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* STATES OF WEST VIRGINIA, ALABAMA, AND 12 OTHER STATES IN SUPPORT OF RESPONDENT


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## QUESTION PRESENTED

Section 3345(b) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsection (a)(2) and (a)(3).

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## INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case is significant to *amici curiae*—the States of West Virginia, Alabama, Arizona, Georgia, Kansas, Michigan, Montana, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, and Wisconsin—because its outcome is critical to protecting the States against federal encroachment by preserving the Senate's constitutionally mandated advice and consent power.

In our constitutional system, the separation of powers protects both state sovereignty and individual liberty. The Constitution preserves the States' "residuary sovereignty," The Federalist No. 62, at 376 (James Madison) (C. Rossiter ed. 1961) (The Federalist), by granting the States equal representation in the Senate. The power to provide advice and consent on executive appointments is one important tool the Senate uses to check executive power and, accordingly, protect the States' sovereign interests and individual freedoms.

At issue here is the President's attempt to circumvent the Senate's role, and by extension the States' role, in the appointments process. The question presented is the extent to which the Federal Vacancies Reform Act ("FVRA") limits the President's ability to install his nominee on a temporary basis as an "acting officer" in the same position before the Senate has an opportunity to advise and consent. The NLRB argues that the statutory limitation applies only to a small subset of people who could permissibly serve as acting officer

under the statute. As persuasively explained by SW General, such reading is contrary to the clear text of the FVRA, which Congress enacted to secure the Senate's ability to advise and consent on presidential nominees.

As set forth below, canons of constitutional avoidance and federalism provide further reason for this Court to reject the NLRB's expansive view that the FVRA authorizes the President to install as acting officer any nominee who is currently serving in a GS-15 salaried position or higher within the agency or another position requiring Presidential appointment and Senate confirmation ("PAS positions"). This reading would provide the President with more latitude to install a broader range of potential nominees in an acting capacity, over a longer period of time, than any historical antecedent to the FVRA. If the NLRB prevailed, the President could install nominees in a host of positions with broad policymaking authority before the Senate had an opportunity to advise and consent. This Court should reject this reading, which raises significant concerns about whether Congress has improperly delegated or abdicated its constitutional responsibilities.

The NLRB's reading would also have significant adverse impact on the States, as unchecked federal agencies can and frequently do upset the constitutional balance of federal and state powers through regulatory overreach. The Senate's advice and consent power provides an important check on these federal encroachments. Allowing the President to circumvent advice and consent by routinely

installing his preferred nominee in office in an acting capacity would eviscerate an important constitutional check on executive power, and by extension, impair the federal-state balance. Absent a clear statement from Congress, this Court should not interpret the FVRA in a way that would provide the President with such untrammeled power.

## SUMMARY OF ARGUMENT

I. When left unchecked, federal agencies can upset the balance of federal and state powers, especially when regulating in areas of traditional state responsibility. They do so primarily by attempting to expand federal authority at the expense of state laws. This Court has long recognized that the structural protections of the Constitution, including the advice and consent power, are important means to protect the States, and by extension the people, from encroachment from federal regulatory overreach. See *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 882–84 (1991).*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985); *Myers v. United States*, 272 U.S. 52, 119–20 (1926).

II. The role of the advice and consent power in protecting the States is not merely academic. Rather, the Senate has repeatedly used this power to resist executive appointments that would, in the Senators' views, upset the federal-state balance. As Senate hearings on three recent nominations demonstrate, the States' representatives in Congress are keenly aware of, and exercise, their constitutional obligation

to protect the federal-state balance and preserve individual liberties.

III. SW General has persuasively shown in its brief that the FVRA plainly prohibits the President from selecting the same person as both acting officer and permanent nominee unless that person is an experienced first assistant. To the extent that the Court deems the text susceptible of multiple interpretations, however, principles of constitutional avoidance and federalism reinforce and compel SW General's interpretation.

