplicable to offices subject to office-specific succession statutes, it would have provided in § 3347 that the FVRA "shall not apply" in whole or in part, rather than merely stating that the FVRA is not "exclusive" when those statutes exist.

The FVRA's legislative history confirms that statutes like § 508 were understood by Congress to work in conjunction with—not to displace—the FVRA. The Senate Report accompanying an earlier bill that led to the FVRA identified then-existing, office-specific vacancy statutes and stated that the bill "retains" § 508 and the other such statutes, S. Rep. No. 105-250, at 15, 16-17 (1998), but that "even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an

alternative procedure for temporarily occupying the office," *id.* at 17 (emphasis added); *see Hooks*, 816 F.3d at 556.

For all these reasons, every court to have considered the question has held that office-specific vacancy and succession statutes do not preclude the President from exercising his designation authority under the FVRA. *See Hooks*, 816 F.3d at 556; *English v. Trump*, 279 F. Supp. 3d 307, 319-20 (D.D.C. 2018); JA 49-60. And that conclusion is consistent with longstanding Executive Branch practice, under which Presidents have consistently invoked the FVRA to provide for orders of succession or directions that designate someone other than the official named in the officer-specific statute. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 208-11 (2007).[1]

b. Faced with these obstacles, plaintiff concedes that § 508 and similar office-specific statutes do not displace the FVRA altogether. But plaintiff contends "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"—in other words, unless and until the line of succession spelled out in § 508 is exhausted. Br. 47. This proposed exhaustion rule finds no home in the text of either the FVRA or § 508.

[1] *See also, e.g.*, *Providing an Order of Succession Within the Department of Defense*, Exec. Order No. 13,533, 75 Fed. Reg. 10,163 (Mar. 1, 2010); 5 U.S.C. § 3345 note (FVRA succession plans for Labor, Treasury, HHS, EPA, OPM, ODNI, and NARA).

i. Plaintiff argues that when 5 U.S.C. § 3347(a) states that the FVRA is "the exclusive means" for temporarily filling vacant offices "unless" one of the specified exceptions applies, "unless" does not modify "exclusive means," but instead modifies only the word "means." Br. 48-49. Thus, plaintiff argues, when the exceptions in § 3347(a) apply, the FVRA is not a "means" of filling the vacancy at all. *Id.* But as a grammatical matter, "unless" is a conjunction, not an adjective or adverb, and therefore cannot modify anything. Moreover, the operative language in § 3347(a) does not say that the FVRA is "a means" of filling vacant offices. It says that the FVRA is "the exclusive means" of doing so. The "unless" clause necessarily applies to the entire preceding clause.

Tellingly, plaintiff is unwilling to embrace the implications of its proffered reading. If, as plaintiff suggests (Br. 49), the FVRA "is not a 'means' to authorize an acting official" when an exception in § 3347(a) applies, then a provision like § 508(a), which "expressly … designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity" (§ 3347(a)(1)(B)), would render the FVRA inapplicable to the office of Attorney General altogether. Plaintiff must disclaim that outcome because the Attorney General's office is not contained in the FVRA's applicability exceptions in § 3349c.

Plaintiff attempts to thread the needle by arguing that, because the FVRA exclusivity exception for office-specific succession statutes applies only where a statute "expressly … designates" an acting officer, the exception does not apply where

the designee is unavailable. Br. 64-65. But as the district court correctly observed, whether or not the designee is available, the statute still expressly designates that individual to serve. JA 56. In addition, where the Deputy Attorney General and Associate Attorney General are unavailable, 28 U.S.C. § 508(b) *authorizes* the Attorney General to designate "the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." Thus, § 508(b) "expressly … authorizes" the Attorney General, as "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," 5 U.S.C. § 3347(a)(1)(A), regardless of whether those officials are also unavailable. Plaintiff's reading would therefore render the FVRA inapplicable even where the office-specific statute is exhausted—a result that plaintiff itself recognizes is untenable.

