No. 22-16552

In the United States Court of Appeals for the Ninth Circuit

GONZALES & GONZALES BONDS & INSURANCE AGENCY, INC., *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in preserving the checks and balances set out in our nation's charter, as well as the proper interpretation of laws that help maintain that balance. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a year, Chad Wolf ran one of the federal government's largest and most powerful departments, approving a series of wide-ranging policies and regulations—including the Rule at issue here—without Senate confirmation or any statutory authority to wield that power. Under the Federal Vacancies Reform Act, which Congress passed to prevent abuses that undermine the Constitution's Appointments Clause, Wolf's unauthorized actions are void and may not be ratified. Defendants, however, construe the FVRA as having virtually no application to any office in the executive branch, and as allowing the precise abuses it was meant to abolish. This Court should reject Defendants' effort to interpret the FVRA out of existence.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief.

The requirement of Senate confirmation for the government's principal officers is a key structural protection of our Constitution—one that promotes democracy and preserves individual liberty by ensuring that presidents may not unilaterally decide who implements the nation's laws. Although Congress has long authorized presidents to fill vacancies temporarily, it has always carefully limited this power. In 1998, presidential circumvention of the existing vacancies legislation led Congress to overhaul that framework, enacting the FVRA as the exclusive means by which a vacant office's duties may be performed, backed up by a new penalty barring ratification of unlawful actions.

According to Defendants, however, that penalty never applies to the actions of an unlawfully installed Homeland Security Secretary. Indeed, it almost never applies to *any* action taken by *any* illegally serving official. Defendants base that startling assertion on a small portion of one sentence in the FVRA, which they wrongly assume can have only one meaning. In doing so, Defendants ignore the cardinal rule that individual words and phrases should not be read in isolation, but rather in the context of the statute as a whole, which can clarify their meaning.

Here, at least six aspects of the surrounding text and structure make clear that Defendants' reading is wrong. And consideration of the FVRA's purpose and history removes any possible doubt. Defendants' position makes the FVRA a nullity, and it does so by employing the very means of avoiding limits on acting

service that the statute was meant to eliminate—and that its text expressly forbids. The district court's decision should be affirmed.

ARGUMENT

I. The FVRA Is a Critical Check on the Manipulation of Appointments by the Executive Branch.

In order "to promote a judicious choice of [persons] for filling the offices of the union," *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *The Federalist No. 76*, at 510 (Jacob E. Cooke ed., 1961) (Hamilton)), and "to curb Executive abuses of the appointment power," *id.*, the Constitution requires "the Advice and Consent of the Senate" to appoint principal officers of the United States, U.S. Const. art. II, § 2, cl. 2. "By limiting the appointment power in this fashion," the Constitution seeks to make federal officers "accountable to political force and the will of the people." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1657 (2020) (quotation marks omitted).

The Appointments Clause is thus "a critical structural safeguard" of the constitutional scheme, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017) (quotation marks omitted), which "helps to preserve democratic accountability," *Fin. Oversight & Mgmt. Bd.*, 140 S. Ct. at 1657. It combats "one of the American revolutionary generation's greatest grievances against executive power," namely, the "manipulation of official appointments." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (quotation marks omitted).

While Congress has long given presidents "limited authority to appoint acting officials to temporarily perform the functions of a vacant . . . office without first obtaining Senate approval," *SW Gen.*, 580 U.S. at 294, Congress has always placed restrictions on such acting service. *See, e.g.*, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415 (allowing acting officials "to perform the duties" of vacant offices, but only for six months).

In the 1860s, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute," the Vacancies Act. *Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998). "The Federal Vacancies Reform Act of 1998 . . . is the latest version of that authorization." *SW Gen.*, 580 U.S. at 293.

Congress enacted the FVRA in response to the executive branch's increasing refusal to comply with the Vacancies Act and the Appointments Clause. Beginning in the 1970s, the Justice Department took the position that the Vacancies Act was not "the exclusive statutory authority for temporarily assigning the duties and powers of a Senate-confirmed office." *The Vacancies Act*, 22 Op. O.L.C. 44, 44 (1998). Instead, the executive branch claimed that "statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials" could be used as an alternative, enabling agencies to avoid the limits of the Vacancies Act. *Id.* Because virtually all federal departments are governed by

such "vesting-and-delegation" statutes, *id.* at 2, across the government people "who were ineligible for appointment as acting officers under the terms of the Vacancies Act were frequently 'delegated' the title and duties of precisely the same office, meaning the act's restrictions had become largely toothless." Thomas A. Berry, *S.W. General: The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 155.