The NLRB's reading, if adopted, would allow the President to install a vast number of individuals to high-ranking federal offices without first obtaining the Senate's advice and consent. Congress may not abdicate its advice and consent power in this manner, see *Freytag*, 501 U.S. at 880, and this Court should reject an interpretation that would raise such serious constitutional concerns, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

And because the Senate's advice and consent power ultimately protects the States, Congress must provide a clear statement if it intends to "override[] the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089; see also *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). Congress did not provide any such clear statement here. To the contrary, it is plain from the text of the FVRA, and from the historical circumstances that led to its adoption, that Congress intended to strengthen and preserve its historic advice and consent power, not diminish it.

In short, traditional canons of construction confirm what the plain text already makes clear—that the FVRA cannot be read to provide the President with broad authority to anoint the same person as both acting officer and permanent nominee.

## ARGUMENT

### I. Separation Of Powers, Including The Advice And Consent Power, Protects Both The States And Individual Liberties.

The Constitution protects the sovereignty of the States through the separation of powers and, in particular, through the Senate as the representative of the States in Congress. The Senate's advice and consent power, as elucidated in the FVRA, is a critical tool that the Senate uses to check executive power and protect state interests.

The federal government's powers are not derived from "the consent of the undifferentiated people of the Nation as a whole," but rather from "the consent of the people of each individual State." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). The Constitution became effective only upon ratification by conventions of nine States and went into effect only between the States that ratified it. U.S. Const. art. VII. As James Madison explained, the consent to the Constitution was "given by the people, not as individuals composing one entire nation, but composing the distinct and independent States to which they

respectively belong." *U.S. Term Limits,* 514 U.S. at 846 (Thomas, J., dissenting) (quoting The Federalist No. 39, p. 243 (C. Rossiter ed. 1961)).

The enumeration of the federal government's limited powers "leaves to the several States a residuary and inviolable sovereignty over all other objects." *Ibid.* "Any interference with [the States' legislative or judicial power] except as thus permitted [by the Constitution], is an invasion of the authority of the State and, to that extent, a denial of its independence." *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 549–50 (1985) (quotation omitted).

The States' "residuary and inviolable sovereignty" is protected in part by the Constitution's separation of powers. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the . . . National government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991) (quoting *Texas v. White,* 7 Wall. 700, 725 (1869)). Indeed, the separation of powers is "the principal means chosen by the Framers to ensure the role of the States in the federal system." *Garcia,* 469 U.S. at 550. As "James Wilson observed[,] . . . 'it was a favorite object in the Convention' to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end." *Id.* at 551 (quoting 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 438–39 (J. Elliot 2d. ed. 1836)). The federal government was designed to "partake sufficiently of the spirit [of the States], to be

disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 293.

The Constitution's recognition of state sovereignty is not merely an end in itself. Rather, "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By protecting the interests of the States, the separation of powers ultimately secures "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); see also *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised.").

The Senate, in particular, was designed to protect state interests. The States are equally represented in the Senate regardless of population, U.S. Const. art. I, § 3, a feature James Madison viewed as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 376. In other words, "'the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature' (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch v. Maryland,* 4 Wheat. 316, 435 (1819)." *Garcia*, 469

U.S. at 551 (emphasis in *Garcia*). Also, a State may not be deprived of its equal representation in the Senate without its consent even through adoption of a constitutional amendment. U.S. Const. art. V. Overall, the Senate is to "function as the forum of the states" and "is intrinsically calculated to prevent intrusion from the [federal government] on subjects that dominant state interests wish to preserve for state control." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546, 548 (1954).

Senate supervision of executive appointments furthers the protection of state interests from federal intrusion. The advice and consent power in Article II is a "significant structural safeguard[] of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997); see also The Federalist No. 70, p. 421 (Hamilton) (describing the President's appointment power as "concurrent" with the Senate, in contrast with the British monarch who was "the sole author of all appointments."). Indeed, "[t]he 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 v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation and citation omitted). The Founders therefore hoped that "[t]he equal representation of the states in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater states." *Myers v.*

*United States*, 272 U.S. 52, 120 (1926) (internal quotation omitted); see also The Federalist No. 76, at 456 (Hamilton) (noting that advice and consent power would serve as an "excellent check upon a spirit of favoritism" and "prevent[] the appointment of unfit characters from State prejudice," among other things).