ii. Equally divorced from the statutory text is plaintiff's assertion, without citation, that the "whole purpose of office-specific designation statutes like [§ 508] 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." Br. 51. Virtually all office-specific statutes (including § 508) were enacted under the backdrop of the pre-FVRA Vacancies Act, which expressly imposed narrow time limits on acting service by the first assistant or any Senate-confirmed officer designated by the President. *See* 15 Stat. at 168; 5 U.S.C. §§ 3347, 3348 (1994). Plaintiff thus provides no basis for its assertion that the purpose of office-specific vacancy statutes was *to*

prevent the President from selecting most Senate-confirmed officers under the Vacancies Act, rather than *to enable* him to have specific officers serve beyond the pre-FVRA Vacancies Act's relatively short time limits. *See United States v. Lucido*, 373 F. Supp. 1142, 1150-51 (E.D. Mich. 1974) (Deputy Attorney General could continue to serve as Acting Attorney General under § 508 after then-30-day time limit in Vacancies Act expired). Indeed, if office-specific statutes excluded those offices from the President's general authority to select other Senate-confirmed officials, Congress would have had no reason to provide in the Vacancies Act that "[t]his section does not apply to a vacancy in the office of Attorney General," 5 U.S.C. § 3347 (1994)—a restriction that Congress then eliminated in the FVRA.

Accordingly, the hypothetical provisions that plaintiff invents to demonstrate a specific statute displacing a generally exclusive one (Br. 51) offer no insight into the meaning of the actual statutes Congress has enacted here. A legislature certainly *could* choose, for example, to make a generally exclusive venue statute inapplicable when another statute contains a more specific (and presumably inconsistent) venue provision. But it is clear from the text, structure, and legislative history of the FVRA that Congress made a fundamentally different choice with respect to the relationship between the FVRA and office-specific vacancy statutes like § 508.

iii. Plaintiff erroneously contends that the presumption against implied repeals applies because § 508 was meant to eliminate the President's discretion under the general vacancy statutes. Br. 52-53. What originally restricted the President's

discretion was not § 508 itself, but instead the provision in the Vacancies Act that excluded the Attorney General from the operation of that Act's designation provision. Congress repealed that provision when it enacted the FVRA. The presumption against implied repeals is irrelevant to an express repeal.

In any event, even if the canon applied, it would require reading the two statutes harmoniously. The district court correctly noted that § 508 serves several purposes not served by § 3345(a)(1) of the FVRA. JA 57. First, as discussed, it allows the Deputy Attorney General (and others in the line of succession) to serve as Acting Attorney General beyond the FVRA's general time limitations. *See* 5 U.S.C. § 3346. Second, it allows those individuals to fill a vacancy in situations where the FVRA's additional restrictions on acting service would not authorize it. *See id.* § 3345(b). And third, it eliminates potential confusion over who the "first assistant" is in the Department of Justice (the Deputy Attorney General, rather than the Solicitor General) for purposes of the FVRA's default rule in § 3345(a)(1)—a clarification, moreover, that would be pointless surplusage on plaintiff's view that the FVRA is inapplicable when the Deputy Attorney General is available, which is why plaintiff is forced to dismiss it as lacking any "substantive effect," Br. 6, 62-63. Unlike plaintiff's reading, the reading of the government and the district court gives effect to both statutes, permitting officers in § 508 to serve as Acting Attorney General in circumstances where they would not be allowed to serve under the FVRA, and vice versa.

Plaintiff's reliance on the specific-governs-the-general canon, Br. 55-56, is misplaced for similar reasons. As the district court correctly observed, that canon is an aid in divining the intended relationship between two statutes when Congress has not expressly addressed that question. *See* JA 58. Here, it has. The more specific provision (§ 508) does not override the more general one (§ 3345) where Congress clearly provides that the two statutes coexist (§ 3347(a)), as expressly confirmed by the legislative history (S. Rep. No. 105-250, at 17).