To vindicate the Vacancies Act's "fundamental purpose . . . to limit the power of the President to name acting officials," S. Rep. No. 105-250, at 7-8 (1998), Congress enacted the FVRA "to create a clear and exclusive process to govern the performance of duties of [Senate-confirmed] offices," *id.* at 1. Accordingly, the FVRA carefully limits who may serve as an acting officer when a vacancy arises, *see* 5 U.S.C. § 3345, as well as the time period during which vacant offices may be filled by acting officials, *see id.* § 3346.

The FVRA is now "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office" requiring Senate confirmation, *id.* § 3347(a), with two exceptions. One exception accommodates recess appointments. *See id.* § 3347(a)(2). The other permits agency organic statutes to supplement the FVRA, or provide an alternative to it, if they expressly designate an official to perform the duties of a vacant office temporarily, *id.* § 3347(a)(1)(B), or if they expressly authorize the head of the department to

designate someone to do so, *id.* § 3347(a)(1)(A). If an office is not validly being filled pursuant to the FVRA or one of these exceptions, however, "the office shall remain vacant." *Id*. § 3348(b)(1).

To prevent department heads from evading these restrictions by purporting to "delegate" the powers of a vacant office to others, the FVRA specifies that statutes giving "general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head" or "to reassign duties" among agency personnel—*i.e.*, so-called vesting-and-delegation statutes—do not provide an exception to the FVRA's limits. *Id.* § 3347(b).

Finally, to ensure compliance with these limits, the FVRA provides that an agency action "shall have no force or effect" if it was taken by a person performing a function or duty of a vacant office without authorization by the FVRA or one of its exceptions. *Id.* § 3348(d)(1). Critically, these void actions "may not be ratified." *Id.* § 3348(d)(2). After all, if another official could simply ratify the actions of someone who unlawfully wielded an office's powers during a vacancy, "then no consequence will derive from an illegal acting designation." S. Rep. No. 105-250, at 8. That result "undermines the constitutional requirement of advice and consent." *Id.*

II. The FVRA Prohibits Ratification of the Rule.

Defendants maintain that even if Chad Wolf had no authority to approve the Rule at issue here, Secretary Mayorkas's ratification cured that illegality. But the text, structure, purpose, and history of the FVRA all make clear that actions taken in violation of its rules "are of no effect and are not permitted to be ratified by anyone else." S. Rep. No. 105-250, at 2.

A. Text

In enacting the FVRA, Congress determined that the standard remedies for unlawful agency action were not sufficient to deter violations of its rules. The FVRA therefore imposes an additional penalty: if "any person" unlawfully performs "any function or duty" of a vacant office, that action "may not be ratified." 5 U.S.C. § 3348(d).

The term "function or duty" includes "any function or duty of the applicable office that is established by statute and is required by statute to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A) (punctuation omitted). That standard is clearly satisfied here.

It is undisputed that approving a regulation like the Rule is a function of the Secretary's office that is "established by statute" and "required by statute to be performed by the [Secretary]." *Id.*; *see* Defs. Br. 8. The relevant statute provides that the Secretary "shall establish such regulations" and "prescribe such forms of

bond . . . as he deems necessary for carrying out his authority." 8 U.S.C. § 1103(a)(3).

It is also undisputed that no statute assigns this function and duty to any other officer. Congress has required the Secretary, and no one else, to perform it. *Id.* As a result, this is a function and duty "required by statute to be performed by the [Secretary] (and only that officer)." 5 U.S.C. § 3348(a)(2)(A).

In short, the FVRA's plain language bars ratification whenever a statute directs an officer to perform a function or duty and does not direct any other officer to do so. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 30 (D.D.C. 2020) (ratification is prohibited when a function is "assigned by statute to the office" and "not assigned by statute to any other office"). The ratification penalty thus encompasses "all statutorily prescribed functions of a given office" that no other office is also directed to perform. *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 23 (D.D.C. 2022) (quotation marks omitted). Here, the statute authorizing the DHS Secretary to "prescribe such forms of bond . . . as he deems necessary," 8 U.S.C. § 1103(a)(3), meets this standard because it is "a statute that designates one officer and only that officer to perform the duty or function," *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 946 (N.D. Cal. 2021).

