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 *AMICI CURIAE*
SENATORS JOHN MCCAIN AND THOM TILLIS
URGING AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Legislative Material

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Senator John McCain of Arizona has served in the Senate since 1987, and was the Republican presidential nominee in the 2008 United States presidential election. Senator McCain is Chairman of the Senate Committee on Armed Services; Member and former Chairman of the Senate Committee on Indian Affairs; and Member of the Senate Committee on Homeland Security and Governmental Affairs. Senator McCain supported the FVRA when it was introduced in Congress and voted for its final passage.

Senator Thom Tillis of North Carolina has served in the Senate since 2015. Senator Tillis is a Member of the Senate committees on the Judiciary; Armed Services; Veterans Affairs; Agriculture, Nutrition and Forestry; and the Senate Special Committee on Aging.

The United States Senate is responsible under Article I of the Constitution for enacting legislation and under Article II of the Constitution for providing advice and consent on presidential nominees. *Amici* are filing this brief because, as U.S. Senators with extensive experience in vetting and confirming presidential nominees, they have a substantial interest in preventing the President from circumventing Congress's constitutionally mandated role in the process

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

of appointing top government officials. The interpretation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq*., pressed by the petitioner is contrary to the statute's plain text and Congress's intent in enacting it. *Amici* have an interest in maintaining the integrity of the Senate's constitutionally prescribed advice-and-consent powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this case presents a seemingly arcane question about the proper interpretation of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq*. ("FVRA"), answering that question correctly is vital to preserving the integrity of the Appointments Clause, which protects individual liberty by diffusing the power to install high government officials between the Senate and the President.

The Appointments Clause is a vital structural protection of the Constitution that safeguards the separation of powers and individual liberty. The norm under this clause is that all officers of the United States are subject to consideration and confirmation by the Senate. However, Congress has historically enacted legislation that permits the President to fill offices on a temporary basis to permit the government to continue to function during vacancies. This power has always been limited in order to prevent the President from using it to circumvent the Appointments Clause.

In 1998, after several decades of presidential abuse of the power to appoint temporary officers, Congress passed the FVRA to reform that process. Under this statute, a nominee cannot, while they await Senate confirmation, serve as an acting officer in the position they were nominated to fill. Congress enacted this bar to prevent circumvention of the Appointments Clause by presidents who install their nominees in acting positions solely for the purpose of having them in place as the Senate considers the nomination. The only exception to this prohibition is

a narrow one: current first assistants, as well as Senate-confirmed first assistants, other Senate confirmees, and high-ranking civil servants, who have been the first assistant to the office they are nominated to for at least 90 days in the prior year. This narrow exception to the bar on nominees serving as acting officers balanced Congress's overriding goal of preventing circumvention of the Appointments Clause while also meeting the practical need to keep the government running during vacancies. This scheme is considered and reasonable, and is plainly stated in the text of the FVRA.

In passing the FVRA, Congress took aim at abuses that had occurred in the decades before its passage. But its goal was broader than just preventing those specific abuses. The Court should not (as petitioner here suggests) interpret its provisions in light of those past controversies, but broadly in light of Congress's evident purpose to maintain the integrity of the advice-and-consent process and the constitutional separation of powers. Reading the text in light of that intent, it is clear that Congress crafted only a narrow exception to the FVRA's prohibition on nominees serving as acting officers, in order to limit the danger of presidential circumvention.

Nor does the post-enactment practice of the President and the Senate have any interpretive significance. Congress's supposed "silence" in the face of occasional nominees who have improperly served as acting officers is not, in these circumstances, evidence of its "acquiescence" in the Executive Branch's misinterpretation of the FVRA. Rather, this silence reflects the structure of the FVRA, which explicitly

invites enforcement of the statute by private litigants in the first instance. Petitioner cannot reasonably argue that Congress's action in passing a statute that plainly limits who may serve as an acting officer and then inviting private enforcement of that provision constitutes acquiescence in the Executive Branch's misreading of the plain text of the FVRA.