Nor can plaintiff derive any support from other statutes that address different circumstances when the President may override office-specific designation statutes. Br. 54. The civilian statutes authorize the President to designate any "officer of the Federal Government," not just officers who may be designated under the FVRA, and therefore require express language to accomplish that result. *See, e.g.*, 40 U.S.C. § 302 (General Services Administration Administrator). The military statutes acknowledge the President's designation power under the FVRA, but the inclusion of such cross-references does not imply that the statutes otherwise would have foreclosed the President from invoking his independent FVRA authority. *See, e.g.*, 10 U.S.C. § 8017 (Secretary of the Navy). If anything, these statutes confirm that the FVRA coexists with office-specific statutes. *See* Dkt. No. 16, at 52 n.29 (citing examples of presidential designations bypassing available officials designated by office-specific statutes).

iv. Plaintiff objects that Congress could not have intended to give the President the power to fill the vacant office of an agency head with a senior employee within that agency. *See* Br. 55-56. But as discussed above, this objection is belied by the FVRA's text and structure, which expressly and unambiguously provide that power. Indeed, plaintiff must concede this, because its limited argument, as noted, is that the FVRA is displaced *only* if an office-specific vacancy statute designates an acting official and the individual designated is available to serve. There are agencies that do not have an office-specific vacancy statute (*e.g.*, 22 U.S.C. § 2651a(a) (Department of State)) or that will often have no designee available because only one individual is designated to be acting Secretary (*e.g.*, 29 U.S.C. § 552 (Department of Labor)). The President thus has unambiguous authority to designate a GS-15 employee to serve as an acting agency head even under plaintiff's own atextual reading of the FVRA.

Likewise, plaintiff's various arguments from legislative history are unpersuasive. To begin, plaintiff has no serious response to the Senate Report's statement that "even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105-250, at 17. Plaintiff suggests that this sentence refers to "what 'would' happen if Congress were to 'repeal' the office-specific designation statutes." Br. 60 n.6. That is plainly wrong. Although the Senate Report suggested that other committees might

wish to consider repealing such statutes in the future, it went on to say that, "*[i]n any event*, even with respect to the specific positions" covered by "the specific statutes this bill *retains*," the Vacancies Act would continue to provide an "alternative procedure." S. Rep. No. 105-250, at 17 (emphasis added). And the only contrary legislative history plaintiff musters—committee and floor statements from two Senators, Br. 59-60—is of "the least illuminating" sort. *NLRB v. SW Gen.*, 137 S. Ct. 929, 943 (2017).

Plaintiff notes (Br. 60) that the Senate bill contained a provision, omitted from the enacted statute, that the Vacancies Act would be "applicable" unless another statutory provision "expressly provides that the such [sic] provision supersedes sections 3345 and 3346." S. Rep. No. 105-250, at 26 (proposed § 3347(a)(1)). But the legislative discussion quoted above was not directed at that provision. Instead, the Senate Report was discussing a different provision in the bill, one that is nearly identical to the enacted language in § 3347(a)(1). *Compare* S. Rep. No. 105-250, at 16-17, *with id.* at 26 (proposed § 3347(a)(2)(A)-(B)). The only difference between the version of that provision in the bill and § 3347(a)(1)(A)-(B) as it now stands is that the version in the bill said that the Vacancies Act would be "applicable"—as opposed to "exclusive"—unless office-specific statutes existed. *Id.* at 26. And that difference cuts strongly *against* plaintiff. Even an exception to "applicab[ility]" was treated by the Senate as consistent with the Vacancies Act continuing to "provide an alternative procedure" for filling vacancies in such offices. *Id.* at 17. Thus, the language ultimately enacted by Congress in § 3347(a)(1), which merely creates an exception to

the FVRA's "exclusiv[ity]" rather than its applicability, confirms that office-specific statutes coexist with the FVRA rather than displacing it.

v. Finally, plaintiff argues that the FVRA should be read to bar Whitaker's designation to avoid a constitutional issue. Br. 46-47. But a court "may impose a limiting construction on a statute *only* if it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (emphasis added). As discussed, plaintiff's interpretation is instead "foreclosed by 'ordinary textual analysis.'" JA 60 (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)). Moreover, as explained in detail below, plaintiff fails to raise "*serious* constitutional doubts" about Whitaker's service. *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993).