This straightforward reading makes sense in light of the FVRA's structure and purpose. It ensures that when Congress has assigned specific duties to a

specific office that becomes vacant, an agency cannot circumvent the limits on acting service or avoid Senate confirmation simply by reassigning those duties to someone else—and then later using ratification to legitimize that person's actions. Properly interpreted in this way, the ratification penalty guarantees that the FVRA remains "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office." 5 U.S.C. § 3347(a). However, if Congress has conferred authority on an agency without assigning it to a particular office, or has assigned it to multiple offices, then other agency officials may continue to carry out that function during a vacancy, avoiding unnecessary government paralysis.

Defendants read § 3348 differently. Indeed, they largely read it out of existence, giving it a "vanishingly small" scope, *Kajmowicz v. Whitaker*, 42 F.4th 138, 151 (3d Cir. 2022), that draws arbitrary lines having nothing to do the Act's structure or purpose. Based entirely on four words in parentheses—"and only that officer," 5 U.S.C. § 3348(a)(2)(A)—Defendants interpret the ratification penalty as reaching only duties that a statute *expressly prohibits anyone else from performing*. Defs. Br. 17. Under that gloss, they conclude that the ratification penalty "does not apply to delegable functions and duties." Defs. Br. 18 (quoting *Kajmowicz*, 42 F.4th at 148).

Critically, however, the FVRA does not refer to delegation or use any variant of that word. It does not, for instance, refer to "a statute that designates one officer to perform a non-delegable duty or function." *Behring*, 544 F. Supp. 3d at 946. The more natural reading of its "required to be performed" language is simply that it refers to a statute that assigns a duty to a particular official and no other. When, as here, a statute assigns a function to an officer (and only that officer), then no one else may perform that function during a vacancy, except by complying with the FVRA's rules. The language of § 3348 merely excludes functions that Congress vested in multiple officers; it does not exclude functions that Congress required one specific officer to perform, merely because that officer can enlist subordinates.

Congress, after all, was not focused on subdelegation to subordinates when it enacted the FVRA. It was instead reacting to an entirely different type of "delegation," namely, the practice of reassigning the powers of vacant offices to other agency personnel instead of validly filling those offices through the Appointments Clause or the Vacancies Act. *See supra* Part I.

Like Defendants, the Third Circuit in *Kajmowicz* simply refused to acknowledge that the language of § 3348 is susceptible to two readings. Jumping to the conclusion that the "only" possible interpretation is that this language incorporates "[t]he concept of delegation, more specifically subdelegation,"

42 F.4th at 148, the court proceeded to use the judge-fashioned "subdelegation doctrine" to define the FVRA's contours, citing a body of cases decided after the FVRA's enactment in 1998, *id.* at 148-50.

In doing so, *Kajmowicz* failed to appreciate that an officer can subdelegate even if he is the one "required" by statute to perform the function or duty. When an officer employs subordinates to help him carry out a statutory duty, ultimate responsibility under the statute remains with the officer, who is performing that duty through his subordinates. The Secretary's rulemaking authority at issue here illustrates the point: if a Deputy Secretary approves rules under the 2003 delegation cited by Defendants, he does so "on behalf of the Secretary" and "[a]cting for the Secretary." ER-108-09. An officer's ability to subdelegate in this way is fully consistent with Congress having required "only that officer," 5 U.S.C. § 3348(a)(2)(A), to perform the duty. *Cf. SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015) (although the NLRB's general counsel "delegated his authority to investigate charges and issue complaints to [the agency's] regional directors," he "exercises general supervision of the regional directors" and retains "final authority" under the statute, so "if the General Counsel's office were vacant, the NLRB would not be issuing complaints" (quotation marks omitted)).

B. Structure

Although Defendants' reading of § 3348(a)(2)(A) is not the best one, it might be plausible if that language were viewed in isolation, divorced from everything surrounding it. "Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). For that reason, statutory language must not be construed "in the isolated context" of a single phrase or sentence. *Id.* "Over and over," the Supreme Court has "stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)); *King v. Burwell*, 576 U.S. 473, 498 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."). Thus, "interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 570 U.S. 48, 65 (2013).

