IN THE SUPREME COURT OF THE UNITED STATES

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No. 18-496

BARRY MICHAELS, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL, ET AL.

_____

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

_____

MEMORANDUM FOR RESPONDENTS IN OPPOSITION
TO PETITIONER'S MOTION TO SUBSTITUTE

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The Solicitor General, on behalf of Matthew G. Whitaker, Acting Attorney General, and Thomas E. Brandon, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), respectfully submits this memorandum in opposition to petitioner's motion to substitute.

STATEMENT

1. In 2016, petitioner brought this putative class action against then-Attorney General Loretta E. Lynch, "in her representative capacity as Attorney General," and ATF Deputy Director Brandon. Compl. ¶¶ 2-3. The gravamen of petitioner's

complaint was that the federal prohibition on firearm possession by convicted felons, 18 U.S.C. 922(g)(1), is unconstitutional as applied to certain individuals convicted of non-violent felonies. Pet. App. 10a-13a. The district court dismissed the complaint and denied leave to amend, after finding petitioner's claims foreclosed by circuit precedent. Id. at 15a-17a.

On November 3, 2017, the court of appeals affirmed in an unpublished decision. Pet. App. 5a-7a. The court adhered to its prior determination that "felons are categorically different from the individuals who have a fundamental right to bear arms." Id. at 6a (quoting United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir.), cert. denied, 562 U.S. 921 (2010)). The court also noted that Attorney General Lynch had been succeeded in office by Attorney General Jefferson B. Sessions III and that the latter had therefore been "substituted for his predecessor" as a party to the appeal under Federal Rule of Appellate Procedure 43(c)(2). Pet. App. 5a n.*. On March 29, 2018, the court denied a petition for rehearing and rehearing en banc. Id. at 1a-2a.

On June 27, 2018, petitioner filed a petition for a writ of certiorari. According to petitioner, the question presented concerns the circumstances in which "an as-applied challenge to the constitutionality of a felon disarmament law" may be brought. Pet. i. Petitioner named then-Attorney General Sessions and ATF Deputy Director Brandon as respondents. Pet. ii.

2. On November 7, 2018, Attorney General Sessions resigned from office, and the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 et seq. See Designating an Acting Attorney General, 42 Op. O.L.C. __, at 1 (Nov. 14, 2018), slip op. (OLC Memorandum), https://www.justice.gov/olc/file/1112251/download.

3. On November 16, 2018, petitioner moved to substitute Rod J. Rosenstein, the Deputy Attorney General, as a party to the proceedings in this Court in lieu of Acting Attorney General Whitaker. Mot. to Substitute (Mot.) 1. Petitioner claims that Deputy Attorney General Rosenstein is the Acting Attorney General by operation of 28 U.S.C. 508(a) and that Mr. Whitaker's appointment is unlawful on statutory and constitutional grounds. Ibid.

ARGUMENT

Matthew G. Whitaker is the Acting Attorney General of the United States. Under Rule 35.3 of the Rules of this Court, "[w]hen a public officer who is party to a proceeding in this Court in an official capacity * * * resigns," the official's "successor in office is automatically substituted." By operation of that rule, Acting Attorney General Whitaker was automatically substituted as a party to this official-capacity suit when the President

designated him to serve as Acting Attorney General on November 7, 2018, after Attorney General Sessions resigned.

Petitioner asks this Court to reject that straightforward operation of Rule 35.3 and instead adjudicate the lawfulness of Mr. Whitaker's appointment as Acting Attorney General. Mot. 1. That procedural gambit should be rejected. As petitioner concedes (Mot. 3), no court -- in this case or any other -- has previously addressed the questions petitioner seeks to inject here. Moreover, those questions have no bearing on the resolution of this official-capacity suit, and petitioner lacks standing to raise them. The Court therefore should decline petitioner's request to address those matters in the first instance in this suit. In any event, the President's designation of the Acting Attorney General was proper under both the FVRA and the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2.