And in any event, the construction plaintiff urges would not resolve the constitutional problem plaintiff purports to identify. Although plaintiff contends that the Constitution forbids the President from directing an employee to serve as acting agency head, plaintiff acknowledges that the FVRA expressly permits such service even under its interpretation. *See supra* pp. 35-36. Accordingly, plaintiff's narrowing construction of the FVRA would fortuitously evade the need for this Court to resolve asserted constitutional concerns in this particular case, but it would not "allow[] courts to *avoid* the decision of [the asserted] constitutional question[]" about the FVRA. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). In other words, the avoidance canon is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative

which raises serious constitutional doubts," *id.*; because that presumption is inapposite where *either* interpretation would still present the same constitutional question, this Court should not construe the FVRA more narrowly than its text is best read to reach. *Cf.* Br. 46-47 (citing inapposite cases where courts avoided constitutional questions by deciding antecedent statutory issues, without adopting a narrowing construction of the statute based on constitutional concerns that would persist regardless).

B. The President's Selection of Whitaker Under the FVRA Does Not Violate the Appointments Clause

1. Constitutional text and history demonstrate that the President has authority to select persons to serve as acting agency heads where vacancies exists.

The Attorney General is a principal officer and must be Senate-confirmed. But that does not mean that an individual who temporarily performs the functions of a principal office in an acting capacity is also a principal officer or must be appointed as such. The Appointments Clause does not expressly address that issue. Given that textual silence, "historical practice" is entitled to "significant weight." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). Here, historical practice and precedent from all three branches of government demonstrate that the temporary designation of an individual as acting agency head does not require Senate confirmation.

Going back to the earliest years of the Republic, Congress authorized the designation of non-Senate-confirmed persons to serve as acting principal officers. *See,*

e.g., 5 U.S.C. § 3345(a)(1), (3); Act of July 23, 1868, ch. 227, § 1, 15 Stat. 168; Act of Feb. 13, 1795, 1 Stat. 415 ("1795 Act"); Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 ("1792 Act"). Indeed, the first statute addressing vacancies—the 1792 Act—provided that the President could choose "any person" to serve as an acting Secretary of State, Treasury, or War in the event of death, illness, or absence from the seat of government. *See SW Gen.*, 137 S. Ct. at 935. In 1795, Congress expanded the President's authority by authorizing him to choose any person to serve as Acting Secretary *regardless* of the reason for the vacancy, while "impos[ing] a six-month limit on acting service." *Id.* The 1792 and 1795 Acts are of special importance, as "early congressional practice … provides contemporaneous and weighty evidence of the Constitution's meaning." *Alden v. Maine*, 527 U.S. 706, 743-44 (1999) (quotation omitted).

In the 1860s, Congress replaced these statutes with more general vacancy laws. JA 68-69. The Vacancies Act of 1868 imposed short time limits on acting service and limited the President's choice of persons to fill vacant offices, but allowed the President to choose any Senate-confirmed officer (even if the officer's duties were entirely unrelated to the duties of the vacant office). JA 69. Congress gradually liberalized the terms of the Vacancies Act over the intervening years, then substantially expanded the law by enacting the FVRA, which expressly authorizes the President to direct non-Senate-confirmed senior officers and employees of an agency to serve as acting agency head. *Supra* pp. 26-27. Just like the early congressional

statutes, the FVRA authorizes the President to fill vacancies, including for agency heads, for a temporary period without regard to whether a "first assistant" or Senate-confirmed officer is available to serve or there is any form of exigency.