Defendants' reading of § 3348(a)(2)(A), even if "plausible when viewed in isolation, is untenable in light of [the statute] as a whole." *Dep't of Revenue of Or.*

v. ACF Indus., Inc., 510 U.S. 332, 343 (1994) (citation omitted). Multiple features of the surrounding text refute this narrow reading.

First, § 3348 clearly applies to department secretaries and other agency heads, but Defendants' reading would exempt those same officials from the statute.

When an office other than the head of an agency is vacant and is not being filled by a valid acting officer, the head of the agency may still perform the functions and duties of the vacant office. 5 U.S.C. § 3348(b)(2). In marked contrast, however, Congress provided no such option when the agency head's office is itself vacant. *See id.* § 3348(b)(1). That office simply "shall remain vacant." *Id.* And any unlawfully performed duties of that office during the vacancy are ineligible for ratification. *Id.* § 3348(d)(2). Clearly, therefore, § 3348 applies to the functions and duties of department secretaries, and when a secretary's office is vacant, it gives the department no recourse besides filling the office through Senate confirmation or with a valid acting officer.

All department secretaries, however, can delegate virtually all of their functions and duties. The DHS Secretary, for example, "may delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department." 6 U.S.C. § 112(b)(1). And every other cabinet-level department has a similar provision. *See L.M.-M.*, 442 F. Supp. 3d at 31 & n.11 (citing delegation provisions for all fourteen other executive departments).

Under Defendants' view, the delegable nature of these secretaries' functions exempts them from § 3348. But that flatly contradicts the clear indication in § 3348(b) itself that the functions of department secretaries are covered.

Second, § 3348 expressly excludes certain officials from its reach, *see* 5 U.S.C. § 3348(e), and that list does not include the DHS Secretary. "Under defendants' construction of the statute," however, "the DHS Secretary would be functionally added to that list of exempted officials since most, if not all, of his functions and duties are delegable and thus none would be covered by the FVRA's non-ratification provision." *Asylumworks*, 590 F. Supp. 3d at 24.

"Under the government's theory, because all of the Secretary's functions are delegable, none qualify as a duty or function under the FVRA." *Behring*, 544 F. Supp. 3d at 946. Indeed, the only limit on delegation by the Secretary that Defendants have ever identified is 6 U.S.C. § 624(c)(2), governing certain emergency orders. And because that provision allows the Secretary to delegate this authority to a specific DHS official, *see id.*, it too fails Defendants' test for inclusion in the FVRA's ratification penalty.

Simply put, as Defendants see it, no function or duty of the Secretary is eligible for § 3348's penalties. And the same goes for most, if not all, other department secretaries. But that reading is incompatible with the FVRA's express exemption of certain officials (but not these secretaries) in § 3348(e). *See SW*

Gen., 580 U.S. at 302 (the *expressio unius* canon, *i.e.*, that "expressing one item of [an] associated group or series excludes another left unmentioned," applies whenever "circumstances support[] a sensible inference that the term left out must have been meant to be excluded" (quotation marks omitted)).

Third, the government's reading makes the exemptions in § 3348(e) superfluous. None of the specific officers listed in that provision—inspectors general, chief financial officers, and the general counsels of two agencies—are prohibited by statute from delegating their functions or duties. *See* Stephen Migala, *The Vacancies Act and Its Anti-Ratification Provision* 19-20 (Nov. 11, 2019), *available at* https://ssrn.com/abstract=3486687 (citing statutes); *see also SW Gen.*, 796 F.3d at 71 (noting that the general counsel of the NLRB, who is listed in § 3348(e), "has delegated his authority to investigate charges and issue complaints to thirty-two regional directors").

Were it true, as Defendants claim, that § 3348 "covers only nondelegable functions and duties," Defs. Br. 19, then the functions and duties of the officers listed in § 3348(e) would already be exempt from the statute. Yet § 3348 makes a point of stating that it "shall not apply" to those officers. 5 U.S.C. § 3348(e). Defendants' reading therefore turns § 3348(e) into surplusage. "It is, however, a cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362,

404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *see SW Gen.*, 580 U.S. at 304 (applying this principle to the FVRA). This is yet another indication that Defendants' delegation-based gloss on § 3348 is wrong.

In contrast, the more straightforward interpretation of § 3348 offered here "gives effect to every clause and word of [the] statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). As explained above, the qualifier "and only that officer," 5 U.S.C. § 3348(a)(2)(A)(ii), is needed to clarify that § 3348 does not apply if a function or duty "is required by statute to be performed by the applicable officer," *id.*, but other officers are also directed to perform it.

