No. 15-1251

IN THE

# Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST ALLIANCE,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## *AMICI CURIAE* BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Buckeye Institute for Public Policy Solutions ("Buckeye Institute") was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins *amicus* briefs that are consistent with its mission and goals.

*Amici* file in this case because small businesses have a strong interest in ensuring that courts maintain their Article III power to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). As detailed in a 2015 NFIB Legal Center report, federal agencies frequently issue "guidance" and other informal statements of law, and expect courts to defer to their interpretations. *See Underground Regulations*, NFIB Small Business Legal Center (2015), https://goo.gl/ZctYD8. The small business community suffers from this sub-regulatory conduct because the regulations that agencies promulgate almost always affect small businesses. Providing deference to informal, cursory interpretations of a statute—as Petitioner requests—would further erode small businesses' ability to obtain protection in the federal courts against burdensome regulations.

## SUMMARY OF ARGUMENT

Shortly after Congress passed the Federal Vacancies Reform Act of 1998 ("FVRA"), the Office of Legal Counsel ("OLC") issued a memorandum asking and answering 53 questions about the operation of the new law. One of the answers responded to the same question presented here:

do Section 3345(b)(1)'s limitations on being both the acting officer and the nominee apply to all persons who qualify to serve as an acting officer under Section 3345(a)? In three conclusory sentences, OLC answered the question "no." Petitioner now seeks to use this unsupported conclusion to bolster its untenable interpretation of the FVRA.

The Court should reject Petitioner's argument. The OLC opinion is of questionable value because it departs from multiple "best practices" the office uses to ensure sound decisionmaking. Specifically, the opinion provides a general survey of a statute ungrounded in any concrete factual dispute; it does not employ any tools of statutory construction; and it is one-sided, failing even to acknowledge that the law can be fairly construed in a contrary fashion. Indeed, OLC later revised and qualified the opinion for these reasons. On this basis alone, the Court should not defer to this unusual OLC opinion.

Even if OLC had carefully examined the law, however, its interpretation was flawed and is not entitled to deference. Under a plain reading of Section 3345(b)(1) of the FVRA, individuals like Lafe Solomon cannot serve in an acting capacity if they never served in the position of first assistant and were nominated by the President for appointment to such an office. *See* 5 U.S.C. § 3345(b)(1). The FVRA's text, structure, and purpose all refute OLC's initial conclusion.

## ARGUMENT

### I. The Court Should Not Defer to the OLC Opinion Interpreting Section 3345(b)(1) of the FVRA Because It Offers No Textual Analysis and Departs from Other Best Practices.

#### A. OLC's Best Practices Demand Legal Opinions That Are Focused, Well-Reasoned, and Persuasive.

OLC is an office in the U.S. Department of Justice that exercises the Attorney General's authority to provide the President and executive agencies with "advice and opinion[s] on questions of law." 28 U.S.C. §§ 511-12. Among other things, OLC is charged with "[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet." 28 C.F.R. § 0.25(a). In performing these tasks, OLC assists the President in fulfilling his constitutional obligation to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Although OLC frequently provides informal opinions and legal guidance, the office typically conveys its advice on the most complex and important issues through formal written opinions. These opinions are signed memoranda issued to the Executive Branch official who requested OLC's opinion. Notably, OLC's formal written opinions "inform[] the decisionmaking of Executive Branch officials

on matters of policy" but are not "dispositive as to any policy adopted." *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 203 (2d Cir. 2012) (citation omitted).

Because OLC has no statutory authority to make policy decisions or administer any statute, *see id.*, its interpretations are not entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) ("[T]he vast body of administrative interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under *Chevron*."). OLC opinions have, at most, the power to persuade. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Many of OLC's opinions are persuasive; some are not.

