No. 23-243

In the Supreme Court of the United States

BARBARA RUSH, ET AL., PETITIONERS

v.

MARTIN J. O'MALLEY,
COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, if an office requiring presidential appointment and Senate confirmation becomes vacant due to the death, resignation, or unavailability of the incumbent officeholder, the President may direct certain other officers and employees to temporarily perform the functions and duties of the vacant office in an acting capacity, "subject to the time limitations of section 3346." 5 U.S.C. 3345(a)(2) and (3). Section 3346 states that a person may serve in an acting capacity under the FVRA while an office is vacant "(1) for no longer than 210 days beginning on the date the vacancy occurs," or "(2) * * * 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." 5 U.S.C. 3346(a). The question presented is:

Whether the court of appeals correctly held that a person may serve as an acting officer under the FVRA during the 210-day period after a vacancy occurs, 5 U.S.C. 3346(a)(1), or while a first or second nomination to the vacant office is pending, 5 U.S.C. 3346(a)(2), or for both periods, without regard to whether the nomination is submitted during the initial 210-day period.

PARTIES TO THE PROCEEDINGS

The defendant-appellee below was Kilolo Kijakazi in her official capacity as Acting Commissioner of Social Security. After the petition for a writ of certiorari was filed, Martin J. O'Malley was appointed as Commissioner of Social Security. Commissioner O'Malley is automatically substituted as respondent pursuant to Rule 35.3 of the Rules of this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 65 F.4th 114. With respect to petitioner Barbara Rush, the opinion of the district court (Pet. App. 22-33) is not published in the Federal Supplement but is available at 2022 WL 2057467. With respect to petitioner Cynthia Parker, the opinion of the district court (Pet. App. 34-39) is not published in the Federal Supplement but is available at 2022 WL 2163007.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2023. On July 7, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 8, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Except when Congress has provided otherwise, all "Officers of the United States" are appointed by the President "with the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, Cl. 2. An office whose appointment requires both the President and the Senate is "known as a 'PAS' office." *NLRB* v. *SW General, Inc.*, 580 U.S. 288, 292 (2017).

If a PAS office becomes vacant, Congress has "long * * * authoriz[ed] the President to direct certain officials to temporarily carry out the duties of [the] PAS office in an acting capacity, without Senate confirmation." *SW General*, 580 U.S. at 293. The most recent general enactment along those lines is the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.* The FVRA provides that, for a PAS office, if the incumbent officeholder "dies, resigns, or is otherwise unable to perform the functions and duties of the office," then the "first assistant to the office * * * shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. 3345(a)(1). But the FVRA authorizes the President to alter that default rule. Specifically, the President may "direct a person" who already occupies a different PAS office to "perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2). Or the President may select another officer or employee within the same agency who meets certain criteria. 5 U.S.C. 3345(a)(3).

Acting service under any of those provisions of the FVRA is expressly made "subject to the time limitations of section 3346." 5 U.S.C. 3345(a)(1)-(3). Section 3346(a) sets forth a series of time limitations. As an initial matter, it provides as follows:

> (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.

5 U.S.C. 3346(a). Section 3346(b) then provides that if the President's first nomination for the vacant office is rejected, withdrawn, or returned to the President, the person serving as an acting officer under the FVRA "may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return." 5 U.S.C. 3346(b)(1). Then, if the President's second nomination is also rejected, withdrawn, or returned, the "person serving as the acting officer may continue to serve" for a further period of "no more than 210 days after the second nomination is rejected, withdrawn, or returned." 5 U.S.C. 3346(b)(2)(B).

The initial 210-day period under Section 3346(a)(1) generally begins "on the date the vacancy occurs." 5 U.S.C. 3346(a)(1); see 5 U.S.C. 3346(c). The FVRA also provides a special rule for presidential transitions, in recognition of the large number of vacancies that accompany such transitions. For any vacancy in a PAS office that exists within the first 60 days following the inauguration of a new President, the "210-day period under section 3346 * * * shall be deemed to begin" on the later of 90 days after the inauguration or 90 days after the vacancy occurs. 5 U.S.C. 3349a(b).

