NO. 15-1251

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MORTON ROSENBERG IN SUPPORT OF RESPONDENT

D. JOHN SAUER
Counsel of Record
MICHAEL C. MARTINICH-SAUTER
JAMES OTIS LAW GROUP, LLC
12977 N. Forty Drive, Suite 214
St. Louis, Missouri 63141
(314) 682-6067
jsauer@jamesotis.com
mmartinich@jamesotis.com
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Morton Rosenberg served as an analyst in the American Law Division of the Congressional Research Service for 35 years, from 1973 until 2008. Among numerous other topics, Mr. Rosenberg often wrote research publications and testified before Congress regarding Executive appointments and related issues. In particular, Mr. Rosenberg testified before the Senate Governmental Affairs Committee during the debate of the Federal Vacancies Reform Act ("FVRA"), and a publication written by Mr. Rosenberg was incorporated into the Committee record. Mr. Rosenberg is considered a leading authority on the FVRA and its legislative history.

In its Opening Brief, Petitioner National Labor Relations Board ("Board") cited Mr. Rosenberg's publications numerous times to support its arguments regarding the FVRA's legislative history and congressional purpose. *See* NRLB Br., at 6, 7, 8, 51. Mr. Rosenberg believes that the Board has not drawn the proper conclusions from his research, and that the Board's position in this case conflicts with the background and purposes of the FVRA and threatens

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that, in consultation with *amicus*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represent that all parties have consented to the filing of this brief. Counsel for both Petitioner and Respondent have provided counsel for *amicus* with their written consent to the filing of this brief.

the critical separation-of-powers interests that Congress enacted the statute to preserve.

SUMMARY OF THE ARGUMENT

I. The Court of Appeals correctly concluded that the limitation imposed by 5 U.S.C. § 3345(b)(1) applies to all acting officials serving under § 3345(a), not merely to first assistants serving in an acting capacity under § 3345(a)(1). First, both Senate practice and the legislative history of the Federal Vacancies Reform Act ("FVRA") show that Congress did not intend to impose less stringent restrictions on acting officials designated under § 3345(a)(2)—that is, PAS officials who have already received Senate confirmation to a different PAS office—than the restrictions applicable to first assistants serving under § 3345(a)(1).

A. The Board contends that Congress had little reason to apply § 3345(b)(1) to acting officials whom the Senate has already confirmed for another PAS position. In the Board's view, the prior confirmation suggests that the Senate has already concluded that the individual is fit to hold a PAS office, reducing concerns that the President may designate that individual as an acting official in order to evade the Senate's advice-and-consent role. But Senate confirmation decisions reflect a particularized judgment that a nominee should serve in the specific PAS office for which she has been nominated. The Senate does not view its confirmation decisions as a broad judgment that a nominee is appropriate for *all* PAS offices, in the abstract. Thus, the fact that the Senate has confirmed an individual

for one PAS office does not imply that the Senate is necessarily more comfortable with that individual serving in an acting capacity while awaiting re-confirmation than it would be with a former first assistant.

B. At the time of the FVRA's enactment, the Senate was deeply concerned with attempts by the Executive to move Senate-confirmed PAS officials between PAS positions without seeking Senate re-confirmation. These issues were discussed extensively in the Senate Committee Hearings on the FVRA. And several of the most frequently cited examples of Executive conduct necessitating the enactment of the FVRA involved officials who had received Senate confirmation for one PAS office and then had assumed another PAS office on an acting basis. Thus, the FVRA's legislative history strongly supports the conclusion that Congress intended for § 3345(b)(1)'s limitation to apply to acting officials designated under § 3345(a)(2).

II. Second, the Board claims that applying § 3345(b)(1)'s limitation to acting officials designated under § 3345(a)(3) would undermine the broad congressional purpose of encouraging and facilitating the nomination of career civil servants to PAS positions. In particular, the Board contends that the interpretation adopted by the Court of Appeals would hinder this broad congressional purpose, because it would prevent career civil servants from simultaneously serving as both an acting official under § 3345(a)(3) and as the nominee for the same PAS office on a permanent basis. The legislative history of the FVRA indicates both that the Board overstates the degree to which the application of

§ 3345(b)(1) would hinder the purported congressional purposes, and also that the Board overstates the breadth of the congressional purposes underlying § 3345(a)(3).

A. The legislative history of the FVRA indicates that Congress expressly contemplated that the statute might force the President to choose between designating a qualified candidate to serve on an acting basis under § 3345(a), or nominating that person for the position on a permanent basis. Rather than viewing this choice as a severe constraint on the President's ability to nominate qualified officials, the Senate Committee concluded that this effect would not disturb the President's nominating powers "in any way." S. Rep. 105-250 (1998), at 13. Thus, far from yielding consequences that undermine Congress's intent, the interpretation adopted by the Court of Appeals present the President with precisely the choice that Congress contemplated—and approved.

B. The legislative history of the FVRA suggests that the congressional purposes underlying § 3345(a)(3) are narrower and more modest than the Board argues. Congress did not view § 3345(a)(3) as a broad means of facilitating and encouraging the nomination of career civil servants to PAS positions. Instead, Congress primarily viewed § 3345(a)(3) as addressing situations (particularly at the beginning of a new presidential Administration) where there was no first assistant to the vacant office, and designating a PAS official who had already received Senate confirmation for another PAS office would be impractical, either because no such official is available or because designating such an official

would itself create a new vacancy. Moreover, as even some of § 3345(a)(3)'s strongest proponents emphasized, service under that Subsection was intended to be *temporary*. Applying § 3345(b)(1)'s limitation would not hinder this limited congressional purpose.