This legislative "understanding is further confirmed by the longstanding practice of the Executive Branch." JA 70. Presidents historically have chosen non-Senate-confirmed individuals to assume temporarily the duties of principal offices in the event of vacancies or absences. Most significantly, in over one hundred instances, Presidents exercised their discretion to designate non-Senate-confirmed chief clerks to serve as acting or *ad interim* Secretaries—a distinct role for which they sometimes obtained additional compensation. JA 70-72; *see Designating an Acting Attorney General*, 42 Op. O.L.C. __, slip op. at 12-18 (2018) (Dkt. No. 16-1) (collecting examples); *see also In re Cornelius Boyle*, 1857 WL 4155, at *3-4 (Ct. Cl. 1857); *In re Asbury Dickens*, 1856 WL 4042, at *3 (Ct. Cl. 1856). Presidents also frequently designated as acting principal officers the heads of other Departments, even when the functions of their Senate-confirmed offices were not germane to the duties of the vacant offices and thus the Appointments Clause would have required additional Senate confirmation for them to fill those offices on a permanent basis. JA 73-75; *see Biographical Directory of the American Congress, 1774–1971*, at 13-14 (1971); *Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (assignment of "additional duties" to an existing office does not require additional Senate confirmation when the duties are "germane to the office[]

already held"). Indeed, on at least three occasions, President Jackson designated persons with no government position to serve as an acting principal officer. JA 73.

Here too, the historical executive practice continues to modern times: Presidents George W. Bush and Barack Obama used their FVRA authority to place chiefs of staff in the lines of succession for executive agencies, in some instances above a Senate-confirmed officer within the same agency. *See Designating an Acting Attorney General*, 42 Op. O.L.C. __, slip op. at 23 nn.13-14 (collecting examples).

This consistent record of legislative and executive practice accords with Supreme Court precedent, which "has repeatedly embraced the government's view that it is the temporary nature of acting duties that permits an individual to perform them without becoming a principal officer under the Appointments Clause." JA 63. In the leading case, *United States v. Eaton*, 169 U.S. 331 (1898), a missionary who was not employed by the federal government was appointed as Vice Consul General of Siam in order to take over the consulate after the departure of the Consul General, who was terminally ill. *Id.* at 331-32. Eaton served as acting Consul General for almost a year. *Id.* at 332-33. The Court upheld the constitutionality of Eaton's appointment and the underlying statutory scheme providing for his appointment. *Id.* at 334-35, 343-44, 352. It held that a subordinate "charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions," is not "thereby transformed into the superior and permanent official" for

purposes of the Appointments Clause, and therefore may serve without Senate confirmation. *Id.* at 343-44.

Unable to rely on the text of the Appointments Clause, and acknowledging that that non-Senate-confirmed individuals unquestionably can serve as acting principal officers, plaintiff attempts to reverse-engineer a standard that would carve out this case. The district court properly rejected that effort (JA 60-80) because it lacked any basis in constitutional text or historical practice, as demonstrated below.

2. The Appointments Clause does not confine the President to choosing first assistants or Senate-confirmed officers to serve as acting agency heads.

Plaintiff primarily contends that a non-Senate-confirmed individual may serve as an acting principal officer only if he is that officer's "first assistant"—such that temporary acting service is purportedly part of his own office's job responsibilities—or if he were to replace an unavailable "first assistant." Br. 30-46.

This rule has no basis in the constitutional text or the historical practice outlined above. Instead, as the district court observed on surveying the "unbroken legislative practice" in detail, "from the time of the founding to today, Congress has continually authorized the President to direct persons who are not first assistants and who lack any constitutionally relevant Senate confirmation to perform the duties of a principal office temporarily on an acting basis." JA 70.

Plaintiff recognizes that the 1792 and 1795 Acts expressly authorized Presidents to choose "any person" to serve as acting Secretary of certain cabinet

departments. Br. 40. But Plaintiff contends without support that what Congress meant to say was that the President could choose "any person" as acting Secretary only to meet various "exigencies, such as when a department head's Chief Clerk was unavailable." *Id.* If Congress had wished to confine this authority to cases of unavailability or other exigencies, it easily could have said so. It also could have limited the President to designating as acting the "first assistant" in each department, or requiring the President to choose among Senate-confirmed officials, or at least among federal officers. But Congress did none of these things. Plaintiff cannot rewrite these early statutes to support its theory.