2. This case concerns a vacancy in the office of the Commissioner of Social Security. The Commissioner is the head of the Social Security Administration and is "appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. 902(a)(1). The second highest ranking position in the agency is the Deputy Commissioner of Social Security, which is also a PAS office. 42 U.S.C. 902(b)(1). By default, the Deputy Commissioner "shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner." 42 U.S.C. 902(b)(4).

In 2016, President Obama invoked his authority under the FVRA to issue a memorandum specifying an "[o]rder of [s]uccession" for the office of the Commissioner of Social Security in circumstances when both the Commissioner and the Deputy Commissioner "have died, resigned, or become otherwise unable to perform the functions and duties of the office of Commissioner." 81 Fed. Reg. 96,337, 96,337 (Dec. 30, 2016) (emphasis omitted). In the event of simultaneous vacancies in both offices, the President directed that the "Deputy Commissioner for Operations" would be the first in line to serve as the Acting Commissioner, followed by a succession of other specified officials within the agency. *Ibid.*

When President Trump took office on January 20, 2017, the incumbent Deputy Commissioner of Social Security resigned, and the office of Commissioner was already vacant. See Pet. App. 5. The then-Deputy Commissioner for Operations, Nancy Berryhill, "began serving as Acting Commissioner in accordance with the order-of-succession memorandum." *Ibid.* Accounting for the special rule for presidential transitions, the FVRA authorized Berryhill to continue to serve as Commissioner in an acting capacity, in the absence of

any nomination, until November 16, 2017. See 5 U.S.C. 3346(a)(1), 3349a(b). President Trump did not nominate anyone to serve as Commissioner during that period. In March 2018, the Government Accountability Office (GAO) reported that Berryhill could not lawfully continue to serve as or describe herself as Acting Commissioner under the FVRA, given the statute's "time limitations on acting service." Pet. App. 5. Berryhill ceased to do so after the GAO report. *Id.* at 5-6.[1]

In April 2018, the President nominated Andrew Saul to be the Commissioner of Social Security. Pet. App. 6. Berryhill was still the Deputy Commissioner for Operations at that time, and the 2016 order of succession for the agency remained in place. Thus, after President Trump submitted "a first * * * nomination for the office" of Commissioner, 5 U.S.C. 3346(a)(2), Berryhill resumed serving as Acting Commissioner while that nomination was pending before the Senate. Pet. App. 6.

During Berryhill's second period of service as Acting Commissioner, this Court held that "administrative law judges (ALJs) of the Securities and Exchange Commission" are "'Officers'" within the meaning of the Appointments Clause, not mere employees. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2049 (2018). Although the Court did not address the status of ALJs within other agencies, the Social Security Administration recognized that *Lucia* "ha[d] the potential to significantly affect [its] hearings and appeals process." 84 Fed. Reg. 9582, 9583 (Mar. 15, 2019). The Social Security Administration "employ[s] more ALJs than all other Federal agencies combined"

[1] The GAO is charged with making a report to the President and specified congressional committees if it determines that "an officer is serving longer than the 210-day period * * * under section 3346." 5 U.S.C. 3349(b).

to adjudicate many of the "millions of applications for benefits" that the agency receives each year. *Ibid.* And those ALJs had historically "been selected by lower level staff rather than appointed by the head of the agency." *Carr* v. *Saul*, 593 U.S. 83, 86 (2021). In July 2018, in order to "pre-emptively 'address[] any Appointments Clause questions involving Social Security claims,'" Berryhill exercised her authority as Acting Commissioner to ratify and approve the appointment to office of all of the agency's then-serving ALJs. *Ibid.* (quoting 84 Fed. Reg. at 9583).

3. Petitioners are two individuals who applied for disability insurance benefits under the Social Security program. Pet. App. 23, 37. In separate proceedings, their claims were denied by ALJs whose appointments to office had been ratified and approved by Berryhill during her second period of service under the FVRA as Acting Commissioner. *Id.* at 23-25, 29, 35-37.