1. Rule 35.3 provides that "[w]hen a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party." Sup. Ct. R. 35.3; cf. Fed. R. Civ. P. 25(d) ("The officer's successor is automatically substituted as a party."); Fed. R. App. P. 43(c)(2) (similar). The rule reflects that official-capacity suits seek relief from a particular government official "only nominally." Lewis v. Clarke, 137 S. Ct. 1285, 1292

(2017). The "real party in interest is the government entity, not the named official." Ibid. (citing Edelman v. Jordan, 415 U.S. 651, 663-665 (1974)); see, e.g., Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (citation omitted). Because the real party in interest is the sovereign, the automatic substitution of a successor in office after a public official resigns is "merely a procedural device" and "does not affect any substantive issues which may be involved in the action." Fed. R. Civ. P. 25 advisory committee's note (1961 Amendment).

Petitioner brought this suit against then-Attorney General Lynch "in her representative capacity as Attorney General of The United States of America." Compl. ¶ 2; see Pet. App. 10a-11a. He seeks pre-enforcement declaratory and injunctive relief from the operation of a federal statute, 18 U.S.C. 922(g)(1). See Compl. ¶¶ 35-40. He does not assert any personal-capacity claims against former Attorney General Lynch or any other governmental official, nor does he assert that the Attorney General had any personal role in any matter relating in any way to his claims. The "real party in interest," Lewis, 137 S. Ct. at 1291, is thus the Department of Justice or the United States itself, not the individual personally performing the duties of the Attorney General at a particular time.

Acting Attorney General Whitaker therefore was properly "automatically substituted as a party" to this official-capacity suit when former Attorney General Sessions resigned, Sup. Ct. R. 35.3, just as Attorney General Sessions was substituted as a party for Attorney General Lynch during the pendency of petitioner's appeal, Pet. App. 5a n.*. At all times, the suit has run against a particular Attorney General in name only. Indeed, the Rules of this Court would permit naming the respondent as simply "the Attorney General." See Sup. Ct. R. 35.4.

2. Petitioner seeks (Mot. 1-3) to substitute the Deputy Attorney General as a party to the proceedings in this Court on the theory that the President's appointment of Mr. Whitaker as Acting Attorney General was unlawful. But petitioner identifies no basis or reason for the Court to address that matter now, in this anomalous posture.

a. Petitioner suggests (Mot. 1) that Rule 35.3 requires the Court to have "the ability * * * to identify the correct successor" and that it cannot do so where petitioner disputes the lawfulness of Mr. Whitaker's appointment. But that suggestion reflects petitioner's misunderstanding of Rule 35.3.

As explained above, Rule 35.3 and its analogues in the lower federal courts are premised on the nature of official-capacity suits, in which the real party in interest is a "governmental entity and not the named official." Hafer v. Melo, 502 U.S. 21,

25 (1991). As a result, when a successor "is automatically substituted as a party" under Rule 35.3, it is of no consequence to the opposing party whether the successor is properly identified. Any error in identifying the Acting Attorney General would not deprive the Department of Justice of notice of the litigation. Cf. Graham, 473 U.S. at 166 ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Nor would any error relieve the government from being bound by the judgment, or otherwise affect the scope or operation of any relief. Indeed, "any misnomer [in the substitution] not affecting substantial rights of the parties will be disregarded." Sup. Ct. R. 35.3; see Charles A. Wright, Substitution of Public Officers: The 1961 Amendment to Rule 25(d), 27 F.R.D. 221, 242 (1961) (noting that, in official-capacity suits, "[t]he manipulation of names is merely a technicality which should not interfere with substantial rights"). As already noted, the Rules of this Court do not even require identifying a public official by name rather than title in an official-capacity suit. Sup. Ct. R. 35.4. Accordingly, the automatic-substitution rule presents no occasion for this Court to address the validity of a successor official's appointment to office, either in this case or in any of the countless other official-capacity cases, federal and state, that come before this Court.

b. The lawfulness of Mr. Whitaker's appointment also has no bearing on the proper disposition of the certiorari petition. Petitioner seeks review of what he frames as two questions concerning the scope of an as-applied constitutional challenge to 18 U.S.C. 922(g)(1). Pet. i. The Acting Attorney General's appointment is immaterial to whether those questions merit review and, if so, how to resolve them. Petitioner does not contend otherwise. To the contrary, petitioner implicitly concedes that the Court would need to address the appointment question only in a case, unlike this one, where the Acting Attorney General personally took action that aggrieved the party contesting the designation. See Mot. 2 (suggesting that the validity of the Acting Attorney General's designation would properly be addressed in a case involving his "personal responsibilities" and "personal orders").