## II. The Senate Frequently Exercises Its Advice And Consent Power To Protect The States.

The danger to state interests from unchecked executive appointments is not merely theoretical. To the contrary, appointees to federal agencies wield enormous influence and their actions can affect the balance of state and federal authority through overreaching regulations. Accordingly, when the President puts forward a nomination, the Senate frequently exercises its advice and consent power to protect the States.

For example, Senators often question nominees about their views of certain policies that significantly interfere with state authority and interests. There are numerous examples of this, but the *amici* States highlight three recent nominations that exemplify this practice. In these cases, the Senate either rejected or declined to take action on one of the President's nominees.

A. In January 2014, the President nominated Janet McCabe to serve as Assistant Administrator for the Office of Air and Radiation at the Environmental Protection Agency ("EPA"). After

serving as the Principal Assistant Administrator,[1] Ms. McCabe became Acting Assistant Administrator one year earlier. Ms. McCabe was nominated to fill the position permanently in January 2014[2] and again in June 2015.[3]

In the Senate Committee on the Environment and Public Works, which considered Ms. McCabe's nomination, senators questioned her about the effect that EPA's rules regulating $CO_2$ emissions would have on the States.[4] In brief, after Congress declined to pass legislation authorizing a program requiring reductions in $CO_2$ emissions, President Obama

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[1] Press Release, The White House, President Obama Announces More Key Administration Posts (Dec. 19, 2013), available at https://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-announces-more-key-administration-posts.

[2] *PN1293—Janet Garvin McCabe—Environmental Protection Agency*, Congress.gov (2014), https://www.congress.gov/nomination/113th-congress/1293?q=%7B%22search%22%3A%5B%22janet+mccabe%22%5D%7D&resultIndex=2. (last visited Sept. 23, 2016).

[3] *PN597—Janet Garvin McCabe—Environmental Protection Agency,* Congress.gov (2015), https://www.congress.gov/nomination/114th-congress/597?q=%7B%22search%22%3A%5B%22janet+mccabe%22%5D%7D&resultIndex=1 (last visited Sept. 23, 2016).

[4] *Hearing on the Nominations of Janet G. McCabe to be Assistant Administrator for Air and Radiation of the U.S. Environmental Protection Agency (EPA), Ann E. Dunkin to be Assistant Administrator for Environmental Information of the EPA, and Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board: Hearing before the Subcomm. on Env't and Pub. Works,* 113 Cong. (2014) (hereinafter McCabe Hearing).

issued the "Climate Action Plan"[5] and ordered the EPA to mandate reductions in $CO_2$ emissions from power plants.[6] EPA then adopted a rule under section 111(d) of the Clean Air Act ("CAA") for $CO_2$ emissions from existing fossil fuel-fired electric generating units. 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Power Plan"). The Power Plan requires States to fundamentally change the mix of electricity generation in their States, and thus encroaches on the States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Ms. McCabe played a central role in developing the Power Plan while serving as Acting Assistant Administrator.

Thus, in committee, Senator Jim Inhofe questioned Ms. McCabe on the EPA's commitment to allowing the States true flexibility in achieving the $CO_2$ emissions standards under Section 111(d) of the CAA. McCabe Hearing, at 50. He also noted a Senate committee report finding that a majority of States have expressed concerns about the "EPA's failure to adhere to the Clean Air Act's cooperative federalism design." *Id.* at 65 (internal quotation omitted). Senator Jeff Sessions similarly noted a white paper

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[5] Executive Office of the President, *The President's Climate Action Plan* (June 2013), available at https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[6] *Power Sector Carbon Pollution Standards: Memorandum for the Administrator of the Environmental Protection Agency* (June 25, 2013), 78 Fed. Reg. 39,535, 39,535-36 (July 1, 2013).

authored by a number of state attorneys general explaining the States' role in determining emissions standards under Section 111(d). *Id.* at 55.