Each petitioner brought an action in the Western District of North Carolina to challenge the denial of her application on various grounds. Pet. App. 22-23, 34-35; see 42 U.S.C. 405(g). As relevant here, petitioners argued that Berryhill had exceeded the time limitations on acting service in the FVRA by July 2018; that Berryhill's ratification of the appointment of the ALJs at issue was therefore invalid; and that petitioners were each entitled to a new hearing before a properly appointed ALJ. Pet. App. 27, 37-38. The district judges to whom the cases were assigned both granted summary judgment to the government, rejecting petitioners' FVRA arguments. *Id.* at 22-33, 34-39. Both judges concluded that "[A]cting Commissioner Berryhill was validly serving under the" FVRA when she ratified the appointment of the agency's ALJs in response to *Lucia*

because the statute permitted her to "resume[] her service as Acting Commissioner during the * * * pendency" of President Trump's first nomination to the office of Commissioner. *Id.* at 29; see *id.* at 30 (describing that result as following from "the plain language of 5 U.S.C. § 3346"); *id.* at 38 (stating that "§ 3346(a)(2) permits acting service during the pendency of a first or second nomination without regard to when the nomination is submitted").

4. Petitioners both appealed, and the court of appeals consolidated their appeals with a similar appeal raising the same FVRA challenge to a denial of Social Security benefits. Pet. App. 6; see 22-1797 C.A. Order 2 (Sept. 13, 2022); cf. Pet. ii (noting that the third appellant is not a petitioner in this Court). On appeal, petitioners reprised their contention that Section 3346(a)(2) is "exclusively a tolling provision," available only to extend the lawful period for acting service by a person who is already serving in an acting capacity under the FVRA during the 210-day period specified in Section 3346(a)(1), and only when the President makes a first nomination during that period. Pet. App. 8.

The court of appeals unanimously affirmed, rejecting petitioners' tolling theory. Pet. App. 1-21. The court found that "Subsections 3346(a)(1) and 3346(a)(2) by their plain text authorize independent periods of acting service." *Id.* at 8. The court explained that the two provisions authorize distinct time periods for acting service that "stand[] on [their] own," with different starting and ending dates. *Ibid.* The "first period," authorized by Section 3346(a)(1), starts when a vacancy occurs "and ends 210 days later." *Ibid.* The "second period," authorized by Section 3346(a)(2), "commences when a nomination is sent to the Senate and terminates when

the nomination for whatever reason is no longer pending." *Ibid.* The court further explained that those two provisions are "joined by the word 'or,'" *id.* at 9, which is ordinarily "disjunctive, that is, the words it connects are to 'be given separate meanings,'" *ibid.* (quoting *United States* v. *Woods*, 571 U.S. 31, 45-46 (2013)). Accordingly, the "most natural interpretation" of the statute is that Section 3346(a)(2) "authorizes an independent period of acting service while a nomination is pending regardless of whether the nomination occurred during the" 210-day period specified in Section 3346(a)(1). *Id.* at 10. Petitioners' contrary view, the court concluded, would improperly "subordinate" (a)(2) to (a)(1) and "contravene[] the most natural reading of the statute's disjunctive 'or.'" *Ibid.*

The court of appeals also considered and rejected petitioners' various other arguments about the statutory context, the legislative history, and the separation of powers. Pet. App. 11-21. In particular, the court found no "textual support" in adjacent provisions for reading Section 3346(a) to mean that a person may serve in an acting capacity under the FVRA "for an initial 210-day period or while a nomination is pending *if and only if the nomination occurs during the initial 210 days.*" *Id.* at 11. "[T]he statute does not say that," *ibid.*, and the court found no warrant for reading such a significant limitation on acting service into the law, particularly in light of the ample evidence that "Congress knows how to create a tolling provision" when it wishes to do so, *id.* at 13. The court also observed that its decision rejecting petitioners' challenge was consistent with a recent decision by the Eighth Circuit. See *id.* at 19-20 (discussing *Dahle* v. *Kijakazi*, 62 F.4th 424 (8th Cir. 2023), cert. denied, No. 23-173 (Jan. 8, 2024)).

ARGUMENT

Petitioners contend (Pet. 29-35) that then-Deputy Commissioner for Operations Nancy Berryhill was time-barred under the FVRA from serving as Acting Commissioner of Social Security in July 2018, when she approved and ratified the appointments of the ALJs who denied their applications for benefits. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Nor do petitioners identify any other sound basis for further review. The Court recently denied a petition for a writ of certiorari presenting the same question about the FVRA's time limitations. *Dahle* v. *O'Malley*, No. 23-173 (Jan. 8, 2024). The same course is warranted here.