Petitioner likewise does not suggest that the authority of the Solicitor General to act for the United States in this proceeding depends in any way on petitioner's challenge to the validity of the Acting Attorney General's designation. Although most functions of the Department of Justice, including its litigation functions, are vested in the first instance in the Attorney General, see 28 U.S.C. 509, the Attorney General need not and in most cases does not exercise those functions personally. The authority to conduct litigation "in which the United States,

an agency, or officer thereof is a party," 28 U.S.C. 516, has been conferred by statute and regulation on other officers of the Department. In particular, the Solicitor General is authorized by statute and regulation to conduct litigation in this Court, without any need for authorization or personal participation by the Attorney General. See 28 U.S.C. 518(a) (authorizing the Solicitor General to "conduct and argue suits and appeals in the Supreme Court"); 28 C.F.R. 0.20(a) (assigning to the Solicitor General responsibility for "[c]onducting * * * all Supreme Court cases"). Other officers of the Department have similar authority for the conduct of litigation in the lower courts. See, e.g., 28 U.S.C. 547(1) and (2) (authorizing United States Attorneys to "prosecute for all offenses against the United States" and to "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned"); 28 C.F.R. 0.13(a) (authorizing "[e]ach Assistant Attorney General and Deputy Assistant Attorney General * * * to exercise the authority of the Attorney General under 28 U.S.C. 515(a), in cases assigned to, conducted, handled, or supervised by such official").

c. For similar reasons, petitioner lacks standing to challenge the lawfulness of Mr. Whitaker's designation as Acting Attorney General. The appointment did not cause petitioner's asserted injury -- being barred by federal law, as a convicted felon, from purchasing a firearm -- and resolving the lawfulness

of the designation would not redress that putative injury in any fashion. Petitioner instead seeks to raise "a generally available grievance about government," and such grievances do "not state an Article III case or controversy." Hollingsworth v. Perry, 570 U.S. 693, 706 (2013) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-574 (1992)); see, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (noting that Article III requires a plaintiff to demonstrate a "particularized" injury, meaning one that "affect[s] the plaintiff in a personal and individual way") (citation omitted). Article III forecloses considering petitioner's generalized complaint about Mr. Whitaker's designation, and petitioner cannot evade that requirement by invoking Rule 35.3.*

d. Finally, petitioner's motion is contrary to this Court's repeated admonition that the Court sits as "a court of review, not of first view." Byrd v. United States, 138 S. Ct. 1518, 1527 (2018) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)). The Court's general practice is "not [to] decide in the first instance issues not decided below" in the course of the litigation. Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting NCAA v. Smith, 525 U.S. 459, 470 (1999)). A fortiori,

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* Indeed, unlike a criminal defendant or an alien in removal proceedings (Mot. 1-2), petitioner is currently not even subject to any form of enforcement action brought or adjudicated by the Department of Justice, let alone one involving personal participation by the Acting Attorney General.

the Court typically does not address questions that have not been addressed in any case by the lower courts. See, e.g., Chaidez v. United States, 568 U.S. 342, 358 n.16 (2013) (declining to address an argument the petitioner raised in her brief on the merits where no "federal court has considered [the] contention").

By petitioner's own admission (Mot. 3), no other court has considered the statutory and constitutional questions petitioner asks the Court to resolve in the present motion. Litigants are, however, raising similar arguments in a number of criminal and civil cases pending in district courts around the country. See, e.g., Compl. ¶¶ 35-43, Blumenthal v. Whitaker, No. 18-cv-2664 (D.D.C. Nov. 19, 2018); Pl.'s Mot. for Prelim. Inj. at 1-2, Maryland v. United States, No. 18-cv-2849 (D. Md. Nov. 13, 2018); Def.'s Mot. to Dismiss Indictment at 4-6, United States v. Haning, No. 18-cr-139 (E.D. Mo. Nov. 13, 2018). None of those courts has decided any of these issues.

Petitioner argues (Mot. 3) for pretermitting the ordinary course of those proceedings and addressing the lawfulness of Mr. Whitaker's appointment now, before any other court has done so, because the issue is "a pure question of law" and because the Department of Justice has released a legal memorandum from the Office of Legal Counsel explaining why the appointment is lawful. But the Court's practice of declining to address issues in the first instance has never turned on such factors. Even if the

Department's position is well known, entertaining the questions petitioner seeks to interpose here would require this Court to decide in the first instance the issues petitioner seeks to inject into the case.

