No. 18-3579

In the United States Court of Appeals
for the Third Circuit

United States of America,

Plaintiff-Appellee,

v.

Tomas Miguel Liriano Castillo,

Defendant-Appellant.

Appeal from the United States District Court of the Virgin Islands
Division of St. Thomas & St. John
No. 3:16-cr-00029-001
Hon. Curtis V. Gomez

BRIEF OF MORTON ROSENBERG AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

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INTEREST OF AMICUS CURIAE

Amicus Morton Rosenberg is considered a leading authority on the acts of Congress at issue in this case.[1] Before he retired in 2008, Rosenberg spent over three decades as an analyst in the American Law Division of the Congressional Research Service. In that capacity, he advised Congress on many issues of constitutional law, administrative law, and congressional practice and procedure, with a special emphasis on Executive appointments.

While serving at the Congressional Research Service, Rosenberg was intimately involved in the enactment of the Federal Vacancies Reform Act. Among other things, Rosenberg wrote a report for Congress, detailing the problems with prior laws, that lead directly to the Vacancy Reform Act's legislative overhaul. *See* Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 1998) (*Rosenberg Memo I*). He then testified before Congress during the debate over the resulting legislation. *Oversight of the*

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or his counsel contributed money intended to fund this brief's preparation or submission. All parties have consented to the filing of this brief.

Implementation of the Vacancies Act, Hearings Before the Senate Committee on Governmental Affairs, Mar. 18, 1998 (Statement of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service), 1998 WL 8993467. And after the Act passed, he wrote another report for Congress exploring how it was being implemented. *See* Morton Rosenberg, Cong. Research Serv., Report for Congress, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (Nov. 1998) (*Rosenberg Memo II*). Both of Rosenberg's CRS reports were cited by the Supreme Court in *NLRB* v. *Southwest General, Inc.*, 137 S. Ct. 929, 935 (2017). And commentators consider his views on the Vacancies Reform Act's legislative background to be authoritative. *See* Joshua L. Stayn, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 Duke L.J. 1511, 1513 n.8 (2001); Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1050 n.60 (1998).

Mr. Rosenberg writes to provide the Court with his considered expertise on the Vacancies Reform Act, its impact on the rules for designating officials to serve as Acting Attorney General, and why the

President's appointment of Matthew Whitaker to serve in that position violates these rules.

SUMMARY OF ARGUMENT

In attempting to justify the appointment of Matthew Whitaker as Acting Attorney General, the Government makes extraordinary claims about the President's power to designate temporary holders of the nation's most powerful law-enforcement post. And the Government does so in an effort to sideline Congress and prevent it from ensuring that those assuming the Attorney General's responsibilities are properly vetted and willing and able to faithfully wield the Justice Department's considerable power.

The Government's position is rooted in an opinion issued by the Office of Legal Counsel. *Memorandum for Emmet T. Flood, Counsel to the President, Re: Designating an Acting Attorney General*, -- Op. O.L.C. -- (Nov. 14, 2018) (*Flood Memo*). In that opinion, the Government acknowledges that Congress enacted a careful scheme in the Attorney General Succession Act, 28 U.S.C. § 508, which provides an automatic "chain of succession" to fill vacancies in the office of the Attorney General. *Flood Memo* 4. The Government nowhere contests the importance of that scheme, which

requires temporary occupants to have been previously vetted by the Senate for senior positions within the Justice Department. Those requirements ensure that those who would exercise the Attorney General's sweeping powers—as the nation's chief law-enforcement officer and chief legal counsel, and as boss to the Justice Department's 110,000 employees—will understand the Department's operations and be loyal to its mission.

The Government has likewise acknowledged that for as long as the Department of Justice has existed, and until enactment of the Federal Vacancies Reform Act at issue in this case, the Attorney General Succession Act's scheme provided the exclusive method for determining who would be entitled to temporarily lead the Department. *Acting Attorneys General*, 8 Op. O.L.C. 39 (Mar. 30, 1984); *see also Rosenberg Memo I* at 14–17. And the Government acknowledges that under the Attorney General Succession Act, the rightful holder of the office is the Deputy Attorney General, Rod Rosenstein. *Flood Memo* 4 n.2.

The Government nonetheless contends that Congress quietly overturned its previous 150 years of practice for designating Acting Attorneys General by enacting the Vacancies Reform Act of 1998, Pub. L. No. 105-277, div. C, tit. I, 112 Stat. 2681-611. This law, the Government

claims, gave the President the "option" to evade the exclusive, congressionally mandated succession scheme specific to the office of the Attorney General, in 28 U.S.C. § 508, and to instead use the Vacancies Act's default statutory scheme, pertaining to temporary appointments generally, in 5 U.S.C. § 3345(a). *Flood Memo* 4. And under this alternative scheme, says the Government, the President would be allowed to place the Justice Department in the hands of any senior DOJ employee—anyone from a pool of thousands—even someone whom the Senate has never confirmed to any position, in the Justice Department or anywhere else in the federal government. 5 U.S.C. § 3345(a)(3).