1. The court of appeals correctly rejected petitioners' theory that Berryhill was time-barred from serving under the FVRA as Acting Commissioner in July 2018. President Trump submitted a first nomination to the Senate for the office of Commissioner in April 2018. Pet. App. 6. Once that nomination was submitted, the relevant FVRA time limitation provided that Berryhill could "serve in the [vacant] office" of Commissioner on an acting basis "from the date of such nomination for the period that the nomination [was] pending in the Senate." 5 U.S.C. 3346(a)(2).

a. The FVRA permits certain officers and employees to temporarily perform the functions and duties of a vacant PAS office in an acting capacity "subject to the time limitations of section 3346." 5 U.S.C. 3345(a)(1); see 5 U.S.C. 3345(a)(2) and (3). Section 3346 specifies two "independent periods" during which acting service under the FVRA is permissible. Pet. App. 8. In separate paragraphs, Section 3346(a) states that a person

serving in an acting capacity under the FVRA may serve in the vacant PAS office "for no longer than 210 days beginning on the date the vacancy occurs," 5 U.S.C. 3346(a)(1), or "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," 5 U.S.C. 3346(a)(2).

The court of appeals properly gave those two time periods distinct, independent operation. See Pet. App. 8-11. To be sure, the same person may serve in an acting capacity under the FVRA for one continuous period authorized by the two provisions in immediate succession, if the person begins serving as an acting officer during the 210-day period described in Section 3346(a)(1); the President submits a nomination for the vacant office during that period; and the same person continues to serve in an acting capacity while the nomination is pending in accordance with Section 3346(a)(2). In that way, Section 3346(a)(2) can be said to provide a form of "toll[ing]," by allowing acting service beyond the 210-day initial limit in Section 3346(a)(1). *NLRB* v. *SW General, Inc.*, 580 U.S. 288, 296 (2017).

As the court of appeals explained, however, nothing in the text of the statute or its history supports petitioners' theory that Section 3346(a)(2) functions "*solely* to toll (a)(1)'s time limitation." Pet. App. 13 (emphasis added). Had Congress wished to link the two time periods together in that way, it could easily have done so—for example, by providing for a 210-day time limitation on acting service *unless* the President makes a nomination within that period. See *ibid.* (observing that "Congress knows how to create a tolling provision expressly" and citing examples). But Congress instead expressed the relationship between Section 3346(a)'s two time lim-

itations by placing them in separate paragraphs linked by the conjunction "or," 5 U.S.C. 3346(a)(1), which indicates that each period should be given "independent * * * significance" and may be "employed without the other," Pet. App. 9 (citations omitted); see *United States* v. *Woods*, 571 U.S. 31, 45 (2013) (observing that the term "'or' * * * is almost always disjunctive, that is, the words it connects are to 'be given separate meanings'") (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Section 3346(a)(2) contains no cross-reference to Section 3346(a)(1), no time limit on when the relevant nomination must be made, and no other requirements except the pendency of a first or second nomination for the vacant office. Thus, "[n]othing in the statute's text conditions the availability of a period of service under § 3346(a)(2) on that period beginning during the 210 days described in § 3346(a)(1)." Pet. App. 11.

Section 3346(a)(2) instead authorizes a distinct period of acting service that begins "once a first or second nomination for the office is submitted to the Senate," 5 U.S.C. 3346(a)(2)—*i.e.*, if and when that circumstance occurs. See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 1575 (1993) (defining "once," when used as a conjunction, to mean "at the moment when" or "as soon as"); *The American Heritage Dictionary of the English Language* 1264 (3d ed. 1996) ("[a]s soon as; if ever; when"). Section 3346(a)(2) also states that the time period described in that provision runs "from the date of [the] nomination," 5 U.S.C. 3346(a)(2), which would be unnecessary to specify if the provision merely operated as a tolling mechanism. And Section 3346(a)(2)'s time period is "subject to subsection (b)," *ibid.*, which provides that a person "may continue to serve as the acting officer" for "no more than

210 days" after a first nomination is rejected, withdrawn, or returned, 5 U.S.C. 3346(b)(1); see 5 U.S.C. 3346(b)(2) (analogous provision for second nomination). In other words, when the period of the nomination's pendency ends, the initial 210-day period does not resume running where it might have left off when the first or second nomination was made. Instead, a new 210-day period begins when either nomination period concludes without confirmation. Thus, the provisions work together to provide both "a beginning and ending date" for any period of acting service that is premised on the pendency of a nomination. Pet. App. 8. And that period "stands on its own," *ibid.*, with no necessary link to the 210-day period described in Section 3346(a)(1).