Petitioner also argues (Mot. 2-3) that practical considerations weigh in favor of addressing the lawfulness of Mr. Whitaker's appointment, but the opposite is true. The question may never need to be addressed. As explained at pp. 8-9, supra, by statute and preexisting regulation, the Department's litigation is conducted and supervised by officers whose litigation authority does not depend on the validity of Mr. Whitaker's designation as Acting Attorney General. See, e.g., 28 U.S.C. 518(a); 28 C.F.R. 0.20(a). The question could also become moot if the Acting Attorney General is succeeded by another official before these cases are resolved. If in the future a particular person claims to be adversely affected by an action personally taken by Mr. Whitaker while serving as Acting Attorney General, that person could seek to raise issues concerning his designation.

4. In all events, the President's temporary designation of Mr. Whitaker as the Acting Attorney General is valid as both a statutory and constitutional matter.

a. Under the FVRA, when a presidentially appointed, Senate-confirmed officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the "first assistant" to

that office by default "shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. 3345(a)(1). But the FVRA also authorizes the President to override that default rule. As relevant here, "the President (and only the President) may direct an officer or employee" of the agency in which the vacancy occurs "to perform the functions and duties of the vacant office temporarily in an acting capacity," as long as the officer or employee served in the agency for at least 90 of the 365 days preceding the vacancy and is paid at least at the GS-15 level. 5 U.S.C. 3345(a)(3). An individual whom the President designates under that provision may serve in an acting capacity subject to the time limitations of 5 U.S.C. 3346.

The President invoked 5 U.S.C. 3345(a)(3) to designate Mr. Whitaker as the Acting Attorney General following former Attorney General Sessions' resignation from office. See OLC Memorandum 1. At the time, Mr. Whitaker had been serving in the Department of Justice as Chief of Staff and Senior Counselor to the Attorney General, and he met the statutory requirements of having served in the Department of Justice for at least 90 days prior to the vacancy at a rate of pay of GS-15 or higher. See id. at 5. Petitioner does not contend otherwise. Accordingly, Mr. Whitaker's appointment as Acting Attorney General satisfied the plain terms of Section 3345(a)(3).

Petitioner's statutory argument that the President could not designate Mr. Whitaker to serve as Acting Attorney General (Mot. 8-17) rests entirely on the premise that the President generally may not invoke the FVRA at all with respect to a vacancy in the office of the Attorney General, because a separate statute, 28 U.S.C. 508, is supposedly the exclusive means for addressing such a vacancy. That premise is wrong, for reasons the Department's Office of Legal Counsel has explained at length. See OLC Memorandum 5-8; see also Authority of the President to Name an Acting Attorney General, 31 Op. O.L.C. 208, 209-210 (2007). In brief, 28 U.S.C. 508(a) states that "[i]n 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." Section 508(a) also specifies that "for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General." Ibid. On its face, Section 508(a) does not purport to be the exclusive means of addressing a vacancy in the office of the Attorney General, and indeed the reference to the first section of the FVRA ("section 3345 of title 5," ibid.) in Section 508(a) itself confirms the opposite.

Petitioner incorrectly argues (Mot. 7, 9-10) that a separate provision in the FVRA makes 28 U.S.C. 508 exclusive. The relevant provision, entitled "Exclusivity," states that "Sections 3345 and 3346" of the FVRA "are the exclusive means for temporarily

authorizing an acting official to perform the functions and duties of any [presidentially appointed, Senate-confirmed] office of an Executive agency," unless another statute "expressly * * * designates 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)(B). Petitioner is correct that Section 508(a) is a statute that "designates an officer or employee to perform the functions and duties of a specified office" within the meaning of that provision. Mot. 9 (citation omitted); see 31 Op. O.L.C. at 208. But by the plain terms of the FVRA, the existence of such an agency-specific succession statute means only that the FVRA is not "exclusive"; it does not mean that the FVRA is therefore unavailable or inapplicable. 5 U.S.C. 3347(a) (emphasis added). When an agency-specific statute, such as Section 508(a), provides a default rule for succession in office, 5 U.S.C. 3347 ensures that the President may either allow that default rule to operate or may invoke the FVRA to designate an alternate acting officer. Petitioner's contrary reading would invert the meaning of the FVRA's exclusivity provision, transforming it from a rule about when the FVRA is exclusive of other statutes into one about when other statutes are exclusive of the FVRA.