Plaintiff also acknowledges there are hundreds of examples where the President selected non-confirmed chief clerks in various cabinet departments to serve as acting or *ad interim* department heads. Br. 41 n.4. Yet plaintiff assumes without support that these chief clerks were the first assistants of their respective departments, whose defined job responsibilities included automatically performing the duties of the principal officer in the event of an absence or vacancy. Br. 41; *see* Br. 36. But as discussed, it was well established that when the chief clerks served as acting department heads, they were performing *additional* duties in a wholly new capacity as acting or *ad interim* Secretary, not duties belonging to their offices as clerks. *See Boyle*, 1857 WL 4155, at *1-3; *Dickens*, 1856 WL 4042, at *3. As *Boyle* reasoned, "[t]he office of Secretary ad interim being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him ex

officio, but because the President, in the exercise of his discretion, sees fit to appoint him." 1857 WL 4155, at *4. Precisely because the chief clerks were assuming additional duties of an office they did not previously hold, rather than performing duties of their existing offices, they were entitled to additional compensation for performing those duties. *See, e.g.*, *id.* at *7; *Dickens*, 1856 WL 4042, at *3; *Pay of Sec'y of the Treasury ad Interim*, 4 Op. Att'y Gen. 122, 122-23 (1842) (compensation of chief clerk as Secretary of the Treasury *ad interim*). This historical understanding forecloses plaintiff's position that these chief clerks are equivalent to the office of Deputy Attorney General.

Plaintiff entirely ignores the presidential designations of non-germane cabinet secretaries to serve as acting heads of other departments, notwithstanding the fact that they were neither first assistants nor confirmed by the Senate for the constitutionally relevant office. *Supra* p. 41. And with respect to the designations of persons with no prior government position and executive orders placing chiefs of staff in the line of succession, *supra* pp. 41-42, plaintiff's only response is to assert that these presidential designations constituted unchallenged violations of the Appointments Clause, *see* Br. 41-44, 41 n.4.

Plaintiff's argument likewise cannot be reconciled with *Eaton*. Plaintiff observes that in *Eaton*, "the job responsibilities of the vice-consul included filling in for an absent consul general." Br. 43. True, but *Eaton* did not turn on that premise. As the district court explained, "to the extent *Eaton* involved a first assistant at all, it

involved one only in the most superficial and formalistic sense": Eaton was a clergyman with no connection to the government, who upon the Consul General's imminent departure was appointed to the office of Vice Consul, an office the sole function of which was to assume the Consul General's duties in the event of absence or vacancy. JA 65; *see* Rev. Stat. § 1674 (2d ed. 1878); *Eaton*, 169 U.S. at 336. The core feature of the Vice Consul's role that distinguished it from that of the Consul General for constitutional purposes, and that permitted Eaton to serve as Acting Consul General without Presidential selection and Senate confirmation, was that Congress had confined Vice Consuls to serving in "special and temporary conditions" "and thereby … deprive[d] them of the character of 'consuls.'" *Eaton*, 169 U.S. at 343. The conditions referred to in *Eaton* were not any particular exigency, but the limits of the then-regulatory scheme, which permitted service during "the absence or the temporary inability of the consul," whatever the cause. *Id.* at 342-43. *Eaton* thus confirms the general rule that the designation of a non-confirmed official to *temporarily* perform a principal office's duties does not "transform[]" the acting official "into the superior and permanent official" requiring Senate confirmation. *Id.* at 343-44; *accord Boyle*, 1857 WL 4155, at *3.