The court of appeals was therefore correct to conclude that petitioners' tolling theory contradicts the "plain text" of the statute. Pet. App. 3. The legislative history points in the same direction, "further prov[ing] that subsection 2 is not solely a tolling provision." *Dahle* v. *Kijakazi*, 62 F.4th 424, 428-429 (8th Cir. 2023), cert. denied, No. 23-173 (Jan. 8, 2024). The report of the Senate Judiciary Committee explained that an acting officer would be able to "resume service" under Section 3346(a)(2) after the President makes a nomination, even if that officer's acting service had previously become time-barred under proposed Section 3346(a)(1)—which then specified an initial period of 150 days rather than 210 days. S. Rep. No. 250, 105th Cong., 2d Sess. 2 (1998) (Senate Report). The availability of that second, independent time period for acting service was a key reason why the initial time limitation would not unduly hamper the operations of the Executive Branch. See *id.* at 19. The Committee observed that "[a]ny inconvenience to the executive branch can be eliminated instantly by the

President's unilateral decision to make a nomination, for once such a nomination is made, the acting officer can resume service." *Ibid.* And other passages of the report were clear about the Committee's expectation that a nomination would allow an acting officer to serve during the pendency of that nomination "even if the nomination is submitted after the 150 days has passed." *Id.* at 14; see *ibid.* (noting that "the acting officer may not serve between the 151st day and the day the nomination is submitted"); *id.* at 17 (noting that the time-bar on acting service after the initial 150-day period applies "until a nomination is forwarded to the Senate"); *id.* at 18 (similar). Similarly, the Committee explained that yet another discontinuous period of acting service will arise whenever the President takes more than 150 days to submit a second nomination "after the rejection, withdrawal or return of the first nomination." *Id.* at 15.

Petitioners suggest (Pet. 10-12) that the statements in the Committee's report repudiating their tolling theory reflected certain language that was eliminated in later versions of the bill. But that suggestion is unfounded. As the Eighth Circuited explained in *Dahle*, the only material "change between the proposed language discussed in the Senate report and the final law was the number of days an individual could serve" under Section 3346(a)(1). 62 F.4th at 429.[2]

[2] Petitioners assert (Pet. 11) that the Committee report was discussing draft statutory language that was ultimately not enacted as part of Section 3348. That language stated that a PAS office would remain vacant after the initial 150-day period "until the President submits a first nomination to the Senate." Senate Report 27 (draft Section 3348(b)(1)(A)) (emphasis omitted). That reading of the report is wrong for two reasons. First, the passages quoted above were discussing the timing rules in Section 3346, not Section 3348. See, *e.g.*, *id.* at 14 (explaining how, "[u]nder new section 3346(a)(2),"

The decision below also accords with the Executive and Legislative Branches' long-established understanding of the FVRA. In 1999, the Office of Legal Counsel in the Department of Justice concluded that Section 3346(a)(2) "permits an acting officer to begin performing the functions and duties of the vacant office again upon the submission of a nomination, even if the 210-day period expired before that nomination was submitted," and the Executive Branch has adhered to that view ever since. *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 68 (1999). The GAO—which is headed by the Comptroller General, an agent of Congress—has shared the same view, explaining that the FVRA "contains a spring-back provision that allows an acting official to resume performing the duties of the office once a first or second nomination is submitted to the Senate for the period that such nomination is pending in the Senate." GAO, B-328888, *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—Department of Energy, Director of the Office of Science* 2 (Mar. 3, 2017), https://www.gao.gov/assets/b-328888.pdf; see also, *e.g.*, GAO, B-302743, *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998*, at 2 (Aug. 19, 2004), https://www.gao.gov/assets/b-302743.pdf (same).

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an individual may resume an expired period of acting service "even if the [first] nomination is submitted after the 150 days has passed"). Second, the enacted version of Section 3348 acknowledges the availability of acting service during the pendency of a first or second nomination by including a different clause—missing from the Committee's draft. See 5 U.S.C. 3348(b) (providing that "the office shall remain vacant," "[u]nless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347").