III. The Board claims that its interpretation of § 3345(b)(1) derives support from the fact that Congress allegedly has not strongly opposed past Executive action that violates the FVRA under the interpretation adopted by the Court of Appeals. The Board further argues that its interpretation finds support in formal opinions issued by the Office of Legal Counsel ("OLC") and the General Accounting Office ("GAO"). Neither of these contentions supports the Board's position in this case.

A. The alleged lack of strong congressional opposition to the Executive's past violations of the FVRA does not excuse those violations, nor does it signal that Congress approves the Executive's interpretation of the statute. Congress enacted the FVRA to preserve the critical separation of powers under the Appointments Clause. Congressional inaction cannot excuse violations of these sorts of structural limitations, which exist to protect broad liberty interests of the People, not merely the prerogatives of the Senate. In addition, congressional inaction on violations of the FVRA likely reflects the fact that Congress faces numerous other pressing concerns, not that Congress approves of Executive conduct that conflicts with the plain language of the FVRA.

B. The OLC and GAO opinions cited by the Board do not warrant deviating from the plain

language of the statute. The Court does not defer to these sorts of formal opinions, and—as with a legal brief or scholarly publication—it accords them weight only to the extent that they are persuasive. Here, the OLC opinion on which the Board principally relies does not provide any careful analysis of the statutory text, instead presenting only a cursory and conclusory statement that is not persuasive. The GAO opinion cited by the Board provides even less support. Indeed, it is unclear that the GAO opinion addresses the Board's interpretation at all. Thus, these opinions provide no basis for deviating from the plain language of the statute. Moreover, the FVRA represents, in large part, Congress's rejection of a series of OLC opinions adopting aggressive interpretations of the Vacancies Act (the FVRA's predecessor) that undermined the Senate's advice-and-consent role. Against this statutory background, relying on the conclusory analysis offered by OLC here would be especially anomalous.

IV. Fourth, the Board contends that Congress has afforded the President "substantial latitude" regarding acting officials since the beginning of the Nation. To the contrary, for more than two centuries, Congress has strictly limited the President's designation of acting PAS officials in order to preserve the Senate's advice-and-consent role.

ARGUMENT

The Federal Vacancies Reform Act ("FVRA") permits the President to select from three classes of persons to temporarily fill, on an acting basis,

positions that require the advice and consent of the Senate under the Appointments Clause. 5 U.S.C. § 3345(a). The President may choose to allow the current first assistant to the vacant office serve as the acting official (under § 3345(a)(1)), or the President may choose to fill the office on a temporary, acting basis with a current PAS official who has already received Senate confirmation for a different PAS position (under § 3345(a)(2)) or a longstanding civil servant already working within the agency in which the vacancy arose (under § 3345(a)(3)). *Id.* If the President wishes to nominate an acting official to serve as the permanent holder of that office, the FVRA imposes an additional limitation: "Notwithstanding subsection (a)(1)," a person may not serve simultaneously as an acting officer under the FVRA and the nominee for the same PAS office on a permanent basis, unless the nominee has served as first assistant for at least 90 days in the year prior to the vacancy. 5 U.S.C. § 3345(b)(1)(A)-(B).

This case turns on the narrow interpretive question whether the limitation imposed by § 3345(b)(1) ("Subsection (b)(1)") applies to acting officials designated under § 3345(a)(2) ("Subsection (a)(2)") and § 3345(a)(3) ("Subsection (a)(3)"), or only to those acting officials serving under § 3345(a)(1). As the Court of Appeals explained, the statutory text clearly provides that Subsection (b)(1)'s limitation applies to *all* acting officials serving pursuant to § 3345(a). *SW Gen., Inc.* v. *NLRB*, 796 F.3d 67, 72-78 (D.C. Cir. 2015). Faced with the textual weakness of its position, the Board relies heavily on its claim that the interpretation adopted by the Court of Appeals

conflicts with the legislative history and the congressional purposes underlying the FVRA.

Contrary to the Board's assertions, the FVRA's legislative history and the congressional purposes underlying the statute actually *support* the interpretation adopted by the Court of Appeals. Careful consideration of these sources confirms the plain meaning of the statute and supports affirming the judgment of the Court of Appeals.

I. Senate Practice and the Legislative History of the FVRA Make It Entirely Reasonable for Congress to Have Applied the Same Limitations on Acting PAS Officials Designated under Subsection (a)(2) as It Applied to First Assistants Serving under Subsection (a)(1).

The Board contends that it is "implausible" that Congress intended Subsection (b)(1)'s limitation to apply to designees under Subsection (a)(2). NLRB Br., at 39. According to the Board, "[a] Senate-confirmed official, even at another agency, has been found by the Senate to be qualified to serve in a high-ranking government position." *Id.* at 43 n.5. And because an acting official designated "under Subsection (a)(2) already serves in a PAS position, that official is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role." *Id.* at 42. This theory misunderstands both the Senate's view of its confirmation decisions and the legislative history of the FVRA.

A. Senate confirmation decisions reflect a judgment that an individual may serve in a particular PAS office, not a broad judgment that the individual is fit to serve in PAS offices generally.