ARGUMENT

I. In Enacting the FVRA, Congress Acted Broadly To Prevent the President from Circumventing the Appointments Clause.

The Constitution empowers the President to appoint "Officers of the United States" to carry out the functions of government; but that appointment power can only be exercised "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Generally speaking, while the President may nominate persons to serve as officers of the United States, those persons cannot assume their duties and exercise the powers of their offices until the Senate consents to their appointments. *See id.*; *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

This constitutional mandate of congressional approval of presidential appointments "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citing *Buckley v. Valeo*, 424 U.S. 1, 128–31 (1976) (per curiam)). The Crown's abuse of the power to appoint officers was one of the most important grievances that led to the Revolution. *See* L. Kinvin Wroth & Hiller B. Zobel, eds., 2 *Legal Papers*

of John Adams 140, 142 (1965) (complaining that the Crown's unchecked power to appoint officers to execute warrants put "the liberty of every man in the hands of every petty officer"); Declaration of Independence ¶ 12 (1776) (condemning the Crown for erecting "a multitude of New Offices" and sending "hither Swarms of Officers to harass our People, and eat out their Substance"). To prevent such abuses, the Framers enacted the Appointments Clause to "ensure that those who wielded [the appointment power] were accountable to political force and the will of the people." *Freytag v. C.I.R.*, 501 U.S. 868, 884 (1991).

The advice-and-consent power is thus essential to the constitutional scheme of checks and balances. It serves as "a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). It also helps to safeguard individual liberty and ensure that high government officials, though not directly elected, are nonetheless democratically accountable. *See* THE FEDERALIST NO. 39 (Madison) (through the Appointments Clause, the "officers of the Union, will … be the choice, though a remote choice, of the people themselves"). *See also* S. Rep. No. 105-250, at 8 (July 15, 1998) ("Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people."). The Constitution recognizes only two exceptions to the advice-and-consent requirement: the narrow power to make temporary recess appointments, *see* U.S. CONST. art. II, § 2, cl. 3, and Congress's discretion to "vest the appointment of … inferior officers, as [it] think[s]

proper, in the President alone, in courts of law, or in the heads of departments," *id*. § 2, cl. 2.

Recognizing the necessity of ensuring the continued functioning of the government, Congress has long delegated to the President the authority to appoint acting officers in case of the death, resignation, or incapacity of a Senate-confirmed officer. But to discourage the President from relying on acting officers to diminish its constitutional role in the appointment process, Congress has sharply cabined that authority, generally by limiting the kinds of officials who can serve in an acting capacity and the length of time they can serve. *See* Resp. Br. 4–6 (recounting the evolution of Congressional acts to permit temporary appointments of acting officials in case of death, resignation, or incapacity of Senate-confirmed officials).

In enacting the FVRA in 1998, Congress sought to preempt "aggressive claims of exemption" from the then-current Vacancies Act that were being pressed by the Department of Justice and other executive agencies. S. Rep. No. 105-250 at 4. At the time, the Justice Department maintained that under the department's organic statute, the Attorney General could appoint officials to serve in an acting capacity in positions that required senatorial approval for an unlimited period of time. *Id*.

The Department's aggressive stance reached its apotheosis with the appointment of Bill Lann Lee to serve as Acting Assistant Attorney General for Civil Rights. Mr. Lee was nominated to the position in 1997; by the fall, the members of the Senate Judiciary Committee had announced their positions on his

nomination, making clear that it would fail. Committee Democrats prevented a formal vote and, pursuant to Senate Rule XXXI, the committee sent the nomination back to the White House at the next adjournment.[2] Peter Baker, *White House May Use Recess Appointment for Lee*, WASH. POST, Nov. 15, 1997, at A9. Rather than resubmit the nomination or make a recess appointment of Mr. Lee, President Clinton designated him as first assistant to the civil rights division of the Department of Justice, and then as Acting Assistant Attorney General for that division. *See* Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 2 (Jan. 14, 1998). Until his later recess appointment to the position, Mr. Lee thus exercised the considerable powers of an important advice-and-consent position for nearly two-and-a-half years, far longer than the permitted time, without ever obtaining the consent of the Senate. *See* Resp. Br. 9–10.