The structure of the FVRA confirms that 5 U.S.C. 3347 does not render the FVRA inapplicable in the face of an agency-specific vacancy statute, including 28 U.S.C. 508. Congress addressed the

inapplicability of the FVRA elsewhere in the statute. Section 3345 applies in general to vacancies in an "Executive agency." 5 U.S.C. 3345(a); see 5 U.S.C. 105 (defining "'Executive agency'" to include any "Executive department," such as the Department of Justice). In a separate provision, entitled "Exclusion of certain officers," Congress qualified the scope of the FVRA by providing that "Section[] 3345 * * * shall not apply" to certain specified officers in certain specified agencies. 5 U.S.C. 3349c. If Congress had intended agency-specific vacancy statutes to render the FVRA inapplicable rather than non-exclusive, it would have addressed them in Section 3349c rather than Section 3347(a)(1)(B). And the Attorney General, in particular, is not among the officers excluded from coverage under the FVRA by Section 3349c. See ibid.

By contrast, the vacancy statute that preceded the FVRA contained a provision authorizing the President to designate a presidentially appointed, Senate-confirmed officer to perform the duties of a vacant office in some circumstances, but that provision expressly did "not apply to a vacancy in the office of Attorney General." 5 U.S.C. 3347 (1994). Petitioner notes that similar provisions can be traced to the 1870s. Mot. 7, 20; see, e.g., Rev. Stat. § 179 (2d ed. 1878). But petitioner draws (Mot. 19 n.3) precisely the wrong inference from that history. In the FVRA, Congress omitted -- and therefore eliminated -- the prior limitation. See OLC Memorandum 7; see also, e.g., Murphy v. Smith,

138 S. Ct. 784, 789 (2018) (giving effect to Congress's purposeful omission of prior statutory language); Brewster v. Gage, 280 U.S. 327, 337 (1930) (noting that "[t]he deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended").

In light of the FVRA's text and structure, it is unsurprising that the only court of appeals to address the question has concluded that agency-specific vacancy statutes do not displace the President's FVRA authority. In Hooks v. Kitsap Tenant Support Services, Inc., 816 F.3d 550 (9th Cir. 2016), the court of appeals rejected the argument that the FVRA was inapplicable where an agency-specific statute "expressly provide[d] a means for filling" the vacancy in question. Id. at 556 (discussing 29 U.S.C. 153(d)). The court concluded that "the text of the respective statutes" "belied" any such argument. Id. at 555. The existence of an agency-specific statute, the court explained, means only that "neither the FVRA nor the [agency-specific statute] is the exclusive means of appointing" an acting officer, and "the President is permitted to elect between these two statutory alternatives." Id. at 556; see English v. Trump, 279 F. Supp. 3d 307, 323-324 (D.D.C. 2018) (reaching a similar conclusion with respect to the office of the Director of the Bureau of Consumer Financial Protection).

That conclusion is confirmed by the legislative history of the FVRA. The Senate Committee Report accompanying the bill that was the basis for the FVRA contained a list of then-existing, agency-specific statutes "that expressly authorize the President * * * to designate an officer to perform the functions and duties of a specified officer temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee." S. Rep. No. 250, 105th Cong., 2d Sess. 15 (1998) (Senate Report). The Report stated that the bill would "retain[]" those statutes, ibid., but that in those instances the "Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office," id. at 17 (emphasis added).

Petitioner asserts (Mot. 19) that this explanation in the Senate Report pertained to a different provision in the bill, which Congress did not enact, stating that the FVRA would be applicable unless "another statutory provision expressly provides that the such [sic] provision supersedes sections 3345 and 3346." Senate Report 26 (proposed 5 U.S.C. 3347(a)(1)). But that provision would have covered only statutes that "expressly" supersede Sections 3345 and 3346, and none of the preexisting statutes listed in the Senate Report did so. Instead, the Senate Report's statement that the preexisting statutes would be retained was plainly relying on the provision in the proposed bill addressing agency-specific

statutes that expressly authorize the President to designate an officer to perform the functions and duties of the vacant office, and those that expressly provide for the performance of those duties by a particular officer. See ibid. (proposed 5 U.S.C. 3347(a)(2)(A) and (B)). That provision parallels the exact language ultimately enacted as subparagraphs (A) and (B) of 5 U.S.C. 3347(a)(1). The Senate Report thus confirms that the FVRA and the listed statutes would be available as alternative mechanisms for addressing a vacancy in a covered office.