Moreover, each time the Supreme Court has cited *Eaton*, it has characterized the holding in terms of the limited duration of Eaton's service, without restricting it to first assistants or particular exigencies. JA 66-67, 67 n.12. In *Morrison v. Olson*, 487 U.S. 654, 672-73 (1988), the Court expressly relied on *Eaton* in holding that the

Independent Counsel's limited tenure was a factor counseling against his status as a principal officer, even though the Attorney General remained in office and the Independent Counsel quite obviously was not his "first assistant." And in *Edmond v. United States*, 520 U.S. 651, 661 (1997), the Court cited *Eaton* with approval and described it as holding that "a vice consul charged temporarily with the duties of the consul" was an inferior officer. This point illustrates why plaintiff is also wrong to contend that, under *Edmond*, an acting agency head is necessarily a principal officer because he does not "have a relationship with a superior officer." Br. 44. As the description in *Edmond* indicates, *Eaton* forecloses that argument, as does the longstanding legislative and executive practice authorizing individuals to serve as acting agency heads without Senate confirmation for that service. To the extent *Edmond* discussed supervision, it did so in addressing permanent offices, not temporary acting ones.

In short, there is no basis whatsoever to plaintiff's argument that, absent an emergency, the Appointments Clause confines the President to choosing first assistants or Senate-confirmed officers to serve as acting agency heads. The text of the Appointments Clause says nothing of the sort, Congress's vacancy statutes have never limited the President's authority in this manner, Presidents frequently have selected persons to serve temporarily beyond those circumstances, and the Supreme Court has implicitly rejected such constraints.

3. The Appointments Clause does not prohibit the President from directing senior federal employees to serve as acting agency heads.

Plaintiff's backup argument is that, at a minimum, an acting agency head *is* an officer of the United States, and thus the person selected must either already have been appointed as an officer or must be appointed as such before serving. Br. 31, 44. From this premise, plaintiff concludes that Whitaker's selection was unconstitutional, reasoning that he was an employee rather than an officer before the vacancy arose and that the President only directed him to serve rather than appointing him as an officer. Br. 31-32, 44-46. Both the premise and the conclusion of this fallback argument are wrong, largely for the same reasons that doomed plaintiff's primary argument.

Again, the text of the Appointments Clause neither says that the functions of an office must always be performed by an officer nor says that an individual temporarily performing such functions necessarily becomes an officer. To the contrary, the Supreme Court has treated individuals as "mere employees" rather than constitutional "officers" when "their duties were 'occasional or temporary' rather than 'continuing and permanent.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1878)).

The argument is also historically ungrounded. As discussed, the 1792 and 1795 Acts provided the President with plenary discretion to designate any person—including employees and private citizens—to perform temporarily the duties of a vacant principal office. *See supra* p. 40. The statutes thus unambiguously gave

Presidents plenary discretion to designate employees (as well as private citizens) to serve. Plaintiff's speculation that the early Congresses simply disregarded the requirements of the Appointments Clause, *see* Br. 39-40, is both unsupported and inconsistent with the principle that "early congressional practice … provides contemporaneous and weighty evidence of the Constitution's meaning." *Alden*, 527 U.S. at 743-44 (quotation omitted).

Moreover, even if the Constitution did require employees to be appointed as inferior officers in order to perform the duties of a vacant principal office on an acting basis, the President's designation of Whitaker pursuant to the FVRA would satisfy the Appointments Clause. After all, the Clause authorizes Congress "by Law [to] … vest the Appointment" of inferior officers "in the President alone." U.S. Const. art. II, § 2, cl. 2. The fact that the FVRA uses the word "direct," 5 U.S.C. § 3345(a)(2)-(3), rather than the "magic word[]" "appoint," is of no constitutional or statutory significance. JA 79. If necessary, an FVRA direction may be treated as a constitutional appointment, because, at the Founding, "the verb 'appoint' meant 'to establish anything by decree' or 'to allot, assign, or designate.'" *SW Gen.*, 137 S. Ct. at 946 (Thomas, J., concurring) (alterations and citations omitted). Thus, "[w]hen the President 'directs' someone to serve as an officer pursuant to the FVRA, he is 'appointing' that person as an 'officer of the United States' within the meaning of the Appointments Clause." *Id.* (alterations omitted). "[U]nderstanding the President's 'direct[ion]' under 5 U.S.C. § 3345(a)(3) to involve an appointment of an employee as

an inferior officer" would avoid any constitutional questions that might be presented by an employee's temporary performance of the duties of a vacant office. *Designation of Acting Director of the Office of Mgmt. & Budget*, 27 Op. O.L.C. 121, 125 (2003). Indeed, if Congress had created an "office" of "acting agency head" and authorized the President to "appoint" to that office an employee covered by 5 U.S.C. § 3345(a)(3), that would be materially indistinguishable from both the FVRA itself and the statutory scheme in *Eaton*.