OLC has a memorandum of "best practices" that provides guidance for the office in drafting formal written opinions. *See Best Practices for OLC Legal Advice and Written Opinions*, U.S. Dep't of Justice, Office of Legal Counsel (July 16, 2010), http://goo.gl/g2OIVu ("Best Practices Memo."); *see also Best Practices for OLC Opinions*, U.S. Dep't of Justice, Office of Legal Counsel (May 16, 2005), http://goo.gl/x3X3FV. This memorandum sets forth "longstanding principles that have guided and will continue to guide OLC attorneys in all of their work" and "the best practices OLC attorneys should follow in providing … formal written opinions." Best Practices Memo. at 1. OLC purports to follow these best

practices. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 163 F. Supp. 3d 145, 148 (D.D.C. 2016).

OLC's highest priority is to give advice that is "clear, accurate, thoroughly researched, and soundly reasoned." Best Practices Memo. at 1. To meet this level of rigor, OLC has committed to "provid[ing] advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration." *Id.* Thus, OLC must always give "candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers." *Id.*

To that end, formal written opinions must "focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it." *Id.* at 2. That is, OLC should be "attentive to the particular facts and circumstances at issue in the request, and should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis." *Id.* And regardless of OLC's ultimate legal conclusion, the office should "strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question." *Id.*

OLC's principles follow from the federal judiciary's practices for sound decisionmaking. For example, federal courts will not adjudicate legal issues "presented in an abstract rather than in a concrete form." *Gov't & Civil Emps. Org. Comm., CIO v. Windsor*, 353 U.S. 364, 366 (1957). Nor will a federal court resolve a dispute without

considering both sides of the argument. *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193 (2012). And a federal court will not opine on the meaning of a statute without "employing traditional tools of statutory construction." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2220 (2014).

At bottom, "the value of OLC advice depends upon the strength of its analysis." Best Practices Memo. at 1. OLC, like all federal agencies, should follow its internal protocols and "show its work" when interpreting any statute. When OLC follows these best practices, it upholds its "reputation for clear, honest, scholarly advice that is accorded considerable respect and credibility across the political spectrum." T. Olson, *A Salute to the Federal Circuit*, 217 F.R.D. 548, 620 (2002). When it does not, its statutory interpretations should receive little, if any, respect from the federal courts.

### B. The 1999 OLC Opinion upon Which Petitioner Relies Does Not Conform to the Office's Best Practices.

On October 21, 1998, the FVRA was signed into law. *See* Pub. L. No. 105-277, 112 Stat. 2681. The FVRA imposed new limits on a President's authority to fill vacancies in presidentially appointed, Senate-confirmed offices within the Executive Branch ("PAS positions"). The FVRA was "framed as a reclamation of the Congress's Appointments Clause power," *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 70 (D.C. Cir. 2015), which requires "Officers of the United States" to be nominated by the President "by and with the Advice and Consent of the Senate," U.S. Const. art. II, § 2. Before the FVRA, Presidents of both parties had

undermined the Senate's confirmation power by allowing numerous PAS officers to "serv[e] in a temporary acting capacity, many well beyond the time limits prescribed" under prior law. *SW Gen.*, 796 F.3d at 70.

Five months after the FVRA's enactment, OLC issued a memorandum opinion to all Agency General Counsels entitled "Guidance on Application of Federal Vacancies Reform Act of 1998." 23 Op. O.L.C. 60 (1999) ("1999 OLC Opinion"). The opinion provided "general guidance" on "the application of the [FVRA] to vacancies in Senate-confirmed offices within the Executive Branch." *Id.* at 60. As a means of providing this guidance, the opinion asked and answered 53 questions involving a range of issues concerning the FVRA. Most of these answers were given in a few sentences and none was longer than two paragraphs. *See id.* 60-73.

As relevant here, the opinion contained the following question and answer:

> **Question 15.** Does [the] 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. However, because senior agency employees may not be designated by the President unless they have served in the agency for ninety days within the year preceding the vacancy, *see* Q20, a similar time limitation in fact applies to anyone who is not already in a PAS position.

*Id*. at 64.