The drafting history further confirms that the FVRA is available as an alternative means of addressing a vacancy in the office of the Attorney General. A provision in the bill as reported in the Senate would have provided that "[w]ith respect to the office of the Attorney General * * * the provisions of section 508 of title 28 shall be applicable," Senate Report 25, which would have limited the President's authority to designate a person to perform the functions and duties of the Attorney General via the FVRA, see id. at 13. But Congress omitted that limitation from the final version of the Act. The deletion of that limitation means that the office of Attorney General is within the category of offices referred to in 5 U.S.C. 3347(a)(1)(A) and (B) for which the FVRA is an alternative to the agency-specific statute. And indeed 28 U.S.C. 508 was included in the list of such then-existing agency-specific statutes in the Senate Report. See id. at 16.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) (citation omitted); cf. pp. 16-17, supra.

The other canons of construction that petitioner invokes are inapposite. The FVRA and 28 U.S.C. 508(a) do not conflict, but rather are textually harmonious and operate as two alternatives, just as is true of the FVRA and other agency-specific statutes. The canon of relative specificity (Mot. 13-15) therefore has no bearing here. The observation that Congress can speak clearly when it wishes (Mot. 14-15) does nothing to further petitioner's argument. Congress has spoken clearly in the text of the FVRA, as explained above, and the statutory history demonstrates that Congress well knew how to make the FVRA inapplicable to the office of the Attorney General but declined to do so. See pp. 16-19, supra. Giving effect to both statutes, according to their plain language, does not work an implied repeal of either one. Mot. 15-17. Petitioner asserts that reading the FVRA as an alternative to 28 U.S.C. 508 and other agency-specific statutes would lead to a "breathtaking" result (Mot. 17-18) that Congress did not anticipate. The plain text of 5 U.S.C. 3345(a)(3), however, demonstrates that Congress intended to authorize the President to designate any "officer or employee" of an agency to perform the

functions and duties of a vacant office temporarily, if the officer or employee satisfies the 90-day tenure and GS-15 salary requirements of the statute. And the FVRA elsewhere confirms that Congress intended the Act to apply to vacancies in the office of the head of an executive agency. See 5 U.S.C. 3348(b)(2) (special rule applicable only "in the case of an office other than the office of the head of an Executive agency"). Finally, the avoidance canon (Mot. 21) is inapplicable. For the reasons set forth above, the FVRA's exclusivity provision is clear and unambiguous; moreover, as next explained, reading the FVRA to permit the President to designate an individual such as Mr. Whitaker to act temporarily as Attorney General does not raise any substantial constitutional concerns.

b. Mr. Whitaker's designation to serve temporarily as Acting Attorney General did not violate the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. That Clause requires the President to appoint principal officers, "by and with the Advice and Consent of the Senate," but permits Congress to vest the appointment of "inferior Officers * * * in the President alone, in the Courts of Law, or in the Heads of Departments." Ibid.; see Lucia v. SEC, 138 S. Ct. 2044, 2051 & n.3 (2018); Edmond v. United States, 520 U.S. 651, 660 (1997).

Although the Attorney General is surely a principal officer for purposes of the Appointments Clause (Mot. 21), an individual

who merely acts temporarily as Attorney General is not. Both longstanding precedent of this Court and historical practice demonstrate that "the temporary nature of active service weighs against principal-officer status." OLC Memorandum 10. In United States v. Eaton, 169 U.S. 331 (1898), the Court held that a "subordinate officer" (there, a vice-consul) may be "charged with the performance of the duty of" a principal officer "for a limited time, and under special and temporary conditions," without being "thereby transformed into" a principal officer, id. at 343. The Court therefore rejected an Appointments Clause challenge to a statutory and regulatory arrangement under which the vice-consul, who was not appointed as a principal officer, temporarily functioned as an acting principal officer (consul-general) during a vacancy. See id. at 331-332, 339-340, 343-344.