Contrary to the Board's assertions, the Senate views its confirmation decisions as position-specific determinations that a nominee can serve in a particular PAS office, not a general judgment that the nominee is qualified for *any* "high-ranking government position." NLRB Br., at 43 n.5. The Senate does not view PAS offices and PAS officials as "fungible." "The Senate's advice and consent prerogative is particular, not general; its scrutiny is narrow and focused rather than broad and encompassing." Morton Rosenberg, Congressional Research Service, *Requirement of Reconfirmation by the Senate When the Executive Seeks to Shift an Officer from One Advice and Consent Position to Another*, at 20 (Oct. 11, 1995) ("*Requirement of Reconfirmation*"). When the Senate considers whether to confirm a nominee, it addresses only whether the nominee would be appropriate for the specific office to which she has been nominated. *See id.* A number of important practical and institutional interests underlie this particularized approach to confirmations.

First, the requisite qualifications and experience vary significantly between PAS positions. "Nominees . . . are expected to have acquired the appropriate training, insight, and sensitivity for service in a specific government office." G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL

APPOINTMENTS 97 (1981). The background and experience that an official needs to succeed differs significantly between PAS positions. While a nominee's background may make her highly qualified to serve in a position within the Department of Energy, for example, her background might not make the same nominee qualified to head the Office of Legal Counsel. Moreover, "[s]ome positions, such as the Director of the National Institutes of Health or the Director of National Intelligence, may require more qualified officials than other jobs." Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 947 (2009) ("*Vacant Offices*"). Thus, the Senate's confirmation of a PAS official reflects a particularized judgment that the nominee was qualified for the specific position to which she was nominated.

Second, when determining whether to confirm a nominee, the Senate often closely scrutinizes whether the nominee has any "predispositional conflicts" that might hinder her service in the position. MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* at 98-109; ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 183-85 (1983). Predispositional conflicts include aspects of a nominee's background that might limit—or be perceived to limit—the nominee's ability to discharge her duties fairly and effectively. *See id.* These predispositional conflicts often vary significantly between PAS offices, because many PAS offices relate to markedly different substantive areas of law and face markedly different incentives. For example, if the President were to nominate a long-time coal executive as EPA Administrator, some Senators

might question whether the nominee's background in the coal industry could make the nominee less open—whether consciously or unconsciously—to regulating greenhouse-gas emissions. But the nominee's background might not suggest any predispositional conflicts if she were nominated as a Deputy Secretary of Education. The Senate's judgment that a nominee does not have any disqualifying predispositional conflicts typically relates only to the specific office for which the nominee was confirmed.

Third, the Senate often uses confirmation hearings to extract policy commitments from nominees. Senate "committees require nominees, as a condition of confirmation, to make policy-related promises during confirmation hearings." MAASS, CONGRESS AND THE COMMON GOOD, *supra* at 185; *see also* MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* at 134 (noting that committees "may require the nominee, as a condition of his confirmation, to make policy-related promises to the committee during his confirmation hearing"); ROBERT A. KATZMANN, JUDGING STATUTES 24 (2014) (noting that Senators often use confirmation hearings "to press nominees to commit to interpreting statutes in particular ways as a condition for affirmative votes"); MICHAEL GERHARDT, THE FEDERAL APPOINTMENT PROCESS 175 (2000) ("The confirmation process has provided excellent opportunities for senators . . . to extract promises (in public hearings or private meetings) from nominees to nonjudicial offices in exchange for their confirmation."). This practice can enable "Senators [to] influence policy through the confirmation process." Elizabeth Rybicki, Congressional Research Service, *Senate*

Confirmation of Presidential Nominations: Committee and Floor Procedure 1 (Mar. 9, 2015); *see also* GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra* at 175. These policy-related commitments differ significantly between PAS offices, both because various PAS offices address markedly different substantive areas of policy and because various PAS offices have differing degrees of policy-making authority. Thus, the Senate's confirmation of a nominee reflects a judgment specific to the office for which the nominee was confirmed.

Fourth, the Senate scrutinizes nominations to some PAS offices far more closely than nominations to other offices. Commentators have noted "the tendency of senators to question or oppose nominations depending on the importance of the offices to which they are made." GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra* at 171-72. "Among the executive branch positions, nominees for policymaking positions are more likely to be examined closely . . . than nominees for non-policy positions." Rybicki, *Senate Confirmation of Presidential Nominations*, *supra* at 1. Thus, the Senate's confirmation of a person to a non-policy-making PAS position does not necessarily reflect a judgment that the person should hold a policy-making position. Similarly, the substantive areas of law within the purview of a PAS office often affect the level of scrutiny faced by a nominee. *See* Burdett Loomis, *The Senate: An "Obstacle Course" for Executive Appointments?*, *in* INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 167 (2001 G. Calvin Mackenzie, ed.) (noting that nominations to certain

departments may receive greater scrutiny from the Senate than nominations to other departments). "Some positions . . . deal with more controversial issues than others . . . ." O'Connell, *Vacant Offices*, 82 S. Cal. L. Rev. at 969. For example, nominations to positions relating to civil-rights matters often attract considerably more scrutiny than most other positions. *See* GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra*, at 170-72. The Senate might devote limited attention to a nomination to the office of General Counsel for the Department of Commerce, but it would devote significant more attention if the same person were nominated to serve as a Commissioner of the Equal Employment Opportunity Commission.