Petitioner contends that this opinion, which has been followed by subsequent administrations, supports its interpretation of 5 U.S.C. § 3345(b)(1). *See* Pet. Br. 24 ("The consistent manner in which the FVRA has been interpreted and applied since its enactment reinforces the plain text."); *see also id*. at 14, 15, 25, 50. 51. Petitioner's reliance on this OLC opinion is misplaced. Besides being legally incorrect, *see infra* 14-20, the 1999 OLC Opinion departed in several ways from OLC's best practices, rendering it unworthy of this Court's solicitude.

As an initial matter, the opinion's Q&A format appears to be unprecedented. *Amici* are unaware of any other OLC opinion that provides a general survey of a statute through dozens of hypothetical questions and answers. *See generally Opinions of the Office of Legal Counsel*, U.S. Dep't of Justice, http://goo.gl/bdc88K (providing 32 years of published OLC opinions). Indeed, *amici* are aware of only two opinions that are even remotely similar, and even these are far more focused and less abstract than the 1999 OLC Opinion. *See* Temporary Filling of Vacancies in the Office of United States Attorney, 27 Op.

O.L.C. 149 (2003); Memorandum Opinion for the Counsel to the President: Travel Expenses—Person Traveling on Behalf of the President—Use of Appropriate Funds, 2 Op. O.L.C. 327 (1977).

The novelty of the Q&A approach is not surprising: the format departs from numerous OLC best practices. As explained above, OLC opinions "should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis." Best Practices Memo. at 2; *see id.* at 3 ("The legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions."). Yet that is just what the 1999 OLC Opinion does. It presents 53 questions—untethered to any actual cases or controversies that have arisen within an agency—and then answers them with minimal analysis. It thus is no surprise the opinion misreads the statute. *See infra* 14-20; *cf. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (explaining that legal questions should be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

Moreover, on "questions of interpretation," "OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts." Best Practices Memo. at 2. But Question 15 in the 1999 OLC Opinion is answered with a mere three sentences. It contains *no* textual analysis, relies on *no* canons of statutory construction, and points to *no* congressional purpose or legislative history as

guiding or even reinforcing its conclusion. Compared to Petitioner's brief, which addresses the same issue in no fewer than 30 pages, *see* Pet. Br. 25-55, the 1999 OLC Opinion falls far short.

An OLC opinion also "should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question." Best Practices Memo. at 2. Not only does the OLC opinion ignore the alternative view—which the D.C. Circuit and Ninth Circuit both have accepted, *see SW Gen.*, 796 F.3d at 76; *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558 (9th Cir. 2016)—but there is no indication that the opinion had even contemplated an alternative interpretation of Section 3345(b)(1). This tunnel vision likewise undermines Petitioner's argument that the opinion reflects the office's considered, well-reasoned views on the operation of the FVRA.

Most importantly, OLC has since overruled parts of the 1999 OLC Opinion and cautioned against relying on its conclusions. In 2001, the President asked OLC whether Phil Perry, the Principal Deputy Associate Attorney General, could serve as the Acting Associate Attorney General, despite the fact that Mr. Perry became the Principal Deputy Associate Attorney General *after* the vacancy occurred. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) ("2001 OLC Opinion"). OLC recognized that it had answered the underlying legal question "no" in the 1999 OLC Opinion, where it concluded that "you must be the first assistant when the vacancy occurs in order to be the acting officer." *See id.* at 179 (quoting Question 13 of the 1999 OLC Opinion).

But in analyzing the question as it applied to Mr. Perry, OLC gave little weight to its previous analysis. As the "brevity of [the] answer ma[de] clear," OLC observed, the office "did not thoroughly consider (or definitively resolve) the issue" and had only "tentatively answered" the question. *Id.* Indeed, OLC's "initial understanding was offered without explanation or, more importantly, any analysis of the Act's text or structure." *Id.* When the President's request for advice regarding Mr. Perry gave OLC occasion to fully consider the statutory question "in light of both the Act's text and structure," OLC acknowledged that its "initial understanding was erroneous" and concluded that the "better understanding" of the FVRA was that "an individual need not be the first assistant when the vacancy occurs in order to be the acting officer." *Id.* at 179, 181.