Fourth, Defendants seek to avoid the FVRA's ratification penalty by relying on DHS's general vesting-and-delegation statute, but the FVRA explicitly precludes the use of such statutes as an alternative to complying with its mandates.

In arguing that the Secretary's rulemaking authority is not covered by § 3348, Defendants cite the Secretary's authority to "delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department." 6 U.S.C. § 112(b)(1); *see* Defs. Br. 21. Yet the FVRA unequivocally states that this type of statute, "providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to . . . officers or employees of such Executive agency," may not be used as an alternative to the FVRA's exclusive procedures. 5 U.S.C. § 3347(b).

The inclusion of that prohibition in the statutory text is unsurprising: "It was the pervasive use of those vesting-and-delegation statutes, along with 'the lack of an effective enforcement process,' that convinced Congress of the need to enact the FVRA." *L.M.-M.*, 442 F. Supp. 3d at 34 (quoting S. Rep. No. 105-250, at 7). Yet if "the mere existence of these vesting-and-delegation statutes" were "sufficient to negate the enforcement mechanisms Congress included in the FVRA," as Defendants claim, then "Congress would have done little 'to restore [the] constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation.'" *Id.* (quoting S. Rep. No. 105-250, at 8).

Instead, just as before the FVRA's enactment, agencies could cite their vesting-and-delegation statutes to avoid complying with the Appointments Clause and the limits of vacancies legislation. Indeed, agencies would not even need to use these vesting-and-delegation statutes to work around the FVRA: the mere fact that the agencies *could* use such provisions would be enough. *See* Defs. Br. 19 ("It does not matter . . . whether there is an actual delegation of authority.").

Defendants' reading of § 3348 turns § 3347(b) into a nullity. *But see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "fit, if possible, all parts [of the statute] into an harmonious whole").

Fifth, the FVRA provides "the exclusive means" for temporarily filling a vacant office unless one of its exceptions applies. 5 U.S.C. § 3347(a). But Defendants' interpretation of § 3348 would nullify that critical provision too—and with it the Act's central purpose. *See* S. Rep. No. 105-250, at 1 ("The purpose of S. 2176, the Federal Vacancies Reform Act, is to create a clear and exclusive process to govern the performance of duties . . . when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office.").

Building on their premise that § 3348 covers only nondelegable functions and duties, Defendants observe that "subdelegation to a subordinate federal officer or agency is presumptively permissible," Defs. Br. 20 (quoting *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011)), even without "[e]xpress statutory authority for delegation," *id.* (quoting *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983)). The upshot is that few functions or duties of anyone in the executive branch would ever satisfy the criteria of § 3348. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1337 (Fed. Cir. 2022) ("The government readily admits that only a very small subset of duties are non-delegable." (quotation marks omitted)). Thus, few violations of the FVRA could ever be deemed void or ineligible for ratification. Although agencies would have a nominal duty to obey the FVRA's limits, the Act's enforcement mechanism would

be all but dead: agencies could simply ignore those limits or rely on their vesting-and-delegation authority to circumvent them, knowing that their unlawful actions could not be held void under § 3348(d)(1) and, if necessary, could be ratified.

In practice, therefore, the FVRA would no longer be "the exclusive means" of authorizing a vacant office's functions to be performed, draining § 3347(a) of any force. And that concern is more than hypothetical. *See Arthrex*, 35 F.4th at 1337 ("the government contends that the FVRA *imposes no constraints whatsoever* on the [Patent and Trademark Office] because all the Director's duties are delegable" (emphasis added)). Courts "cannot interpret federal statutes to negate their own stated purposes," *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973), and the purpose embodied in § 3347(a) is clear. Defendants' interpretation would functionally excise that key provision.

Sixth, and finally, § 3348 plainly shows that it encompasses delegable functions. In addition to covering duties that are established by statute, it also covers duties that are "established by regulation." 5 U.S.C. § 3348(a)(2)(B). Many duties that are established by regulation are delegations—grants of authority from a higher official to a lower official of part of the higher official's powers. Indeed, because "[a]gencies have only those powers given to them by Congress," *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022), arguably *every* regulation requiring a lower-level official to perform a specific duty is a delegation.