Nor is Eaton exceptional. As the Court noted, the "practice of the Government" for decades before that case confirmed the shared understanding of both the Legislative and Executive Branches that, consistent with the Appointments Clause, a non-Senate-confirmed individual may serve temporarily as an acting principal officer. Eaton, 169 U.S. at 344 (citation omitted). Congress first authorized the President to make such designations in 1792, when it enacted a measure allowing the President to direct "any person or persons" (without regard to prior Senate confirmation, or even prior "officer" status) to perform

temporarily the duties of the Secretary of State, Secretary of the Treasury, or Secretary of War during a vacancy in those offices. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. In 1863, Congress extended that authority to vacancies in the office of "the head of any Executive Department." Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. Presidents exercised that statutory authority repeatedly, designating non-Senate-confirmed individuals to serve as acting principal officers on more than 160 occasions before 1860. See OLC Memorandum 12-16. And non-Senate-confirmed individuals served as Acting Attorney General on a number of occasions. See id. at 16-18.

As this Court concluded in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), such "historical practice" is entitled to "significant weight" in addressing the separation of powers. Id. at 2559 (emphases omitted). Given the "limited" and "temporary" nature of his duties, Eaton, 169 U.S. at 343, an Acting Attorney General is not a principal officer for purposes of the Appointments Clause. Congress has permissibly vested the authority to select non-Senate-confirmed officials to be Acting Attorney General (or any of numerous other acting officers) in the President alone. By doing that in the FVRA, it restored a power that it had repeatedly granted to the President with respect to the heads of executive departments in multiple statutes between 1792 and 1863. See OLC Memorandum 11-12. A contrary conclusion could seriously undermine

the functioning of the Executive Branch, particularly in times of presidential transitions when an incoming President must rely to a significant extent on acting officials. See id. at 27; cf. 144 Cong. Rec. 27496 (1998) (statement of Sen. Thompson) (explaining that Section 3345(a)(3) was added to the bill that was the basis for the FVRA to address the concern that "early in a presidential administration * * * there will not be a large number of Senate-confirmed officers in the government").

Petitioner asserts (Mot. 24) that Eaton's holding applies only "during periods of exigency," but this Court has never suggested such a limiting gloss. In Eaton itself, the Court stated that Congress's "manifest purpose" in distinguishing between consuls and vice-consuls was to "limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word." 169 U.S. at 343. Thus, the "special and temporary conditions" recognized in Eaton were not the particular exigency associated with the facts of that case, but the limits of the then-existent statutory and regulatory procedures, which permitted service in any case of "the absence or the temporary inability of the consul-general," whatever the cause. Id. at 342-343; see id. at 341.

Moreover, the Court has consistently described Eaton as turning on the temporary nature of the service, not on any

particular exigency. In Edmond, for example, the Court explained Eaton as finding that "a vice consul charged temporarily with the duties of the consul" was an inferior officer, 520 U.S. at 661, with no mention of any emergency circumstances. Likewise, in Morrison v. Olson, 487 U.S. 654 (1988), the Court described Eaton as approving of the practice of appointing acting vice-consuls "during the temporary absence of the consul," id. at 672, again without reference to any emergency other than the vacancy itself. See id. at 721 (Scalia, J., dissenting) (noting that Eaton "held that the appointment * * * of a 'vice-consul,' charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause"); cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing Eaton for the proposition that "[t]he temporary nature of the office is the * * * reason that acting heads of departments are permitted to exercise authority without Senate confirmation"), aff'd in part, rev'd in part, and remanded by 561 U.S. 447 (2010). Mr. Whitaker's designation is merely temporary and therefore falls within the ambit of Eaton as this Court has understood that decision.

Petitioner's contention (Mot. 25) that Eaton is distinguishable because it concerned "consular officers" abroad is also mistaken. The decision was not based on the nature of the office at issue. Indeed, the Court explained that a contrary

decision would "render void any and every delegation of power to an inferior to perform under any circumstances or exigency." Eaton, 169 U.S. at 343 (emphases added). Nor can petitioner's distinction be reconciled with the Appointments Clause, which applies equally to "public Ministers and Consuls * * * and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. There is not one constitutional rule for consuls and vice-consuls and another for domestic officers, but rather a single Appointments Clause that has long been understood to permit the President to make a temporary acting designation like the one at issue here.

CONCLUSION

For the foregoing reasons, petitioner's motion to substitute should be denied.

Respectfully submitted.

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NOVEMBER 2018