For the reasons described, the Senate's confirmation decisions reflect a particularized judgment that a nominee is appropriate for the specific PAS office for which she has been confirmed. *See* Rosenberg, *Requirement of Reconfirmation*, *supra* at 20. Contrary to the Board's assertion, the Senate does not view its confirmations as a broad, decontextualized judgment that a person is "qualified to serve in a high-ranking government position." NLRB Br., at 43 n.5. While the Senate may have confirmed a person to one PAS position, "it is entirely conceivable that if [the same person] were nominated to [another PAS position], she might be rejected for any number of reasons, political or otherwise, in spite of her previous confirmation for [her current] post." Rosenberg, *Requirement of Reconfirmation*, *supra* at 20. Thus, there is no basis to conclude that Congress intended acting officials designated under Subsection

(a)(2) to be accorded greater flexibility than any other acting official.

B. At the time of the FVRA's enactment, the Senate was deeply concerned with attempts by the Executive to move Senate-confirmed officials to new PAS positions without Senate re-confirmation.

The Board's contention here that Senate confirmation decisions reflect a broad judgment regarding a nominee's qualification for PAS offices in general echoes a theory of the "fungibility" of PAS officials that the Executive has often invoked—and that the Senate has just as often opposed. The Senate Governmental Affairs Committee was keenly aware of and focused on this "fungibility" theory during the debate and drafting of the FVRA. The FVRA's legislative history substantially undermines the Board's position on this issue.

Under the Vacancies Act, on several occasions, the Executive sought to shift Senate-confirmed officials from one PAS position to another without Senate reconfirmation. In one particularly noteworthy case, the Department of Labor ("DOL") sought to move Anne H. Lewis from her Senate-confirmed role as Assistant Secretary for Public Affairs to the distinct PAS office of Assistant Secretary for Policy. Morton Rosenberg, Congressional Research Service, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998) ("*Validity of Designation*"), incorporated at S. Hrg.

105-495 (Mar. 18, 1998), at 97-98; *see also generally* Rosenberg, *Requirement of Reconfirmation*, *supra*. Relying on an OLC opinion, DOL took the position that Ms. Lewis did not require Senate confirmation to this new role, because she had already received Senate confirmation for the PAS office that she currently held. *See id.*; *Reassignment of Assistant Secretary of Labor Without Senate Reconfirmation*, 19 Op. OLC 274 (Nov. 2, 1995), *at* https://www.justice.gov/sites/default/files/olc/opinions/1995/11/31/op-olc-v019-p0274_0.pdf. Senator Kassebaum, Chairman of the Senate Labor Committee, "rejected the argument, specifically objecting to the challenge to the Committee's confirmation prerogative." Rosenberg, *Validity of Designation*, S. Hrg. 105-495, at 97. After a brief standoff, the Executive backed down. The President nominated Ms. Lewis as Assistant Secretary for Policy, and the Senate confirmed her to that position. *See* 141 Cong. Rec. S19,289 (Dec. 22, 1995).

The Executive's past reliance on this fungibility theory—and the Senate's resistance to that theory—played an important role in the debate from which the FVRA emerged. The Senate Committee that reported the FVRA received thorough testimony regarding past invocations of the fungibility theory. *See* S. Hrg. 105-495 (Mar. 18, 1998), at 43-44, 48-51; S. Rep. 105-250 (1998), at 10 (noting that *amicus* "also spoke of the problem of transferring assistant secretaries from one position to another without their undergoing Senate reconfirmation"). The standoff between Senator Kassebaum and DOL was specifically raised during the Committee hearing. *See* S. Hrg. 105-495, at 44.

And later in that hearing, a Committee member emphasized the office-specific nature of the Senate's confirmation decisions, observing: "How else do you know whether the [nominee's] qualifications are even relevant?" *Id.* at 51.

Moreover, during the debates over the FVRA, several frequently invoked examples of past encroachments on the Vacancies Act involved PAS officials who had been reassigned to other PAS positions without reconfirmation. Several Senators mentioned the Acting Solicitor General Walter Dellinger. *See, e.g.*, S. Hrg. 105-495, at 38 ("Another example [of violations of the Vacancies Act] is the Solicitor General."); 144 Cong. Rec. S6,416 (June 16, 1998) (identifying Mr. Dellinger's service as Solicitor General as among the "prominent examples of how the [Vacancies] Act was being ignored"). The Senate had previously confirmed Mr. Dellinger as the Assistant Attorney General in charge of OLC. But Mr. Dellinger subsequently assumed the vacant office of Solicitor General and served for an entire term of the Supreme Court without being re-nominated for that position. Rosenberg, *Validity of Designation*, *supra*, S. Hrg. 105-495, at 66. While the controversy surrounding Mr. Dellinger's role as Acting Solicitor General focused largely on the duration of his service, it is clear that there was frustration within the Senate that "no effort was made to seek Senate confirmation" for this new, more senior position. S. Hrg. 105-495, at 38.

In addition, one of the key factors that spurred the enactment of the FVRA was the decision in *Doolin Security Savings Bank* v. *Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (holding that the 120-

day limit imposed by the Vacancies Act on acting officials did not begin until an acting official assumed the vacant office). S. Rep. 105-250, at 5-9 (discussing the significance of the *Doolin* decision). *Doolin* involved the "designat[ion of] a Senate-confirmed official from the Department of Housing and Urban Development to serve as acting director" of the Office of Thrift Supervision. *Id.* at 6; *see also* Morton Rosenberg, Congressional Research Service, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 7-8 (Nov. 2, 1998) ("*New Vacancies Act*"). Senators repeatedly identified the *Doolin* decision as evidence of the need to significantly strengthen the FVRA. *See, e.g.*, S. Rep. 105-250, at 5-9, 11, 12, 20.