The FVRA treats those regulatory delegations just as stringently as it treats functions and duties established by statute. It even prevents agencies from circumventing the FVRA's limits by manipulating their regulations in anticipation of an impending vacancy. *See* 5 U.S.C. § 3348(a)(2)(B)(ii). Given this treatment of duties established by regulation—many or all of which are delegable—it makes no sense to exclude statutorily established duties from the ratification penalty simply because they too can be delegated.

Instead, properly interpreted, both provisions work together to ensure that where a specific duty has been assigned to a specific office, a valid acting officer is needed for that duty to be performed during a vacancy. That, of course, is the whole point of the FVRA and its "exclusive" procedures. 5 U.S.C. § 3347(a).

* * *

Defendants address none of these structural points. Neither do the Third and Federal Circuit decisions on which they rely. But when the FVRA is viewed "as a whole," *Maracich*, 570 U.S. at 66, and not with a myopic focus on four words of a single provision, its meaning is clear. Between Defendants' constricted reading of § 3348 and the one offered here, "only one of [those] meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex.*, 484 U.S. at 371.

C. Purpose and History

If there were any lingering doubt, consideration of the FVRA's well-known purpose and history removes it. Defendants' position not only deprives the statute of nearly all effect, but it does so by permitting the precise abuse that Congress sought to eliminate.

As explained above, Defendants' interpretation virtually writes § 3348 out of existence, and by extension the entire FVRA. Under their delegation-based gloss, almost no violations of the FVRA are ever void or ineligible for ratification. *See Kajmowicz*, 42 F.4th at 151 (the scope of § 3348 is "vanishingly small" (quoting *Arthrex*, 35 F.4th at 1337)). In particular, because department secretaries and other agency heads can typically delegate all of their statutory powers, the most important functions that Congress assigned to the highest-level executive officers would never be subject to the FVRA's enforcement penalties—and so could be performed by anyone, without consequence.

It defies belief that this is the FVRA's purpose. "The statute was framed as a reclamation of the Congress's Appointments Clause power," *SW Gen.*, 796 F.3d at 70, and it "ensures compliance by providing that, in general, 'any function or duty of a vacant office' performed by a person not properly serving under the statute shall have no force or effect," *SW Gen.*, 580 U.S. at 296. It cannot be that Congress sought "to limit the power of the President to name acting officials, as

well as the length of service of those officials," S. Rep. No. 105-250, at 8, through an enforcement mechanism that almost never applies. Certainly not when the statutory text supports an alternative reading that avoids this result.

What is more, the circumstances that prompted the FVRA's passage are undisputed. "During the 1970s and 1980s, interbranch conflict arose over the Vacancies Act. The Department of Justice took the position that, in many instances, the head of an executive agency had independent authority apart from the Vacancies Act to temporarily fill vacant offices." *SW Gen.*, 580 U.S. at 294. One common tactic was that an officer would purport to delegate all of his or her powers to another official just before resigning. *See* S. Rep. No. 105-250, at 5-6, 12. Another was that, after a vacancy arose, the head of the department would purport to delegate all the powers of that vacant office to someone else. *Id.* at 3-5.

"These acting officers filled high-level positions, sometimes in obvious contravention of the Senate's wishes." *SW Gen.*, 580 U.S. at 295. In the most notorious example, the Clinton administration designated someone to serve as acting head of the Justice Department's Civil Rights Division "immediately after the Senate refused to confirm him for that very office." *Id.*

These problems were compounded by the D.C. Circuit's decision in *Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), which avoided ruling on the legality of a dubious acting appointment because a

valid official later ratified the earlier actions. *See* S. Rep. No. 105-250, at 8 ("this portion of the court's position demands legislative response"). "Perceiving a threat to the Senate's advice and consent power," Congress "replaced the Vacancies Act with the FVRA." *SW Gen.*, 580 U.S. at 295.

As Defendants see it, however, Congress scarcely did anything. In their view, an agency's vesting-and-delegation statute continues to provide an escape hatch that excuses it from obeying the FVRA's limits, despite 5 U.S.C. § 3347(b). Vacancies legislation is still not the "exclusive means" for carrying out the functions of vacant offices, despite 5 U.S.C. § 3347(a). And judicially imposed penalties can still be averted by ratification, just as in *Doolin*, despite 5 U.S.C. § 3347(d). Congress's response to the rampant violations of the Vacancies Act, and its attempt to reclaim its Appointments Clause power, was merely sound and fury, signifying nothing.