Accordingly, Berryhill's service as Acting Commissioner of Social Security in July 2018 under the FVRA was consistent with the statute's time limitations. Berryhill had previously served as Acting Commissioner for the 210-day period "beginning on the date the vacancy" in the office of Commissioner was deemed to have occurred under the FVRA's special rule for presidential transitions. 5 U.S.C. 3346(a)(1); see 5 U.S.C. 3349a(b). The President did not submit a nomination for the vacant office during that period, and Berryhill was required to and did cease to serve as Acting Commissioner under the FVRA. See pp. 4-5, *supra*. But when the President later submitted a first nomination to the Senate in April 2018, the FVRA allowed Berryhill to serve in an acting capacity "once" that nomination was made and while it was pending, 5 U.S.C. 3346(a)(2), without regard to her earlier period of acting service.

b. Petitioners renew (Pet. 29) their contention that Section 3346(a) should be understood to create only a single "unified 210-day clock that can be tolled if the President submits a nomination before the clock expires." But petitioners identify no sound basis for giving Section 3346(a)(2) such a limited scope. Petitioners principally rely on this Court's observation in *SW General* that Section 3346(a) "'permits acting service' for '210 days' and 'tolls that time limit while a nomination is pending.'" *Ibid.* (quoting *SW General*, 580 U.S. at 296). The court of appeals agreed with that observation and confirmed that Section 3346(a)(2) allows for a form of "tolling" to extend a period of acting service that begins during the 210-day period. Pet. App. 17. But the court also correctly recognized that Section 3346(a)(2) can operate independently of Section 3346(a)(1)'s 210-day period. See *ibid.* ("Nothing in *SW General* forecloses the

possibility that *in addition* to operating as a tolling provision, § 3346(a)(2) allows another independent period of acting service if a nomination is submitted after (a)(1)'s 210-day period.").[3]

Petitioners next invoke Section 3346's title, which is phrased, in the singular, as "Time limitation." Pet. 29 (citation omitted). But even on petitioners' own unduly narrow interpretation, Section 3346 contains multiple possible time limitations, depending on whether the President makes a nomination. And in any event, the operative text of the FVRA refers to "time limitations" in the plural. Section 3345 states that acting service is "subject to the time *limitations* of section 3346." 5 U.S.C. 3345(a)(1) (emphasis added); see 5 U.S.C. 3345(a)(2) and (3) (same); cf. *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947) (observing that "headings and titles are not meant to take the place of the detailed provisions of the text").

Petitioners also rely (Pet. 30) on Section 3346(a)'s reference to "the person serving as an acting officer as described under section 3345." 5 U.S.C. 3346(a). That language cannot be read to mean that Section 3346(a)(2) is available only to extend the permissible period of acting service for a person who is "*currently* serving" when the President makes a first or second nomination. Pet. 30 (citation omitted). The "person serving" language on which petitioners rely appears in the text of Section

[3] Additionally, the court of appeals noted that "Section 3346 was not at issue in *SW General*," Pet. App. 17, which instead concerned eligibility for acting service under Section 3345. The court further noted that this Court's "passing" reference to tolling in *SW General* occurred in the context of "a brief overview of the FVRA" and was offered as a description of how the time periods operate in "'most cases'" rather than all cases. *Ibid.* (quoting *SW General*, 580 U.S. at 296) (emphasis omitted).

3346(a) preceding *both* Paragraphs (1) and (2) and thus should apply equally to both. If petitioners were correct that an individual must already be "serving" in an acting capacity at the time of a nomination in order to qualify to serve further under Section 3346(a)(2), then it would follow that an individual must likewise already be presently "serving" to qualify to serve under Section 3346(a)(1).