The frequent references to Mr. Dellinger and the *Doolin* decision during debate of the FVRA demonstrate that the Senate viewed designations under Subsection (a)(2) as potential opportunities for the Executive to seek to evade the Senate confirmation process. Such designations are not inherently suspect; both the Vacancies Act and the FVRA have expressly permitted them.[2] But neither

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[2] However, several Senators did express practical concerns about widespread designation of acting officials under Subsection (a)(2). These Senators noted that when Senate-confirmed officials are designated to fill a different PAS office on an acting basis, the additional duties of that new position may either interfere with their ability to discharge the office for which the Senate confirmed them or force them to abandon that post altogether. *See, e.g.*, 144 Cong. Rec. S11,032 (Sept. 28, 1998) (Sen. Glenn) ("[D]o we really want a President to designate a PAS from HUD to assume the additional responsibilities of a PAS position at Department of Education? Or vice versa? Do we

are such designations inherently innocuous, as the Board suggests. *See* NLRB Br., at 42 (contending that an acting official designated under Subsection (a)(2) "is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role"). As the Ninth Circuit noted, "[a] designation of a prior Senate-confirmed officer to the acting position could just as easily be used for 'manipulation' as a first assistant of insufficient tenure." *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 561 (9th Cir. 2016). Thus, the FVRA's legislative history undermines the Government's contention that there was no reason for Congress to apply Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(2).

II. The FVRA's Legislative History Indicates That Applying Subsection (b)(1)'s Limitation to Acting Officials Designated Under Subsection (a)(3) Comports with the FVRA's Objectives.

The Board claims that applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) "would undermine the statute's goal of enabling service by career officials that Members of Congress had described as especially qualified—by preventing such individuals from serving [on an acting basis] if the President also regarded them as most qualified to occupy the PAS position on a permanent basis." NLRB Br., at 23. The Board's

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want these folks who already have plenty of responsibility as it is to assume the added responsibility of a second position?").

position both overstates the effect that Subsection (b)(1) would have on the President's ability to nominate PAS officials, and overstates the breadth of the congressional purposes underlying Subsection (a)(3).

A. Congress specifically contemplated that the FVRA might force the president to choose between designating a particular individual as an acting official and nominating that individual for the same PAS office on a permanent basis, and Congress concluded that such an effect would not disturb the President's ability to nominate "in any way."

The Board claims that applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) would unreasonably limit the President's ability to nominate career civil servants to PAS positions, because it would prevent such individuals from simultaneously serving as an acting official and as a nominee for the same office on a permanent basis. NLRB Br., at 23, 39-40. In the Board's view, applying Subsection (b)(1) to such officials would present the President with a "Hobson's choice": designate the career civil servant to the PAS office on an acting basis, allowing her to hold the position immediately but preventing her from holding it permanently; or designate a less qualified acting official to hold the office now, while nominating the more qualified civil servant for the position on a permanent basis. *Id.* at 41. The Board contends that this dilemma conflicts with the flexibility that

Congress intended the FVRA to provide the President.

To the contrary, the Senate Committee Report regarding the FVRA demonstrates that Congress specifically recognized that the statute might present the President with such a dilemma. But rather than characterizing it as an untenable Hobson's choice, Congress concluded that it did not impinge on the President's nomination power at all. To the extent legislative history is viewed as authoritative, this Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (quotation and brackets omitted). "Committee Reports are more authoritative than comments from the floor . . . ." *Id.* at 76 (quotation omitted). The weight accorded to Committee Reports reflects the fact that such Reports are often the primary source on which Members of Congress rely when considering a bill. *See* KATZMANN, JUDGING STATUTES, *supra*, at 17-22, 130 n.5.

The Committee Report here demonstrates that the Senate Committee specifically contemplated that the FVRA might force the President to choose between designating a particular individual as an acting official under Subsection (a) and nominating that individual for the same office on a permanent basis. And the Committee expressly concluded that such an effect would not limit the President's ability to nominate. Under the version of the FVRA before the Committee, a first assistant could not

simultaneously serve as the acting officer and the permanent nominee unless he or she had been first assistant for at least 180 out of the preceding 365 days. *See* S. Rep. 105-250, at 25; *see also id.* at 13.

The Committee recognized that this provision would have precisely the effect that the Board complains of here. "If the President nominates the former first assistant, who served for less than 180 of the 365 days preceding the vacancy, to the permanent position, the first assistant must cease performing the functions and duties of the office." S. Rep. 105-250, at 13. While the Committee acknowledged this effect of the predecessor to Subsection (b)(1), the Committee did not view that effect as a vice. The Committee emphasized that "***[t]he President's power to nominate is not disturbed in any way***; however, if he chooses to nominate a brief-serving first assistant, that person may no longer serve as the acting officer." *Id.* (emphasis added). This conclusion did not rest on any considerations specific to first assistants. *See id.* The same analysis would apply to acting officials designated under Subsections (a)(2) or (a)(3). While the Minority Members of the Committee criticized several aspects of the original version of the FVRA, none expressed any concern that this limitation on simultaneous service as an acting official and a permanent nominee would hinder the President's ability to nominate PAS officials or otherwise undermine any "flexibility" intended by the FVRA. *See id.* at 30-33 (Additional Views of Senators Glenn, Levin, Lieberman, Cleland, and Torricelli); 34-36 (Minority Views of Senators Durbin and Akaka).

Applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3)

does not prevent the President from nominating qualified career civil servants to PAS positions. The President remains entirely free to designate such persons to occupy PAS positions temporarily under Subsection (a)(3), and the President remains entirely free to nominate such persons to PAS positions on a permanent basis. The President simply cannot do both at the same time. In this situation, "[t]he President's power to nominate in not disturbed in any way . . . ." S. Rep. 105-250, at 13. The Senate Committee expressly contemplated—and expressly approved—the effect that the Board here describes as an impermissible Hobson's choice. NLRB Br., at 41. Thus, the interpretation of Subsection (b)(1) adopted by the Court of Appeals fully accords with the Senate Committee's understanding of how the FVRA would operate. The far broader interpretation urged by the Board would not only depart from the express understanding of the Senate Committee, but also threaten to afford the President so much "flexibility" that he or she could entirely avoid Senate confirmation for many long-serving holders of PAS offices, thereby pushing the outer limits of the Constitution's separation-of-powers provisions. *See Mistretta* v. *United States*, 488 U.S. 361, 383 (1989) (describing the Court's "separation-of-powers inquiry as focusing on the extent to which a provision of law prevents [a Branch] from accomplishing its constitutionally assigned functions" (quotation and brackets omitted)). The Court should not needlessly interpret the FVRA to raise such serious constitutional problems, especially when such an interpretation conflicts with both the plain text of the statute and the intent of the Senate Committee.

B. The Board overestimates the breadth of the congressional purposes underlying Subsection (a)(3).

On the Board's telling, Congress added Subsection (a)(3) for the broad purpose of facilitating and encouraging the appointment of career civil servants to PAS positions. NLRB Br., at 23, 39-40. Applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) would undermine this broad purpose by forcing the President to choose between designating such a person as an acting official or nominating the person to the PAS office on a permanent basis. *Id.*

In reality, however, the primary congressional purposes underlying Subsection (a)(3) were substantially narrower and more modest that the Board suggests. The version of the FVRA reported by the Senate Governmental Affairs Committee permitted only two categories of individuals to temporarily fill vacant PAS offices: a longstanding first assistant to the vacant office or a PAS official who had already received Senate confirmation for another position. S. Rep. 105-250, at 25. In the Committee Report, Senators Durbin and Akaka identified a significant potential problem with limiting acting officials to these two categories. "Early in the Administration of a newly-inaugurated President, virtually the only person who could serve as acting officers would be the first assistants from the prior Administration, since transferring another PAS person would merely create a new vacancy elsewhere." *Id.* at 34 (Minority Views). If a new President were limited to selecting from only the prior

Administration's first assistants or officials who had already been confirmed by the Senate, the office might simply remain vacant until a permanent nominee could be confirmed.

These concerns were echoed during the floor debates. Senator Levin argued:

> [T]he restriction [of acting officials to first assistants and Senate-confirmed PAS officials] may be operating particularly harshly at the start of a new administration when many vacancies exist. At such times, not many first assistants may be holding over from previous administrations. Therefore, the first assistant slots may be empty, also. Similarly, few other Senate-confirmed officers will exist that the President could choose from to serve in a vacant position.

144 Cong. Rec. S11,037 (Sept. 28, 1998). Acknowledging similar considerations, Senator Glenn proposed "an amendment to add a third category which would include qualified individuals of a certain level or higher who are already within an agency in which a vacancy occurs." *Id.* at 11,032. Among other benefits, adding this third category would "allow[] a larger category of who can act at the beginning of an administration to keep government functioning at a time when there are not many PAS officials." *Id.*

The version of the FVRA ultimately enacted by Congress contained a compromise provision addressing these concerns. *See* Omnibus

Consolidated and Emergency Supplemental Appropriations Act, 112 Stat. 2681-611, § 151(b) (1998). During the Senate debate of this final version of the FVRA, the addition of Subsection (a)(3) was justified on the ground that "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate confirmed officers in the government." 144 Cong. Rec. S12,822 (Oct. 21, 1998).

Thus, the congressional debate surrounding the addition of Subsection (a)(3) shows that most Senators viewed the Subsection primarily, if not exclusively, as a means to address a relatively narrow problem, *i.e.*, temporarily filling PAS positions when neither a first assistant nor another PAS official were available, especially at the beginning of a new administration when that problem often is most acute. Rather than envisioning Subsection (a)(3) as a broad mandate for facilitating the nomination of career civil servants to PAS offices, even many of the Subsection's strongest proponents viewed it only as a source of *temporary* PAS officials. *See, e.g.*, S. Rep. 105-250, at 31 (Additional Views) (considering the possibility of "a third category of individuals to *temporarily* fill positions" (emphasis added)).

The interpretation attributed to Subsection (b)(1) by the Court of Appeals fully comports with this congressional vision of Subsection (a)(3). Under that interpretation, the President can freely appoint longstanding GS-15 officials to temporarily fill a PAS office until the Senate can confirm a permanent official. Subsection (a)(3) thereby grants the President the added flexibility that many of the

provision's proponents believed necessary "where there is no first assistant, and the President must turn to another PAS official to temporarily fill the slot," especially "at the beginning of an administration to keep government functioning at a time when there are not many PAS officials." 144 Cong. Rec. S11,032 (Sen. Glenn). Thus, the interpretation adopted by the Court of Appeals is fully consistent with the congressional purposes underlying Subsection (a)(3).

III. Neither the Alleged Lack of Strong Congressional Opposition to the Executive's Past Violations of the FVRA Nor Non-Binding Governmental Interpretations of the FVRA Justify Adopting the Executive's Interpretation of the Act.