The text and structure of the FVRA do not demand that conclusion—indeed, they rebut it. *See supra*. This Court should reject Defendants' attempt to immunize the fruits of Chad Wolf's unlawful appointment through ratification.

III. Chad Wolf Was Unlawfully Wielding the Secretary's Authority when He Approved the Rule.

Chad Wolf purportedly became the Acting Secretary of DHS by virtue of an order signed by the previous Acting Secretary, Kevin McAleenan. But McAleenan himself was never a valid Acting Secretary. As a result, he could not install Wolf

as his successor. Every court to consider the matter has agreed. Defendants' contrary arguments amount to "interpretative acrobatics" that contradict "the plain language" of the relevant legal authority, *Asylumworks*, 590 F. Supp. 3d at 20-21 & n.6, boiling down to a "tortured" insistence "that the text means something other than what it says," *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020). So flimsy are these arguments that they arguably "lack a good-faith basis in law or fact." *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 973 (N.D. Cal. 2021).

A. In creating the office of Homeland Security Secretary, Congress supplemented the FVRA's default rules. The Homeland Security Act establishes a Deputy Secretary who is "the Secretary's first assistant" for purposes of the FVRA. 6 U.S.C. § 113(a)(1)(A). Under the FVRA, only this "first assistant" could serve automatically as the Acting Secretary during a vacancy. 5 U.S.C. § 3345(a)(1). The HSA modifies this rule, providing that, in the absence of a Deputy, the Department's third-in-line officer should serve as the Acting Secretary. *See* 6 U.S.C. § 113(g)(1). The HSA also empowers the Secretary to establish a "further order of succession" to account for situations in which the top three positions are all vacant. *Id.* § 113(g)(2).

Exercising that power, the Secretary has established a further line of succession in the Department's internal regulation governing vacancies, known as

Delegation 106. *See* DHS Delegation No. 00106 (Revision No. 08.5) (Apr. 10, 2019) (ER-62). Specifically, Delegation 106 incorporated by reference the line of succession for the Secretary's office that was first provided in an executive order. *See id.* § II.A (citing Exec. Order No. 13753, 81 Fed. Reg. 90,667 (Dec. 14, 2016)).

That executive order, in turn, lists sixteen DHS officials who are authorized to take over as Acting Secretary during a vacancy, in the sequence provided. *See* Exec. Order No. 13753, *supra*, § 1. Under Delegation 106, therefore, that list of officials, in that order, were to serve as Acting Secretary following a resignation.

DHS Secretary Kirstjen Nielsen resigned in April 2019. At that point, Kevin McAleenan was the Commissioner of U.S. Customs and Border Protection. Under Executive Order 13753, and therefore under Delegation 106, the Commissioner was *seventh* in line to become Acting Secretary following a resignation. *See* Exec. Order No. 13753, *supra*, § 1. Nevertheless, McAleenan purported to take over as Acting Secretary, departing from the "further order of succession to serve as Acting Secretary," 6 U.S.C. § 113(g)(2), that was set forth in DHS's regulation.

Because McAleenan assumed the role of Acting Secretary without authority, his tenure violated the FVRA, which is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office"

unless an alternative succession statute like the one in the HSA is followed. 5 U.S.C. § 3347(a).

B. Defendants nevertheless insist that McAleenan validly became Acting Secretary pursuant to the DHS order of succession adopted under § 113(g)(2). In support, they cite an order signed by Secretary Nielsen on April 9, 2019. This order states that it is revising Annex A to Delegation 106. *See* ER-22 (memorializing Nielsen's "approval of the attached document," identified as "Annex A"); ER-23 (the attached document, which reads: "Annex A of . . . Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof").

Crucially, however, Annex A governs only who may exercise the Secretary's powers during a disaster or catastrophic emergency that prevents the Secretary from acting, *not* who may exercise the Secretary's powers following a resignation. *See* DHS Delegation 106, § II.B (ER-62) ("I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office . . . in the event I am unavailable to act during a disaster or catastrophic emergency.").

The day after Nielsen signed this order, DHS updated Delegation 106 accordingly. Just as Nielsen ordered, Annex A now contained a revised line of

succession for cases of "disaster or catastrophic emergency." DHS Delegation 106, § II.B (ER-62). Also consistent with Nielsen's order, the updated regulation left intact the line of succession for cases involving "the Secretary's . . . resignation," which were still "governed by Executive Order 13753." *Id.* § II.A.