Similarly, Senator John Barrasso explained the detrimental effect the rule would have in his home State of Wyoming: "People in Wyoming think this agency is behaving in an extreme fashion. Many of the policies coming out of EPA's Air and Radiation Office are the cause of the beliefs I am hearing from the people around the State of Wyoming." McCabe Hearing, at 4. Specifically, the Senator noted that the closure of power plants would have severe economic consequences on Wyoming. *Id.* at 5.

Senator David Vitter similarly questioned whether EPA and Ms. McCabe were "committed to honoring [the] cooperative federalism structure" of the CAA and allowing States to take "the lead in setting case-by-case emission standards." McCabe Hearing, at 27. The Senator further urged Ms. McCabe, if confirmed, to streamline the "process through which states are afforded an opportunity to exempt air quality standard exceedances caused by naturally occurring events outside of their control." *Id.* at 42.

After facing opposition from several senators on federalism grounds, Ms. McCabe's nomination failed to leave committee and has not received a full vote by the Senate.[7]

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[7] *PN597—Janet Garvin McCabe—Environmental Protection Agency,* Congress.gov (2015), https://www.congress.gov/nomination/114th-congress/597?q=%7B%22search%22%3A%5B%22jane

B. A second example involves the President's nomination of Rhea Sun Suh to be Assistant Secretary of the Interior for the National Park Service and the U.S. Fish and Wildlife Service. Prior to her nomination, Ms. Suh served as the Assistant Secretary of the Interior for Policy, Management, and Budget.[8] The two Senate committees with jurisdiction, the Committee on Environment and Public Works and the Committee on Energy and Natural Resources, held hearings in which senators expressed concerns about the "balance of power between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Several senators questioned Ms. Suh about the agency's commitment to consulting with States and communities before taking action affecting local laws and policies. Senator Vitter, for example, questioned Ms. Suh about the Interior Department's "practice of negotiating closed door settlement agreements . . . that exclude from the discussion the folks directly impacted." Suh EPW Hearing, at 7. He noted in particular the Fish and Wildlife Service's failure to

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[8] *Hearing on the Nominations of Rhea Sun Suh to be Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior; Victoria Baecher Wassmer to be Chief Financial Officer, U.S. Environmental Protection Agency (EPA); Roy K.J. Williams to be Assistant Secretary of Commerce for Economic Development, U.S. Department of Commerce; and Thomas A. Burke to be Assistant Administrator for Research and Development, EPA: Hearing Before the S. Comm. on Env't and Pub. Works,* 113 Cong. 32 (2013) (hereinafter Suh EPW Hearing).

consult with state and local governments on a settlement agreement requiring the Service to make listing determinations for more than 250 species. *Id.* at 46, 49. He explained that the agreement "is of substantial concern to many states" because it would interfere with the States' on-going efforts to protect wildlife and avoid the need for listing determinations. *Id.* at 49. Senator John Boozman likewise noted "the failure of the Department to engage with communities and citizens before taking action." *Id.* at 22, 79. As Senator Vitter explained, "[t]hat sort of overreach is . . . exactly why [the Senate's] role with regard to executive nominations is so important." *Id.* at 8.

A number of senators also questioned Ms. Suh about her views on the States' role as sovereign regulators and whether she would support federal policies that preempt or otherwise displace state authority. Senator Tim Scott asked about Ms. Suh's views on state regulation of hydraulic fracturing and whether the federal government should have the authority to regulate it on state and private lands. Suh Energy Hearing, at 52–53. Senator Lisa Murkowski asked under what conditions Ms. Suh would find it appropriate for the federal government to interfere with the States' right to manage wildlife by reversing a state wildlife decision. *Id.* at 49. Similarly, Senator Barraso asked Ms. Suh how she would "ensure that federal authority does not adversely impact" state efforts to protect the sage grouse. *Id.* at 59. Senator Barrasso asked whether Ms. Suh would "block natural gas production in places like Wyoming, Alaska, New Mexico, West Virginia, Louisiana, and others." Suh EPW Hearing,

at 23. The Senator further asked whether Ms. Suh would "use [her] office to federalize a significant amount of Wyoming's private land?" *Id.* at 73.