Put simply, even OLC no longer accepts the 1999 opinion as definitively and correctly resolving the questions it attempted to answer. When these questions arise in an actual controversy, OLC does not consider the matter resolved. Instead, the office carefully employs the traditional tools of statutory construction to determine what the statute requires, as is necessary for rational and grounded analysis of any statutory regime. *See id.*; *compare* 1999 OLC Opinion at 65 (Question 20), *with* Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 121, 124-25 (2003) (examining a similar question in a concrete situation involving the acting director of the OMB).[2] The Court

2. Petitioner also relies on the legal opinion of the Government Accountability Office ("GAO"). *See* Letter from Carlotta C. Joyner, *Eligibility Criteria for Individuals to Temporarily Fill Vacant*

should not defer to the 1999 OLC Opinion, to which OLC itself no longer accords deference.

Finally, *amici* do not mean to denigrate the OLC officials who drafted the 1999 OLC Opinion. OLC frequently "operates under severe time constraints in providing advice" and is often tasked with analyzing difficult questions of law that are "centrally important to the functioning of the Federal Government." Best Practices Memo. at 1-2. Given the wide-ranging effects of the FVRA, OLC may have had sound reasons for adopting the Q&A approach in that particular situation.

The fact nevertheless remains that the 1999 OLC Opinion is not the type of "thoroughly researched and soundly reasoned" opinion to which this Court might defer. Best Practices Memo. at 1. These brief answers, including Question 15, were "tentative" and "not thoroughly considered." 25 Op. O.L.C. at 179. If "[t]he value of OLC advice depends upon the strength of its analysis," Best Practices Memo. at 1, then the 1999 OLC Opinion adds little, if any, value to the present dispute.

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*Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001), https://goo.gl/RjvLIG. But the GAO opinion similarly offers an interpretation of the FVRA that fails to grapple with the statutory text. Such shallow reasoning warrants no deference from this Court. *See supra* 5-7; *see also Bowsher v. Merck & Co.*, 460 U.S. 824, 837 (1983) (providing no deference to GAO's "longstanding interpretation" of the access-to-records statutes).

## II. The 1999 OLC Opinion Misinterprets Section 3345(b)(1) of the FVRA.

This case requires the Court to answer the same basic question that OLC quickly addressed in the 1999 OLC Opinion: namely, whether Section 3345(b)(1)'s prohibitions on serving as both the nominee and the acting officer apply to all persons who qualify to serve as an acting officer under Section 3345(a). As Respondent has thoroughly explained, the answer is "yes." Resp. Br. 22-61.

Section 3345(a) of the FVRA creates three categories of individuals who may serve in a vacant PAS position. *See* 5 U.S.C. § 3345(a)(1)-(3). Subsection (a)(1) fills the vacancy automatically. It says that "the first assistant to the office of such [absent] officer *shall perform* the functions and duties of the office," unless someone else is appointed. *Id.* § 3345(a)(1) (emphasis added). Subsections (a)(2) and (a)(3) allow the President to select other individuals to fill the vacancy. *Id.* § 3345(a)(2)-(3). Subsection (a)(2) permits the President to designate prior Senate-confirmed officers to the vacancy, and Subsection (a)(3) permits the President to designate officers who have served within the agency for not less than 90 days in a position with a GS-15 salary to fill the vacancy.

Subsection (b)(1), in turn, carves out certain individuals who *cannot* fill the PAS vacancy. It states:

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

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

5 U.S.C. § 3345(b)(1).

Subsection (b)(1) thus prevents certain individuals from serving in an acting capacity after being nominated to the permanent position unless the person had been the first assistant for at least 90 days. Petitioner contends—and OLC in 1999 agreed—that Subsection (b)(1) applies *only* to acting officers designated under Subsection (a)(1). *See* Pet. Br. 26; 1999 OLC Opinion at 64. Petitioner and OLC's prior opinion are wrong.