Defendants have claimed this was all a mistake that did not accurately reflect Nielsen's order. But DHS personnel did exactly what her order told them to do: they replaced Annex A and made no other changes to Delegation 106. Thus, when Nielsen resigned, the applicable order of succession was still provided in Executive Order 13753, not the amended Annex A, which applied when the Secretary was unavailable due to disaster or emergency.

C. Defendants argue that Nielsen actually established a new, consolidated line of succession for all vacancies, including those caused by resignations. That, however, is simply not what the order says. It states: "I hereby designate the order of succession for the Secretary of Homeland Security *as follows*." ER-22 (emphasis added). The only thing that "follows" is an amendment to the text of Annex A.

In reality, Defendants are attempting to conflate what Nielsen did in April 2019 with what McAleenan did later that year. In November, McAleenan signed an order changing the Secretary's line of succession again. But unlike Nielsen, he altered the line of succession for vacancies caused by resignations—replacing the

list of officials set forth in Executive Order 13753 with the list in Annex A: "Section II.A of DHS Delegation No. 00106 . . . is amended hereby to state as follows: 'In case of the Secretary's . . . resignation, . . . the order of succession of officials *is governed by Annex A*.'" ER-25 (emphasis added). Delegation 106 was then changed accordingly.

When DHS personnel amended Delegation 106 to implement McAleenan's order, they were not belatedly correcting a mistake they made seven months earlier. McAleenan amended Delegation 106 to make Annex A govern resignations; Nielsen did not. Defendants have never explained why McAleenan needed to amend Delegation 106 in that way if Nielsen had already made that change.

D. Instead, Defendants have argued that the plain text of Nielsen's order should be ignored based on clues supposedly indicating that she intended something other than what she prescribed. These arguments, unpersuasive on their own terms, do not warrant overriding the clear language of the order.

Defendants' main argument is that Nielsen's use of the term "order of succession" must mean that she intended to alter the line of succession for resignations, not just the one for disasters and emergencies. Nielsen could not possibly have designated an "order of succession" under § 113(g)(2) to govern

disasters and emergencies, they say, because those situations are covered only by delegations of authority, which are different.

This argument is premised on a black-and-white distinction between "orders of succession" and delegations of authority, as well as the idea that an "order of succession" applies only to permanent vacancies following a death or resignation. Both premises are refuted by the HSA, Delegation 106, and Nielsen's order itself.

In the HSA, § 113(g) states that the "order of succession" it empowers the Secretary to establish will govern not only a "vacancy in office," but also situations in which "absence" or "disability" prevents a Secretary from being "available to exercise the duties of the Office." 6 U.S.C. § 113(g)(1). That language clearly encompasses situations in which a Secretary is "unavailable to act during a disaster or catastrophic emergency." DHS Delegation 106, § II.B (ER-62). Likewise, Delegation 106 says that it "delegate[s] authority" to the officials listed in its annexes to "perform the functions and duties of the named positions" in case of "death" and "resignation," *id.* ¶ II.D, while also using the term "order of succession" to describe those annexes, *see id.* ¶¶ II.C, II.G. Finally, Nielsen's order proclaims its intent to designate an "order of succession," but the revised version of Annex A that follows is titled "Order *for Delegation of Authority* by the

Secretary." ER-23 (emphasis added). Clearly, the term "order of succession" does not have the uniform meaning Defendants claim.[2]

In short, nothing in Nielsen's order or the relevant legal authorities offers any reason to disregard the order's unambiguous text. Speculative inferences about her true intent, drawn from conduct during that period, cannot override the plain language of the order. And because Nielsen's order did not authorize McAleenan to be Acting Secretary, his own later order could not hand off that position to Wolf.

[2] The FVRA, too, applies equally to permanent vacancies, *see* 5 U.S.C. § 3345(a) (an officer "dies" or "resigns"), and temporary absences, *see id.* § 3346(a) ("a vacancy caused by sickness"); *accord* Office of Legal Counsel, *Designating an Acting Dir. of the Bureau of Cons. Fin. Protect.*, 2017 WL 6419154, at *3 (Nov. 25, 2017).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 15th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 15, 2023.

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