Ms. Suh's nomination was ultimately voted out of committee but failed to receive a full vote on the floor. President Obama ultimately withdrew the nomination.[9]

C. A third example involves a nominee to the NLRB, the petitioner in this case. During Craig Becker's nomination to be a member of the Board in 2010, senators raised concerns that he would implement policies displacing state labor laws. Senator Richard Burr, for example, asked Mr. Becker whether he would seek to interfere with right to work laws in North Carolina and other States.[10] In response, Mr. Becker acknowledged that the National Labor Relations Act allows States to enact laws that prohibit employers from conditioning employment on union membership and represented that he would not interfere with any such law if confirmed. Becker Hearing, at 27. Becker ultimately was not confirmed by the 111th Congress[11] but was

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[9] *PN1068—Rhea Sun Suh—Department of the Interior*, Congress.gov (2014), https://www.congress.gov/nomination/113th-congress/1068?q=%7B%22search%22%3A%5B%22rhea+suh%22%5D%7D&resultIndex=3 (last visited Sept. 23, 2016).

[10] *Nomination of Craig Harold Becker: Hearing of the S. Comm. on Health, Educ. Labor and Pensions,* 111 Cong. 27 (2010) (hereinafter Becker Hearing).

[11] *PN 1647—Craig Becker—National Labor Relations Board,* Congress.gov (2010) https://www.congress.gov/nomination/111th-

later installed by the President through a recess appointment.[12] Ten months later, several senators again expressed their opposition to Mr. Becker's appointment, explaining that during his tenure, the NLRB threatened four States with lawsuits over provisions that protected the secret ballot in union elections.[13]

These three examples, and others like them, demonstrate that Senators take their role as the States' representatives in Congress seriously, and that they often exercise their advice and consent power to reject or decline to take action on nominees who they believe could upset the federal-state balance.

## III. The FVRA Should Be Interpreted To Preclude NLRB's Reading In Light Of Significant Separation Of Powers and Federalism Concerns.

The importance of separation of powers, and the advice and consent role, in protecting the States from executive overreach highlights the need for this

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congress/1647?q=%7B%22search%22%3A%5B%22craig+becker%22%5D%7D&resultIndex=2 (last visited Sept. 23, 2016).

[12]Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), available at https://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.

[13] Letter from Senator Michael Enzi et al. to President Barack Obama (Feb. 1, 2011), available at http://indianachamberblogs.com/wp-content/uploads/Becker%20Nomination%202011.pdf.

Court's vigilant enforcement of the FVRA's limits on the President's authority to install acting officers in case of vacancies while the Senate considers a permanent nomination.

SW General has persuasively explained how the text of the FVRA unambiguously forecloses the President from making the appointment at issue here. But even if there were uncertainty on that point, canons of constitutional avoidance and federalism weigh decisively in favor of SW General's reading of the statute. The NLRB's contrary reading of the FVRA would provide the President with unprecedented latitude to install his preferred nominee as acting officer in derogation of the Senate's advice and consent power and historic role as protector of the States' interests in Congress. The Court should decline the invitation to alter the separation of powers and federal-state balance in this manner.

### A. The NLRB's Reading of the FVRA Would Impermissibly Abdicate The Senate's Historic Advice and Consent Power to the President.

The Constitution provides the default rule that presidential appointments of "Officers of the United States," among others, must be submitted to the Senate for advice and consent. U.S. Const. art. II, § 2. The Constitution further provides a limited exception for the President to make recess appointments for "Vacancies that may happen during the Recess of the Senate." *Ibid.*; *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014). While the

Senate remains in session, however, the Constitution does not provide an explicit mechanism for the federal government to staff critical positions between the time when a position becomes vacant and when the Senate confirms a permanent nominee. *E.g.*, *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 209–11 (D.C. Cir. 1998) (providing history of Congressional legislation on acting officers).