The "preeminent canon of statutory interpretation requires [the Court] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Under a plain reading of Section 3345(b)(1), no individual may continue serving as an acting

officer after being nominated for the permanent position if he or she has never served as the first assistant of the office. Here, there is agreement that (1) Mr. Solomon never served in the position of first assistant to the office of the NLRB General Counsel and (2) President Obama nominated him to be General Counsel on January 5, 2011. Pet. Br. 17-18. As of January 5, 2011, then, Mr. Solomon could no longer serve as acting NLRB General Counsel.

Nothing in Subsection (b)(1) limits its effect only to those individuals serving under Subsection (a)(1). On the contrary, Subsection (b)(1) states that "[n]otwithstanding subsection (a)(1), a *person* may not serve as an acting officer for an office under *this section*" in certain circumstances. Congress's use of "a person" shows that the provision covers *all* persons who could serve as an acting officer—under Subsections (a)(1), (a)(2), and (a)(3)—and not just "first assistants." Similarly, by using the phrase "this section," Congress made clear that certain individuals cannot serve under *any* provision of Section 3345—not just Subsection (a)(1).

Petitioner disagrees with this straightforward interpretation of the statute. Petitioner's principal argument is that Subsection (b)(1) does not apply here because it is preceded by the dependent clause "[n]otwithstanding subsection (a)(1)." *See* Pet. Br. 27-28. And Subsection (a)(1) provides that, if a PAS vacancy occurs, then "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Thus, in Petitioner's view, Congress inserted this clause to make clear that "the limits of Subsection (b)(1) take precedence over only one of three statutory mechanisms

for acting service—the mechanism for service by a first assistant under Subsection (a)(1)." Pet. Br. 21. Because Mr. Solomon became acting NLRB General Counsel under the method articulated in Subsection (a)(3), *see* 5 U.S.C. § 3345(a)(3), Petitioner contends that naming him acting General Counsel did not violate Subsection (b)(1).

Petitioner's argument fails for multiple reasons. First, Petitioner's argument turns on a misreading of the word "notwithstanding." Congress does not use the word "notwithstanding" to mean, as Petitioner needs it to, "for the purpose of" or "with respect to." *See* Pet. Br. 21-22. "Notwithstanding" means "in spite of," American Heritage Dictionary (2d ed. 1982), or "without prevention or destruction from or by," Webster's Third World International Dictionary (3d ed. 2002); Garner's Modern English Usage (4th ed. 2016) (defining "notwithstanding" as "a formal word used in the sense 'despite,' 'in spite of,' or 'although'"); *see also* Resp. Br. 31-32.

A "notwithstanding" clause thus "does not define the scope of [the statute]." *Kucana v. Holder*, 558 U.S. 233, 238-39 n.1 (2010). It simply "informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say." *Id.*; *see also* 3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) ("In general, a 'notwithstanding' clause merely excepts enumerated provisions that otherwise conflict."). By using "notwithstanding subsection (a)(1)," Congress merely made clear that Subsection (b)(1)'s prohibitions control, "in spite of" Subsection (a)(1)'s command that first assistants "shall" serve as the acting officer.

If Congress had wanted to limit Subsection (b)(1) solely to those officers appointed under Subsection (a)(1), it knew how to do so. It would have said "*for purposes of* subsection (a)(1), a person may not serve as an acting officer …." Indeed, Congress used the phrase "for purposes of" in the very next subsection of the FVRA. *See* 5 U.S.C. § 3345(c)(2) ("For purposes of this section … the expiration of a term of office is an inability to perform the functions and duties of such office."). These two clauses—both of which appear within the same section of the statute—must be given different meanings. *See Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338, (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."); *see* 2A Norman Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000) (same).