The Board contends that aspects of congressional and executive practice support its interpretation of Subsection (b)(1). First, the Board claims that, because Congress has not challenged past instances in which non-first-assistant acting officials were nominated to the same PAS office, this suggests that Congress intended the FVRA to permit such actions. *See* NLRB Br., at 49-50. Second, the Board contends that its interpretation of the FVRA is strengthened by the fact that OLC and the GAO adopted the same interpretation soon after the statute's enactment and have adhered to that interpretation consistently since then. *Id.* at 50-52. Neither of these contentions has merit.

A. The alleged lack of strong congressional opposition to the Executive's past violations of the FVRA does not support the Executive's interpretation of the statute.

The Board contends, in essence, that because Congress has not challenged past instances in which non-first-assistant acting officials were nominated to the same PAS office, the FVRA must permit such actions. NLRB Br., at 49-50. The Board notes that "not only can the Senate reject nominees it concludes are serving unlawfully, but Congress has ample incentive and ability to enact new legislation to displace an interpretation by the Executive that it sees as trenching on its prerogatives." *Id.* at 49. The Board contrasts Congress's purported acquiescence here with the forceful congressional response to violations of the Vacancies Act. *Id.* This argument has no merit.

First, the alleged lack of strong congressional opposition to the Executive's unlawful conduct cannot alter the plain meaning of the FVRA or waive the structural safeguards protected by the statute. In the context of the FVRA, "[t]he issue is not simply the prerogative of the Senate. Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people." S. Rep. 105-250, at 8; *see also Freytag* v. *Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991) ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."); *Mistretta*, 488 U.S. at 380 ("[T]he separation of powers into three coordinate

Branches is essential to the preservation of liberty."). Because the FVRA operates to preserve the separation of powers established by the Constitution, putative congressional inaction can neither waive nor undermine the statute's requirements. "[T]he separation of powers does not depend . . . on whether the encroached-upon branch approves the encroachment." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (quotation omitted); *see also Freytag*, 501 U.S. at 880 ("[T]he [Appointments] Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection."); *Clinton* v. *City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand . . . ."). "The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) (internal citations omitted). The Court should not rely on putative congressional inaction to undermine the FVRA's important protections of the separation of powers.

Second, the Board relies on an unrealistic view of congressional action. Violations of the FVRA present significant issues warranting congressional attention, but they are not the only significant issues faced by Congress over the past 18 years. "Congressional life is marked by incredible pressure—such as pressures of the permanent

campaign for reelection, raising funds, balancing work in Washington and time in the district, balancing committee and floor work in an environment of increasing polarization, and balancing work and family responsibilities. It is also now more intense than in the past." KATZMANN, JUDGING STATUTES, *supra* at 17 (footnote omitted). The fact that the myriad other matters facing Congress have taken priority over addressing violations of the FVRA does not render the latter unimportant.

Moreover, Members of Congress may not have been aware of the widespread and serious violations of the FVRA. As Senator Byrd, a leading proponent of the FVRA, noted regarding the relatively weak congressional opposition to decades of the Executive's flouting of the Vacancies Act's requirements:

> Now, we are busy men and women. I have been around a long time. I was not fully aware that this was going on until I wrote to the President and then received his response and then wrote to the Attorney General and receive a response from someone else in her Department. And then I became a little more aware of it and I have to assume that this is probably the case with most other members, if not all.

S. Hrg. 105-495, at 13. But Senator Byrd did not view the lack of congressional awareness of—and lack of congressional action against—violations of the Vacancies Act as evidence that the Executive had

acted properly or that the Senate had acquiesced to Executive overreach. To the contrary, he chastised Senators (including himself) for their "failure to aggressively demand strict compliance with the provisions of the Vacancies Act." *Id.* And he urged his colleagues to "awaken to the threat posed by circumventions by the executive branch of the appointments clause" and to pass the FVRA. 144 Cong. Rec. S11,025 (Sept. 28, 1998).

Here, too, even if the demands of congressional life and other policy priorities may have prevented Congress from identifying and firmly opposing Executive nomination practices, the Court should not construe that lack of opposition as approval of the Executive's interpretation of the FVRA. The Court should instead give effect to the plain language of the statute, which preserves the important separation of powers established by the Appointments Clause. As Senator Byrd noted, "each time a vacancy is filled by an individual in violation of the Act yet another pebble is washed off the riverbank of the Senate's constitutional role and, . . . as more and more of these pebbles tumble downstream, the constitutional riverbank weakens until, finally, it will collapse." S. Hrg. 105-495, at 14.

B. The OLC and GAO opinions cited by the Board do not justify adopting the Board's interpretation of Subsection (b)(1).

The Board contends that the "clear and contemporaneous" interpretations of Subsection (b)(1) issued by OLC and the GAO support the

Executive's position in this case. NLRB Br., at 50. As an initial matter, neither OLC opinions nor GAO opinions are entitled to any deference in the interpretation of a statute. *See Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *Delta Data Sys. Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984). Like any other non-authoritative interpretation of a statute, the Court should rely on these sources only to the extent that the Court finds their legal analysis persuasive. *See id.* Here, the opinions issued by OLC and the GAO do not provide a persuasive basis for adopting the Board's proposed interpretation of Subsection (b)(1).

The OLC opinion on which the Board principally relies does not closely analyze the interpretative questions at issue in this case. The relevant portion of the OLC opinion provides, *in toto*:

> **Question 15**. Does [Subsection (b)(1)'s] limitation on the ability to be both the nominee and the acting officer apply only to first assistants, or does it also apply to persons who qualify to serve as an acting officer under other provisions of the Vacancies Reform Act?
>
> **Answer**. The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office. If someone is serving in an acting capacity on another basis, i.e., as

> a PAS or a senior agency employee designated by the President, this particular limitation does not apply.