Therefore, since 1792, Congress has enacted carefully calibrated statutes intended as temporary stopgap measures to provide it with adequate time to exercise its constitutional obligation to advise and consent. The statutes authorize the President to name acting officers to fill key positions temporarily after a vacancy occurs but before a nominee is confirmed. *Doolin*, 139 F.3d at 205. These statutes historically have carefully restricted either the time during which an acting officer may serve or the universe of people who may serve as an acting officer or both. *Id.* at 210.

From the Founding period to the enactment of the FVRA, the statutory period during which an acting officer could serve was relatively short—varying from ten days to six months.[14] Starting in 1863, the

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[14] The six-month time limit was established in 1792 and remained in effect until 1868. *Doolin*, 139 F.3d at 210; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. The Second Congress adopted this time limit against the backdrop of exceptionally speedy confirmation proceedings—Thomas Jefferson and Alexander Hamilton, for example, were both confirmed to George Washington's cabinet within a day of their nominations. *Doolin*, 139 F.3d at 209. Congress reduced this time limit to 10 days in

law limited the individuals who could serve as acting officials to already-appointed executive officers. Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. In 1868, the Vacancies Act further limited the President's choice of acting officers to those who served as first or sole assistant to that officer or to someone who had already been previously appointed as a constitutional officer to another post and confirmed by the Senate. The version of the Act in effect immediately prior to the FVRA placed a 120-day limit on the service of acting officers in most cases, and retained the limits on the universe of people that the President could appoint to such interim positions. *Doolin*, 139 F.3d at 206; 5 U.S.C. §§ 3345, 3348 (1996). Congress also clarified that the Vacancies Act applied to all executive agencies other than the General Accounting Office. The Vacancy Act (1988 Amendments), Pub. L. No. 100-398, § 7(a), 102 Stat. 985, 988.

As federal agencies grew in size and number, however, American presidents attempted to circumvent the Senate's advice and consent function by bypassing the limitations in the Vacancies Act, claiming for example that particular agencies or positions were exempt from the law's reach. See S. Rep. No. 105–250, at 3.

Congress therefore enacted the FVRA to reclaim its constitutional prerogative to advise and consent

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1868, then increased it to 30 days in 1891. *Id.* at 210. That time limit was expanded again to 120 days in 1988. *Id.* at 210; Presidential Transition Act of 1963,, Pub. L. No. 100–398,§7(b), 102 Stat. 988.

on presidential nominees. *Id.* at 4–5. The Senate report accompanying the bill explained that the scope of the FVRA "must be government-wide unless Congress chooses *clearly and specifically* to exempt specifically identified officers from its reach when countervailing considerations apply." S. Rep. No. 105-250, at 5 (emphasis added). Senator Robert Byrd, a sponsor of the legislation, likewise indicated in a committee hearing that he intended to fashion the FVRA to make it "'so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep.'" *Id.* at 9 (internal citation omitted). Congress viewed as "imperative" the importance of preserving its advice and consent role over executive appointments because "the issue is not simply the prerogative of the Senate." *Id.* at 8. Rather, "[l]ike other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people." *Id.*

In furtherance of these goals, Congress in the FVRA set limitations applying to all federal officers who were subject to the requirements of presidential appointment and Senate confirmation. 5 U.S.C. § 3345. The FVRA, however, provided the President with additional flexibility in naming acting officers in other respects. For example, it increased the length of time in which an acting officer could serve from 120 to 210 days. 5 U.S.C. § 3346. It also extended the universe of people who could serve as acting officer to any officer or employee of the agency who was paid at a GS-15 salary or above and had served for more than 90 days. 5 U.S.C. § 3345. But, as SW General explains in detail in its brief, the FVRA also prohibited the President from naming as

an acting officer the same person that he nominated for the permanent position, unless that person was an experienced first assistant (i.e., served as first assistant in the same position for more than 90 days) or a Senate-confirmed first assistant. *Ibid.*

The NLRB, by contrast, incorrectly reads the FVRA to reach significantly beyond providing stopgap measures to fill vacancies. NLRB reads the statute as exempting potentially thousands of GS-15 employees and officials holding PAS positions from the statute's prohibition on the same person serving as both acting officer and nominee. SW General Br. 36–46. If adopted, the NLRB's position would provide the President with authority to install preferred candidates into offices prior to Senate review to an extent beyond that previously permitted under the Vacancies Act. This Court should reject this invitation, because the plain text of the FVRA prohibits it. But the same result also obtains under the traditional canon of constitutional avoidance.