Plaintiff resists the idea that the FVRA should be understood to authorize an "appointment" in the relevant sense. Br. 33-34. But in so doing, plaintiff ignores its own insistence (Br. 46) that the statute should be read to avoid constitutional problems. The reading plaintiff urges would condemn *any* service by *any* employee, notwithstanding the FVRA's clear contemplation of such service, 5 U.S.C. § 3345(a)(3), and therefore would manufacture rather than avoid a constitutional issue.

Plaintiff's reliance on *Weiss v. United States*, 510 U.S. 163 (1994), is misplaced. *Weiss* addressed whether military judges assigned under the Uniform Code of Military Justice by other Judge Advocate Generals were lawfully appointed. As the district court correctly explained, JA 78-79, *Weiss* held only that a statute using terms like "detail" and "assign" did not require an "appointment" as a statutory matter, not that it foreclosed interpreting the statute as authorizing an appointment even if necessary to avoid a constitutional problem, *see* 510 U.S. at 170-72.

Plaintiff alludes to the fact that Eaton was technically appointed to the inferior office of Vice Consul before serving as Acting Consul-General. Br. 43. But again, that was an appointment to an inferior office "only in the most superficial and formalistic sense," because the sole duty of the Vice Consul was to perform the functions of the Consul General in his absence, and Eaton was a private missionary chosen to serve as Acting Consul-General upon the Consul-General's imminent departure. JA 65. If there is any meaningful difference between the "appointment" to the "office" in Eaton and the President's direction here that the Attorney General's own Chief of Staff should temporarily serve as Acting Attorney General given the Attorney General's resignation, it cuts decisively against plaintiff.

Finally, plaintiff speculates about dangers to the Senate's role under the Appointments Clause. Br. 29. But Presidents were authorized by Congress to designate employees to serve as acting cabinet secretaries for nearly seventy years after the Founding, and the apocalyptic scenarios sketched out by plaintiff never materialized. Nor have they materialized in the two decades that the FVRA has been in effect. Moreover, if Congress ever determines that the FVRA gives the President undue latitude, it may pare back on the President's statutory authority, as it did when it enacted the Vacancies Act in 1868.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,999 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brad Hinshelwood
Brad Hinshelwood

ADDENDUM

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U.S. Const. Art. II, § 2, Cl. 2:

The President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers & Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

28 U.S.C. § 508. Vacancies

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d

§ 3345. Acting officer

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

> **(1)** the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
>
> **(2)** notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or
>
> **(3)** notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--
>
> > **(A)** during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
> >
> > **(B)** the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

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

> **(A)** during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--
>
> > **(i)** did not serve in the position of first assistant to the office of such officer; or
> >
> > **(ii)** served in the position of first assistant to the office of such officer for less than 90 days; and

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

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

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

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

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

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

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

§ 3346. 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.

§ 3347. 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.

§ 3348. 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.

§ 3349. 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.

§ 3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring--

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

§ 3349b. Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office--

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

§ 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to--

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that--

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

§ 3349d. Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

Vacancies Act, 5 U.S.C. §§ 3345-3348 (1994)

§ 3345. Details; to office of head of Executive agency or military department

When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3346. Details; to subordinate offices

When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3347. Details; Presidential authority

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of Attorney General.

§ 3348. Details; limited in time

(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that—

> **(1)** if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title—
>
> > **(A)** until the Senate confirms the nomination; or
> >
> > **(B)** until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.

§ 3349. Details; to fill vacancies; restrictions

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281

And be it further enacted, That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the U:dted States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absentee or inability by sickness shall cease.

Act of Feb. 13, 1795, ch. 21, 1 Stat. 415

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices; it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.