Petitioner, in its brief to this Court, has focused narrowly on the Lee nomination and on the way in which the FVRA was designed to prevent "gaming" of the Vacancies Act by installing first assistants who

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[2] Section 6 of Senate Rule XXXI states: "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."

would then assume the powers of advice-and-consent positions in an acting capacity for unlimited periods of time. *See* Pet. Br. 38, 42. The FVRA was undoubtedly enacted, in part, to prevent this and similar abuses. *See* S. Rep. No. 105-250 at 5.

But Congress's intent in enacting the statute was broader than just preventing a reprise of the Lee nomination. Rather, the FVRA was written with broader goals in mind: "maintain[ing]" the Constitution's separation of powers by ensuring that officers are subjected to "the scrutiny of the Senate for the benefit of the liberty of the people." *Id.* The FVRA is appropriately interpreted not just as a means of preventing another Lee nomination, but in a way that gives effect to this congressional intent to prevent "outright circumvention" of the "vital constitutional 'safeguard'" of the Appointments Clause. 144 Cong. Rec. 27,497 (Oct. 21, 1998) (statement of Senator Robert Byrd). Ultimately, the FVRA was enacted in the belief that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers," and to prevent such transgressions. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

II. To Prevent the President from Circumventing Its Advice-and-Consent Power, Congress Limited the President's Power To Install a Nominee as an Acting Officer.

One of the abuses that Congress sought to curb by enacting the FVRA was the circumvention of the Appointments Clause that occurs when the President nominates someone to an office requiring the Senate's advice and consent, but the nominee is also al-

lowed to serve as an acting officer while her nomination is pending. The statute's anti-circumvention principle is equally implicated whether the nominee becomes an acting officer because she is a first assistant, a confirmed appointee from elsewhere within the government, or a high-ranking civil servant within the agency—*i.e.*, whether through operation of subsection (a)(1), (a)(2), or (a)(3) of Section 3345. Because all three types of acting officers present the same kinds of separation-of-powers concerns, Congress limited the ability of individuals in each of the three categories to serve as acting officers while their nominations are pending before the Senate.

A. Section 3345(b)(1) Plainly Applies to All Acting Officers Who Assume Their Positions Pursuant to Section 3345.

Section 3345(b)(1) is the means by which Congress sought "to prevent [the President from] placing an employee in an agency simply for the purpose of having him in place while his nomination is pending." Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Prerogative* 9 (Nov. 2, 1998). Section 3345(a)(1) mandates that the current first assistant to the office where the vacancy occurs becomes the acting officer, limited to the time constraints contained in 5 U.S.C. § 3346. The President can forestall that self-executing provision by appointing another Senate-confirmed officer or a high-ranking civil servant pursuant to, respectively, Section 3345(a)(2) or (a)(3). These provisions are a practical and narrow exception to the constitutional norm that permits "someone who has not received Senate confirmation for

that particular post to serve temporarily to keep the government functioning." S. Rep. No. 105-250 at 8. However, Congress explicitly directed that a *nominee* for an office may not become the acting officer "under this section"—*i.e.*, under Section 3345 generally—if that person "did not serve in the position of first assistant to the office of such officer," or did so for less than 90 days in the past year. 5 U.S.C. § 3345(b)(1).