Under the avoidance doctrine, where a statute is susceptible of two plausible interpretations, this Court should adopt the reading that avoids serious constitutional questions. *Bond,* 134 S. Ct. at 2087. The NLRB's reading of the FVRA raises serious concerns about whether Congress had impermissibly abdicated its duty to advise and consent on presidential appointments that SW General's reading does not.

As explained above, the Advice and Consent Clause protects against the President's appointment of unqualified persons who might be chosen merely

by virtue of their familiarity with the President, local attachments, or partiality. *See supra* at pp. 5–9. Under SW General's interpretation of the statute, only experienced first assistants could serve as both the President's nominee and as a temporary acting officer. For at least two reasons, this arrangement should not ordinarily raise constitutional concerns. First, experienced first assistants represent a small, identifiable universe of employees that Congress has, from at least 1863, repeatedly concluded possess the necessary qualifications to serve as acting officers. *See Doolin*, 139 F.3d at 210; Vacancy Act of July 23, 1868, ch. 227, 15 Stat. 168; Vacancy Act of Feb. 6, 1891, ch. 113, 26 Stat. 733; Presidential Transition Act of 1963 (1988 Amendments), Pub. L. No. 100–398, § 7(b), 102 Stat. 988. Second, as the archetypal civil servants, first assistants do not raise the same concerns about partiality and inexperience that motivated the Founders to adopt the Advice and Consent Clause. S. Rep. No. 105–250, at 12.

The NLRB's reading of the statute, by contrast, would open the door to numerous employees in any position within an agency at or above a particular salary level from serving as both nominee and acting officer, advancing the President's policy agenda before the Senate can act on the nomination. Moreover, the FVRA contains a provision (preserved from the prior Vacancies Act) that tolls the 210-day limit for acting officers when a nomination is delivered to the Senate. 5 U.S.C. § 3346. Therefore, unless the Senate acts on a nomination, the President's choice could continue serving as acting officer indefinitely.

Congress cannot, and did not, provide the executive with a blank check to make appointments in this manner. The Constitution prevents Congress from delegating its enumerated powers to the President or any other person or body. *Freytag*, 501 U.S. at 880; *Mistretta v. United States*, 488 U.S. 361, 371–72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). This principle applies to the Appointments Clause, which "prevents Congress from dispensing power too freely," and "limits the universe of eligible recipients of the power to appoint." *Freytag*, 524 U.S. at 880. "For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch," and "[n]either Congress nor the Executive can agree to waive this structural protection." *Ibid.*

Here, the NLRB's reading of the FVRA would raise serious concerns about whether Congress had impermissibly delegated or abdicated its power to advise and consent to the President. If the President were permitted to install any agency employee as acting officer before the Senate had an opportunity to advise and consent, the "undeniable effects" would be to "enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, [or] to favor one State and ignore another." *City of New York*, 524 U.S. at 451 (Kennedy, J., concurring). This Court should not interpret the FVRA to undermine the structural protections of the Constitution in this manner to the detriment of the States and the people.

It is no answer to note that this Court has at times permitted Congress to delegate rulemaking

authority to federal agencies so long as Congress articulates an "intelligible principle" to guide agency discretion. *Mistretta*, 488 U.S. at 372; *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984). As the D.C. Circuit correctly noted in this case, Congress did not entrust the NLRB with the authority to administer the FVRA, and therefore no deference is owed the NLRB with respect to its interpretation of the statute. *SW General, Inc. v. NLRB*, 796 F.3d 67, 74 n.4 (D.C. Cir. 2015) (citing *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000)); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Moreover, this Court has never extended the concept of *Chevron* deference outside the policymaking sphere to the realm of executive appointments. Where, as here, the Constitution specifically entrusts the Senate with the power to advise and consent, Congress may not delegate that power, even if it has set certain broad parameters within which the President may act.