As the court of appeals explained, petitioners' must-be-currently-serving interpretation would result in an "impossibility" because no one could already be serving in an acting capacity before the relevant vacancy occurs. Pet. App. 15 (quoting *Dahle*, 62 F.4th at 428) (emphasis omitted). At a minimum, the only person who might be deemed to be currently serving as an acting officer under the FVRA at the moment a vacancy first occurs would be an incumbent "first assistant" to the vacant office, whose acting service may occur by operation of law under 5 U.S.C. 3345(a)(1). Cf. Pet. 34 (arguing that first assistants become acting officers under the FVRA "'automatic[ally]'" and are therefore examples of persons "presently serving" when the 210-day clock begins) (citation and emphasis omitted).[4]

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[4] Petitioners also invoke (Pet. 33-34) the special rules for applying the 210-day clock to vacancies that occur during presidential transitions or when Congress has adjourned. See 5 U.S.C. 3346(c), 3349a. According to petitioners (Pet. 33), individuals who serve in an acting capacity under the FVRA during periods implicating those rules could be viewed as already serving "*before* the 210-day period begins," thus avoiding any logical impossibility. But in the context of the FVRA as a whole, those special rules operate as exceptions to the general application of the 210-day period described in Section 3346(a)(1). If petitioners' reading makes sense only with respect to vacancies that arise during those exceptional periods, that reading must be incorrect.

The FVRA, however, plainly contemplates that the President may "direct" someone else who is eligible under Subsections (a)(2) or (3) to perform the functions and duties of the vacant office in an acting capacity "notwithstanding" the default role of the first assistant. 5 U.S.C. 3345(a)(2) and (3). The court of appeals recognized that petitioners' interpretation would render those provisions "nugatory" in many circumstances, effectively foreclosing the President from changing the identity of the acting officer during any periods when the FVRA authorizes acting service. Pet. App. 15. Such an interpretation would violate the "'cardinal principle of statutory construction' that statutes ought to be construed such that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Ibid.* (quoting *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001)).

Seeking to avoid that problem, petitioners maintain (Pet. 35) that when the President exercises his authority under Sections 3345(a)(2) or (3) to direct acting service by a person other than the first assistant to the vacant PAS office, that person "inherits the [first] assistant's proper acting service which existed right at the moment § 3346(a)'s 210-day period began." But the statute says nothing of the sort. And if "the person" to whom the statute is being applied must have already been serving in an acting capacity under the FVRA in order for either of the time periods in Section 3346(a) to be available, 5 U.S.C. 3346(a), then the President's authority to designate alternatives to a first assistant would be largely a dead letter.

The court of appeals correctly recognized that the reference in Section 3346(a) to someone "serving as an acting officer as described under section 3345," 5 U.S.C. 3346(a), instead "functions to specify that § 3346's time

limitations apply to acting officers whose authority derives from 5 U.S.C. § 3345 rather than some other statute." Pet. App. 15 (emphasis omitted). Other statutes may also authorize acting service within particular agencies—such as the provision permitting the Deputy Commissioner of Social Security to serve as Acting Commissioner "during the absence or disability of the Commissioner," 42 U.S.C. 902(b)(4). Section 3346(a) does not govern the time period for acting service under such non-FVRA provisions because it applies only to acting officers "serving . . . under section 3345." Pet. App. 16 (quoting 5 U.S.C. 3346(a)).

Petitioners similarly err in contending that the conjunction "or" implies that a person may serve under Section 3346(a)(1) or (2) "but not both." Pet. 30 (citations and emphasis omitted). That construction would be inconsistent with petitioners' own understanding that the same individual can serve for both time periods, as long as the President submits a nomination during the initial 210-day period. Instead, the statute uses "or" here in that word's recognized sense of "A or B, or both." Pet. App. 10 (citation omitted). The court of appeals illustrated that common usage with the following example: "When a waiter offers a patron 'coffee or dessert,' an ordinary English speaker understands that he can have both coffee *and* dessert if he so chooses." *Ibid.*; see Bryan A. Garner, *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011) ("Authorities agree * * * that *or* has an inclusive sense as well as an exclusive sense."). Contrary to petitioners' assertion (Pet. 33), giving "or" such an inclusive sense does not render the term "surplusage." The term could not be eliminated without significantly altering the meaning of Section 3346(a). What petitioners appear to mean by "surplus-

age" (*ibid.*) is that Congress could have substituted the word "and" instead. But properly construed, Section 3346(a) sets forth two time periods, each of which "may be employed without the other," *i.e.*, disjunctively. Pet. App. 9 (citation omitted). The conjunction "or," used in its inclusive sense, is the natural choice to capture that relationship: A person may serve in an acting capacity under the FVRA during the 210-day period following a vacancy *or* while a first or second nomination is pending —or both. See *id.* at 9-10; see also p. 11, *supra*.