Amici join fully respondent's interpretation of the plain text of these provisions. Resp. Br. 22–32. The statutory reference to a nominee becoming an acting officer "under this section" clearly refers to all of the ways in Section 3345 by which a person may become the acting officer—whether automatically under subsection (a)(1) because the nominee is the current first assistant, or by designation of the President under subsections (a)(2) or (a)(3). The use of the phrase "under this section" to refer to the entirety of the section of an act in which that phrase appears is consistent with congressional legislative drafting practice, which organizes the components of statutes into a descending hierarchy of sections, subsections, paragraphs, subparagraphs, and clauses. *House Legislative Counsel's Manual on Drafting Style*, HLC No. 104-1, p. 24 (1995); *see also* Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997). The Court should give "under this section" its plain and ordinary meaning, which is that the provisions of subsection (b)(1) apply to all of the other provisions in the statutory section in which subsection (b)(1) appears. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 377 (2006) (statutory terms should be given their plain and ordinary meaning).

B. Respondent's Interpretation of the FVRA Is Consistent with Clearly Expressed Congressional Intent.

Moreover, respondent's interpretation is consistent with the intent of the FVRA, which is to preserve the integrity of the advice-and-consent process, assure democratic accountability of high government officials, and prevent the President from circumventing the Appointments Clause. The danger of circumvention is not lessened because a nominee is a confirmed appointee in another office or a high-ranking civil servant, rather than a first assistant. What raises separation-of-powers concerns is not simply that an unconfirmed nominee becomes an acting official by virtue of having been a recently appointed first assistant, but that an unconfirmed nominee becomes an acting official by *any* means.

"[T]he Founders intended … Senate approval [of principal government officers] to be the norm." *Noel Canning*, 134 S. Ct. at 2558. The FVRA departs from that constitutional norm in a narrow set of circumstances, in order to permit government agencies to function during vacancies. *See* 144 Cong. Rec. 12,432 (June 16, 1998) ("[I]t is important to establish a process that permits the routine operation of the government to continue [when a vacancy occurs], but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations.") (statement of Senator Fred Thompson). But the constitutional norm still has considerable force in the way acting officers actually operate. Though acting officers are generally vested with the full powers of their office, commentators have noted that in prac-

tice, they are frequently caretakers, reluctant to enact dramatic policy shifts or depart substantially from the status quo. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 942 (2009) ("Acting officials will generally lack sufficient authority to direct [career civil servants] beyond the most basic agency functions.").

This circumspection is understandable and, indeed, appropriate: An acting officer is neither the hand-picked appointee of the President for a specific position, whose actions can be presumed to reflect the President's program, nor a Senate-confirmed officer whose actions are cloaked in the democratic accountability and political legitimacy conferred by the advice-and-consent process. However, an acting official who is *also* the President's nominee unbalances this equation, endowing that acting official with the force and energy of the President's appointment without the constraining counterbalance of the Senate's consideration and confirmation. This dynamic works to undermine democratic accountability and the constitutionally mandated separation of powers embodied in the Appointments Clause.

To prevent the President from circumventing the advice-and-consent process, in passing the FVRA, Congress determined to permit nominees to serve as acting officials only in the narrow circumstance where the nominee either currently serves or recently served (for the prescribed 90 days within the past year) as the first assistant. This narrow exception balances the overriding concern of preventing circumvention of the Appointments Clause against the

practical reality that a current or recent first assistant will frequently be the most qualified candidate to serve in an acting capacity before confirmation *and* on a permanent basis after confirmation, since they have been previously been closely involved in the administration of that office. Insofar as the FVRA constitutes an exception to the constitutional norm against unconfirmed persons serving as officers, that exception must be read in light of both the general rule against "reading legislation, absent [a] clear statement," in a way that raises "[s]eparation-of-powers concerns," *Kucana v. Holder*, 558 U.S. 233, 237 (2010), and Congress's evident purpose of maintaining the integrity of the advice-and-consent process.