In short, the serious separation of powers concerns associated with the NLRB's reading of the FVRA provide an additional reason for this Court to interpret the statute according to its plain meaning and limit the President's ability to install nominees as acting officers prior to Senate confirmation.

### B. Congress Has Not Clearly Expressed An Intent To Alter The Federal-State Balance By Expanding The President's Authority To Install Nominees As Acting Officers.

As explained above, the NLRB's position if adopted would also raise serious federalism concerns given the importance of advice and consent for protecting state interests. A permissive reading of the FVRA would allow the President to circumvent the Senate's advice and consent role, which serves as an important protection for state interests, in a host of novel circumstances. Even if the text of the FVRA allowed for this reading, which it does not, Congress must plainly express such an intention to upend the federal-state balance. It has not done so here.

This Court has explained that "Congress legislates against the backdrop" of certain presumptions, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), including "the relationship between the Federal Government and the States under our Constitution." *Bond* 134 S. Ct. at 2088. For example, this Court presumes federal statutes do not abrogate state sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); impose obligations on States under section 5 of the Fourteenth Amendment, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–17 (1981); or preempt state law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Similarly, it is "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state

powers." *Bond*, 134 S. Ct. at 2089 (quoting *Gregory*, 501 U.S. at 460).

For example, this Court in *Bond* rejected a reading of the term "chemical weapon" in the federal Chemical Weapons Convention Implementation Act that would "reach purely local crimes," 134 S. Ct. at 2090. The question presented was whether the statute, which defined "chemical weapon" broadly as any toxic chemical used for other than peaceful purposes, *id.* at 2084, prohibited the local use of a chemical that caused a minor thumb burn, *id.* at 2083. Although the text of the Act might have included the conduct at issue, the Court rejected that reading as inconsistent with "principles of federalism inherent in our constitutional structure," *id.* at 2088, because it would "'dramatically intrude upon traditional state criminal jurisdiction.'" *Ibid.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). The Court declined to read the statute in that manner because Congress had not clearly indicated its intent to upset "the relationship between the Federal Government and the States under our Constitution." *Ibid.*

This Court applied the same canon of construction to the selection of state government officials in *Gregory*, 501 U.S. at 460. The question there was whether the Missouri constitution's mandatory retirement provision for state judges violated the federal Age Discrimination in Employment Act ("ADEA"). *Id.* at 455–57. The Court concluded that, although the text of the ADEA was ambiguous as to whether state judges were exempt from the ADEA, reading the statute to limit the

State's ability to set qualifications for its officers upset the federal-state balance and required clear congressional authorization. *Id.* at 470. Allowing Congress to interfere with Missouri's "constitutional power to establish the qualifications" of state officers, *id.* at 461, this Court reasoned, "would upset the usual constitutional balance of federal and state powers," *id.* at 460.

This clear statement rule applies with equal force in this case. The NLRB's permissive reading of the FVRA would upset the usual balance of federal and state powers by diluting the Senate's historic advice and consent power. The current constitutional balance affords States, through their elected representatives in the Senate, an important role in advice and consent on executive appointments, see *supra* pp. 9–16, just as States traditionally have had the power to set qualifications for their own officers, *Gregory*, 501 U.S. at 461–62, and punish local criminal activity, *Bond*, 134 S. Ct. at 2089. This Court should similarly decline to read the FVRA to alter the existing balance of power on executive appointments absent clear congressional authorization.

Nothing in the FVRA indicates that Congress intended to limit its advice and consent role. To the contrary, as shown above, Congress repeatedly expressed its intent during the enactment process to *preserve* the Senate's advice and consent power. See S. Rep. No. 105–250 at 5, 12. This Court should not infer, based upon at most a dubious reading of statutory text, that Congress intended to abdicate that power here in a host of novel circumstances.

In short, federalism principles reinforce the conclusion that the FVRA does not authorize the President to direct a panoply of nominees to serve in an acting capacity pending hearings and a vote in the Senate. For this reason too, the Court should reject the NLRB's attempt to insulate presidential nominations from the Senate's advice and consent.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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