Second, Petitioner misreads the significance of Subsection (b)(1)'s reference to Subsection (a)(1). Contrary to Petitioner's speculation, *see* Pet. Br. 32-33, singling out Subsection (a)(1) makes sense. Congress uses "notwithstanding" clauses, as it did here, to signal its "intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Under the FVRA, only Subsection (a)(1) commands a replacement for the PAS vacancy (the first assistant); Subsections (a)(2) and (a)(3), by contrast, provide mechanisms for the President to appoint someone other than the first assistant. Subsection (b)(1)'s "notwithstanding" clause thus means that, although Subsection (a)(1) is the default rule for filling a PAS vacancy, Subsection (b)(1)'s limitations still apply. "Without the 'notwithstanding' clause, confusion could easily arise as to whether (b)(1) has any force in light of the fact that a default rule exists." *Hooks*, 816 F.3d at 560.

To be sure, Congress could have spoken more broadly, as Petitioner suggests, by saying "notwithstanding any other law." *See* Pet. Br. 30-31. But the "preclusive scope" of a clause "purport[ing] to override 'any other provision of law,' … often is unclear." Larry M. Eigh, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* 37 (2011); *see, e.g.*, *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (holding that a directive to proceed with timber sale contracts "notwithstanding any other provision of law" meant only "notwithstanding any provision of *environmental* law"). By focusing narrowly on Subsection (a)(1), Congress might simply have concluded that it would "be more effective to spell out which other laws are to be disregarded," Eigh, *supra*, 37, rather than broadly preclude other laws or provisions. Indeed, this type of broad "notwithstanding" clause likely would not have worked here because it would have risked overriding 40 independent vacancy-filling mechanisms in other statutes. *See Hooks*, 816 F.3d at 556; S. Rep. No. 105-250 at 17; *see also* 5 U.S.C. § 3347(a).

Third, Petitioner's interpretation would render Section 3345(b)(2)(A) meaningless. That provision states that Subsection (b)(1) will not apply if, among other things, the person "is serving as the first assistant to the office of an officer described under subsection (a)." 5 U.S.C. § 3345(b)(2)(A). But this provision is superfluous if Subsection (b)(1) applies only to Subsection (a)(1). A person can fill a PAS vacancy under Subsection (a)(1) *only* if he or she is serving as the "first assistant." Congress had no need to insert Subsection (b)(2)(A) under Petitioner's interpretation because an individual could *never* be an acting officer under Subsection (a)(1) without being a first assistant. If, however, Subsection (b)(1) applies to all

acting officers—including those designated under (a)(2) and (a)(3)—then Subsection (b)(2)(A) is not superfluous because many such officers will not be serving as the first assistant. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *see also* Resp. Br. 29-32 (identifying additional superfluities created by Petitioner's interpretation).

Given this unambiguous language, it is telling that Petitioner places so much emphasis on OLC's and GAO's interpretations of the FVRA.[3] Pet. Br. 48-55. As an initial matter, these agencies are not charged with administering the FVRA and so no deference is warranted for their interpretations. *See supra* 5; *Hooks*, 816 F.3d at 564. In any event, the short-lived, conclusory OLC and GAO opinions are not the type of well-reasoned agency pronouncements that should influence this Court's decisionmaking. Indeed, not only are these agency opinions poorly reasoned, they are also wrong. *See supra* 14-19. That these incorrect opinions are "longstanding" also is of no moment—the law says what it says. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994). This Court should not accord them deference.

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3. Petitioner also relies on the statute's legislative history and supposed "purposes" to overcome the plain reading of the statute. The Court of Appeals correctly rejected these arguments, *see SW Gen.*, 796 F.3d at 77-78; *see also Hooks*, 816 F.3d at 562-64, as does Respondent, *see* Resp. Br. 46-54. These concerns have no consequence where, as here, the statute's meaning is plain. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

## CONCLUSION

*Amici curiae* respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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