Read fairly, Section 3345 does not undermine Congress's anti-circumvention purpose, but strikes a balance against the need to provide for the smooth functioning of the government during vacancies. As current or recent first assistants are many times drawn from the apolitical ranks of the civil service, or at the higher level are presidentially appointed and Senate-confirmed principal deputies, Congress determined that the danger of circumvention presented by their service as acting officers for a limited time while their nomination is considered—while not nonexistent—was limited to the greatest extent practically possible. *See* S. Rep. No. 105-250 at 13. That Congress could have gone further and prevented even current or recent first assistants from serving as acting officers while their nominations were pending does not negate the meaning of the statute's plain text and clearly expressed intent. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) "'[N]o legis-

lation pursues its purposes at all costs.'") (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)). The Court should give full effect to this deliberate determination.

The instant case highlights the importance of the congressional intent that nominees who have not been confirmed by the Senate should generally not occupy positions for which the Constitution requires senatorial advice and consent. Lafe Solomon's nomination to be general counsel of the NLRB was, like Mr. Lee's nomination to head the civil rights division, never taken up by the Senate. Nonetheless, Mr. Solomon occupied, as an acting official, a position that has broad "final authority" to investigate and prosecute complaints of unfair labor practices. 29 U.S.C. § 153(d). This power is "independent[] of any direction, control, or review by" the board of the NLRB. 1 *Legislative History of the Labor Management Relations Act, 1947*, at 541 (1985 ed.). Rather, the NLRB general counsel is "ultimately responsible" only to "the President and Congress." *Id*. The general counsel's power is so broad that Congress limited how long an acting official can serve in that role if the President has not named a permanent nominee, reflecting concerns about allowing unconfirmed officials to exercise this expansive authority. *See* 29 U.S.C. § 153(d). Yet Mr. Solomon occupied that office, with its considerable powers, for more than three years without Senate confirmation.

As this case amply demonstrates, permitting the President's hand-picked nominee to occupy an advice-and-consent position in an acting capacity without Senate confirmation undermines the separation-of-

powers and democratic-accountability principles of the Appointments Clause. This case is thus an example of the kind of "outright circumvention" of a "vital constitutional 'safeguard'" that the FVRA was designed to prohibit. 144 Cong. Rec. 27,497.

III. Petitioner's Arguments from Executive Practice Cannot Overcome Plain Statutory Language and Congressional Intent to Limit Nominees Serving As Acting Officers.

A central argument advanced by petitioner comes from Congress's supposed "acquiescence" by failing to object to nominees who were not current or recent first assistants serving in an acting capacity. Pet. Br. 49–55. That argument is unavailing.

As a starting matter, congressional silence in the face of the Executive Branch's misinterpretation of the FVRA—even assuming that Congress *has* been silent, an assumption that is not warranted, *see* Pet. Br. n.8—is no reason to disregard plain statutory text. "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of a statutory interpretation. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (citation omitted). Where Congress *re*enacts statutory language that has acquired a settled meaning, that may indicate congressional acquiescence in that settled meaning. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993). But "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar-*

anty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)). This includes the inference that—far from signaling acquiescence—congressional silence reflects nothing more than the reality that "the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose." *Noel Canning*, 134 S. Ct. at 2564. Text and congressional intent control statutory meaning, and in this case they clearly indicate that the Executive Branch has misinterpreted the FVRA. *Supra* at 10–14.

One inference to be drawn from any congressional "silence" is that Congress intended for private parties to take the lead in objecting to executive branch abuses of the FVRA. The statute's enforcement mechanism states that actions taken by acting officers who are serving in violation of the FVRA "shall have no force or effect." 5 U.S.C. § 3348(d)(1). Private parties affected by actions taken by officers who are serving in violation of the FVRA would have standing to challenge those actions on the basis of that invalidity. To the extent Congress has been silent regarding the Executive Branch's misinterpretation of the FVRA, that silence is explained by its expectation that private litigants "will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action"—as has happened here. S. Rep. No. 105-250 at 19–20.