Petitioners are also mistaken to rely (Pet. 30-31) on the references in Section 3346(b) to a person who "continue[s] to serve as the acting officer" for a 210-day period after a first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. 3346(b)(1); see 5 U.S.C. 3346(b)(2) ("may continue to serve"). If anything, that language affirmatively rebuts petitioners' interpretation. It shows that, where Congress wished to specify a time period available *only* to "continue" a period of acting service that had already commenced, it did so expressly. *Ibid.* "But crucially, Congress did *not* use the phrase 'may continue to serve' in § 3346(a)(2)" itself, which addresses the period that is relevant here: the one that follows the *submission* of a nomination. Pet. App. 12. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Id.* at 11-12 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)) (brackets omitted).

Nor does the language of Section 3346(c) support petitioners' interpretation. Section 3346(c) refers to "the 210-day period under subsection (a)." 5 U.S.C. 3346(c).

Petitioners read (Pet. 31) that as suggesting that Subsection (a) concerns only a single time period keyed to the initial 210 days that follow a vacancy. But that inference is unsound. Section 3346(c) refers to the 210-day period "under subsection (a)" in order to distinguish that period from the other 210-day periods specified in Subsection (b)—*i.e.*, the 210 days following a first withdrawn, rejected, or returned nomination, see 5 U.S.C. 3346(b)(1), and the 210 days following a second such nomination, see 5 U.S.C. 3346(b)(2)(B).

Finally, petitioners invoke (Pet. 31) a provision elsewhere in the FVRA providing that, "[i]f 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." 5 U.S.C. 3348(c). Petitioners assert that Section 3348(c) only "makes sense" on their reading of the statute, Pet. 31 (citation omitted), but they fail to explain why. Section 3348(c) specifies how to calculate any of the three 210-day periods in Section 3346 described above. And the overall thrust of Section 3348(c) is to protect the President's authority, not to limit it. It *extends* any 210-day period when the Senate is not available to consider a nomination on day 210.

2. In any event, petitioners do not identify any sound basis for further review under this Court's traditional criteria. See Sup. Ct. R. 10. Petitioners assert (Pet. 20) that the "federal courts" are divided on the question presented. But the only two courts of appeals to have considered the question have both concluded—unanimously—that under the "clear" text of Section 3346(a), "[a]n acting officer may serve while a nomination is pending in accordance with § 3346(a)(2) regard-

less of whether her service under § 3346(a)(1) expired before the nomination was submitted." Pet. App. 20; accord *Dahle*,62 F.4th at 427-428.

The decisions that petitioners identify as representing the "the flip side" (Pet. 22) largely consist of unpublished district-court opinions from the District of Minnesota that preceded the Eighth Circuit's decision in *Dahle*, which is now controlling on the issue for that district. See, *e.g.*, *David A.P.* v. *Kijakazi*, No. 20-cv-1586, 2023 WL 6050243, at *2 (D. Minn. Sept. 15, 2023) (Leung, M.J.) (recognizing as much). Petitioners also identify (Pet. 22) two other district-court decisions adopting their view after *Dahle* or the decision below. But those two decisions are outliers and do not suggest any substantial "confusion" (Pet. 23) that would support further review even in the absence of a circuit conflict. The "great majority" of district courts to have considered the question have rejected petitioner's tolling theory. *Spain* v. *Social Sec. Admin.*, No. 21-cv-2367, 2023 WL 1786722, at *6 (E.D. La. Jan. 18, 2023) (collecting cases); cf. Pet. App. 20 (declining to depart from the consensus view of the Eighth Circuit and "the growing number of district courts" to have addressed the same FVRA question).[5]

[5] Social Security claimants have raised similar challenges to Berryhill's acting service in appeals that are pending in the Third, Fifth, and Sixth Circuits. See *Gaiambrone* v. *Commissioner of Soc. Sec.*, No. 23-2988 (3d Cir.) (appellant's opening brief filed Jan. 3, 2024); *Seago* v. *O'Malley*, No. 23-40001 (5th Cir.) (oral argument held Nov. 6, 2023); *Fortin* v. *Commissioner of Soc. Sec.*, No. 23-1528 (6th Cir.) (appellee's brief filed Dec. 18, 2023).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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