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (Mar. 22, 1999). The OLC opinion neither addresses nor acknowledges any of the important textual considerations that led the Court of Appeals to conclude that Subsection (b)(1) applies to all persons designated under Section (a). Nor did OLC raise the policy and legislative-history arguments on which the Board relies in this case. Instead, the OLC opinion provides only a conclusory and cursory answer that is consistent with the memorandum's limited purpose of "provid[ing] general guidance on the [FVRA]." *Id.* at 60.

In addition to the cursory nature of the analysis contained in the OLC opinion, a further consideration weighs against relying on the OLC opinion in this context. One of the primary factors that spurred the enactment of the FVRA was the Department of Justice's contention that the Attorney General could make temporary appointments under the Department's organic statute, without satisfying the Vacancies Act—an interpretation that the Senate had expressly rejected, but to which OLC had given its imprimatur. *See* S. Rep. 105-250, at 4; Rosenberg, *Validity of Designation*, *supra*, S. Hrg. 105-495, at 80-82; Rosenberg, *The New Vacancies Act*, *supra* at 3-5. Indeed, Congress enacted the FVRA in large part to protect the Senate's advice-and-consent role against perceived attempts by OLC to weaken it. Given that statutory background, the Court should be especially

hesitant to defer to the cursory opinion issued by OLC in this context.

The GAO opinion cited by the Board provides even less support to the Board's position than does the OLC opinion. *See Letter from Carlotta C. Joyner to Sen. Fred Thompson, Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), *available at* http://www.gao.gov/assets/80/75036.pdf. Unlike the OLC opinion, the GAO opinion does not state that Subsection (b)(1) applies only to acting officials serving under Subsection (a)(1). *See id.* Indeed, its discussion of acting officials designated under Subsections (a)(2) and (a)(3) does not even mention the possibility of such persons being nominated at all. *See id.* at 3-4. In contrast, in its discussion of acting officials serving under Subsection (a)(1), the GAO opinion states that "[i]f the President nominates the first assistant for the vacant position, the first assistant may continue to serve as the acting official for that position only if (1) the person served as first assistant for 90 days or more during the 365-day period prior to the vacancy, or (2) the position of the first assistant is itself a PAS position and the Senate approved the appointment of the first assistant to that position." *Id.* at 2.

The Board apparently interprets this discrepancy as signaling that Subsection (b)(1) applies only to persons acting under Subsection (a)(1), but not to those acting under Subsection (a)(2) or (a)(3). *See* NLRB Br., at 50. But the GAO opinion does not state this conclusion—it simply does not address whether the limitations of Subsection (b)(1)

apply to an acting official designated under Subsection (a)(2) or (a)(3). The opinion certainly includes no analysis of the text, structure, or legislative history of the FVRA that this Court could view in any way as persuasive. Thus, the GAO opinion is entitled to, if anything, less weight than the OLC opinion.

IV. For More Than Two Centuries, Congress Has Strictly Limited the President's Ability to Designate Acting PAS Officials in Order to Preserve the Senate's Advice-and-Consent Role.

The Board contends that "[s]ince the earliest days of our Nation, Congress has afforded the President substantial latitude to designate government officials to perform the duties of PAS offices on a temporary basis." NLRB Br., at 4. To the contrary, for more than 200 years, Congress has strictly limited the President's use of temporary PAS officials, consistently viewing such officials as potential threats to the Senate's advice-and-consent role. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (quotations and internal citation omitted). To be sure, in 1792, Congress enacted a statute permitting the President to appoint acting officials who could serve indefinitely. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. But only three years later,

Congress withdrew that broad authority and limited the duration of acting service. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 (limiting term of acting officials to six months).

Since 1795, Congress has consistently and repeatedly imposed tight limitations on the President's designation of acting officials. For example, in 1863, Congress significantly narrowed the classes of persons who could serve as an acting official. Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. And in 1868, Congress further stiffened the restrictions on acting officials, capping the length of acting service at ***10 days***. Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168 (Vacancies Act). "The clear intent of the Vacancies Act from its outset was to prevent the President from delaying sending forth nominations for advice and consent positions which could thereby evade the Senate confirmation prerogative . . . ." Rosenberg, *Validity of Designation*, S. Hrg. 105-495, at 83.

Following the 1868 Act, numerous Attorneys General issued opinions consistently concluding that the President must comply strictly with the Act's demanding requirements, regardless of whether such compliance imposed practical difficulties. *See id.*, at 68-69 (citing seven Attorney General Opinions from five different Presidential Administrations). "[T]hese opinions show that Congress ha[d] been on notice for more than a century that the Vacancies Act [was] generally strictly and narrowly interpreted [by the Executive]." *Olympic Fed. Savings & Loan Ass'n* v. *Director*, 732 F. Supp. 1183, 1198 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

Far from a pattern of "afford[ing] the President substantial latitude" in this area, NLRB Br. at 4, Congress has jealously guarded the Senate's advice-and-consent role. The FVRA reflects only the most recent chapter in this congressional effort to give effect to the Appointments Clause, which "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997).

CONCLUSION

The Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

D. John Sauer
Counsel of Record
Michael Martinich-Sauter
JAMES OTIS LAW GROUP, LLC
12977 North Forty Drive,
Suite 214
St. Louis, Missouri 63141
(314) 682-6067
jsauer@jamesotis.com
Counsel for Amicus Curiae

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