Petitioner's position here—that the Senate has acquiesced in the further erosion of its constitutional prerogatives with respect to the appointment process—is striking in light of the fact that Congress *passed a statute* that clearly expressed its intent to

limit the kinds of nominees who could also serve as acting officers. In *Noel Canning*, this Court took a broad view of the President's power to make recess appointments, largely on the theory that the Senate had not done enough over the preceding two centuries to defend its constitutional role. *See* 134 S. Ct. at 2563 ("[N]either the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so."). Given this alleged failure to take "formal action" to "call into question the broad and functional definition of 'recess'" advanced by the Executive Branch in that case, the Court concluded that the Senate had acquiesced in that interpretation because it had done "nothing to deny the validity" of that interpretation. *Id.* at 2564; *see also id.* at 2578 (Scalia, J., concurring in the judgment) (describing the majority opinion as the "adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor").

Here, the situation is quite different: Congress has taken "formal action," by enacting the FVRA, with clear intent to reject the interpretation of the Executive Branch. It also set up an enforcement mechanism by inviting private parties to bring suit to remedy the President's circumvention of the FVRA. And yet the Executive Branch stills insists that the Senate has not acted with sufficient vigor to protect the separation of powers and the integrity of the advice-and-consent process. The Court should reject the Executive's continued effort to move the goal posts.

Further, the weight that petitioner places on executive practice in the 18 years since the FVRA was enacted is entirely misplaced. In *Noel Canning*, this Court noted that the frequency of recess appointments "since the beginning of the Republic … suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances." 134 S. Ct. at 2560. The Court took that "long-standing practice" into account in interpreting the Recess Appointments Clause. *Id*. That is a far different matter from looking to relatively recent practice in order to construe a statutory text. Moreover, as petitioner's appendix suggests, only 112 nominees have served as acting officials in violation of Section 3345(b)(1) in the past 18 years. Pet. Br. App. A. In that time, the Senate has considered nearly 20,000 presidential nominees. Rather than indications of congressional acquiescence in the Executive Branch's misinterpretation of the FVRA, these 112 nominees are no more than "scattered examples" and "anomalies" with no interpretive significance. *Noel Canning*, 134 S. Ct. at 2567.

Finally, the fact that Congress has confirmed nominees who served as acting officials in violation of Section 3345(b)(1) is not proof of congressional acquiescence in the Executive Branch's misinterpretation of the FVRA. While declining to confirm a nominee whose acting service stands in violation of Section 3345 is one possible congressional response, the remedy for an FVRA violation is not necessarily a rejected nomination. Rather, it is invalidation of the actions taken by the nominee during the period he or she improperly served as acting officer. *See* 5 U.S.C.

§ 3348(d)(1). *See also* S. Rep. No. 105-250, at 19–20. *Amici*'s colleague, Senator Ron Johnson, recognized this point recently when the Inspector General of the Office of Personnel Management ("OPM") concluded—after the court below issued the decision under review—that the actions of Beth Cobert, acting head of OPM, were "void" under the FVRA since the date she was nominated to serve as the permanent agency head. The Executive Branch's "failure to follow the law when appointing officials to management positions at OPM doesn't change my evaluation of Ms. Cobert's qualifications to be the next director of the agency," said Senator Johnson, who chairs the Senate committee considering Ms. Cobert's nomination. Eric Yoder & Joe Davidson, *OPM director nominee can't serve as acting agency head, inspector general says*, WASH. POST, Feb. 17, 2016, at A7.

Senator Johnson's statement accurately reflects the statutory text: the remedy for an FVRA violation is focused on the nominee's prior actions, not on the nominee. Confirmation of an acting official who is serving in violation of the FVRA does not serve to "ratify" that officer's actions. 5 U.S.C. § 3348(d)(2). No more does that confirmation ratify the Executive Branch's circumvention of the vital constitutional safeguards embodied in the Appointments Clause and secured by the FVRA.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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