But the circumstances surrounding enactment of the Vacancies Reform Act reveal that the Government's position would override the Act's reason for being. Congress enacted the Vacancies Reform Act during another period in which the Office of Legal Counsel sought to create "options" allowing for temporary appointments of lower-level DOJ employees (and others) outside of a congressionally mandated scheme, through creative readings of agencies' enabling legislation. That last OLC effort resulted in administrative chaos and routine disregard of congressionally mandated restrictions. The Vacancies Reform Act

produced order from that chaos, by eliminating those outside options and cabining the Executive's appointment discretion.

The same Congress that sought to restore order, by removing the President's option to appoint lower-level DOJ employees, would not have simultaneously invited far more chaos by giving the President free reign to appoint the Attorney General—the Department's most important and powerful Senate-confirmed official. Unsurprisingly, the Government's backwards premise is unsupported by the statutory text, legislative history, or previous cases.

On the contrary, each of these sources confirms that the Vacancies Reform Act maintained Congress's 150-year practice governing the succession of the Attorney General. And under that uninterrupted practice, the Acting Attorney General is Rod Rosenstein and Rod Rosenstein alone.

ARGUMENT

Congress has provided only one mechanism for designating an Acting Attorney General: Section 508 of the Attorney General Succession Act.

The Government contends that the Vacancies Reform Act enables the President to evade a congressionally mandated, 150-year-old regime for designating an Acting Attorney General under 28 U.S.C. § 508—a regime specifying that only certain Senate-confirmed officers within the

Department could temporarily occupy the office of Attorney General. In its stead, the Government insists, Congress gave the President two potential paths to designate an Acting Attorney General: (1) the President could allow the designee specified in section 508 to take office, or (2) the President could choose a successor himself, so long as the replacement met the qualifications of 5 U.S.C. §§ 3345(a)(2) or (a)(3)—the latter of which would leave him free to appoint someone whom the Senate had never confirmed to any position at all.

Nothing in the Vacancy Reform Act or the circumstances of its drafting suggests that it changed the process for appointing an Acting Attorney General or gave the President options to evade *any* office-specific congressional succession scheme. Rather, the Vacancies Reform Act requires that vacancy appointments follow a path that gives the options to Congress. Either Congress enacts a statute detailing how a particular vacancy is to be filled, or Congress allows the President to fill the office through the default provisions in 5 U.S.C. § 3345. And because 28 U.S.C. § 508 is of the former variety—Congress has designated a particular officer to become Acting Attorney General—then § 508, not the Vacancies Act's default provisions, controls.

A. The Federal Vacancies Reform Act does not offer the President an alternative way to name the Acting Attorney General.

1. *Congress sought to prevent presidential evasion of office-specific appointment requirements.*

The Federal Vacancies Reform Act of 1998 sought to clear the administrative rubble left by Watergate. President Nixon's Saturday Night Massacre had decimated the Department's ranks and reinforced the need for principal federal-government officers to be accountable to the people, not just the President—especially one threatening to become a law unto himself. Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1061 (1998). As result, vetting potential officeholders became "more complex, difficult and protracted" (*Rosenberg Memo II* at 8) and left the federal government with far more Senate-confirmable offices than viable candidates to fill them.

To prevent these offices from becoming inoperable for want of agency head, in 1973 the Office of Legal Counsel began to extend temporary acting appointments past the Vacancies Act's strict time limits. In so doing, OLC invoked the enabling statutes governing many agencies, like the Justice Department's statute found at 28 U.S.C. §§ 509–10. *Rosenberg*

Memo II at 1. And it argued that these provisions, which empowered agency heads to delegate functions to subordinates, gave "the head of an executive agency . . . independent authority apart from the Vacancies Act" to fill vacant offices. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

Scandal ensued. Allowing presidents to bypass the Vacancies Act's mandatory scheme ensured routine evasion of specific rules that Congress set for those appointments. And the situation got worse over time. By 1998, 20% of the 320 positions requiring Senate-confirmed appointees—and 25% of such positions within the Justice Department—were staffed by temporary appointees, most of whom had served beyond the 120 days then allotted by the Vacancies Act. *Rosenberg Memo II* at 1. The situation also sparked interbranch conflict between the Justice Department and the Comptroller General, who objected that agency enabling statutes were not specific enough to allow appointees to serve longer than authorized by the Vacancy Act. Comptroller General's Decision B-220522, June 9, 1986, 65 Comp. Gen. 626 (1986); *see also Rosenberg Memo I* at 4–5, 19.

Things came to a head in 1997, when the Senate Judiciary Committee refused to refer Bill Lann Lee, President Clinton's nominee to head the Office of Civil Rights, to a floor vote. *See Democrat Wants New Hearing for*

Embattled Nominee, AP, Nov. 8, 1997, 1997 WL 4891645; Naftali Bendavid, *Democrats Delay Panel's Vote on Civil Rights Nominee*, Chi. Trib., Nov. 7, 1997, § 1, at 3. The President responded by naming Mr. Lee as "Acting" Assistant Attorney General for Civil Rights. President Clinton delegated the officer's responsibilities to Mr. Lee and planned for him to serve beyond the Vacancies Act's time limits. Stewart M. Powell, *Lee Wins Civil Rights Job Despite GOP Block: President Dodges Senate Opposition and Names L.A. Lawyer to Post on an Acting Basis*, S.F. Examiner, Dec. 15, 1997, at A1.

The result was public outcry and calls for the Vacancies Act to be amended to bar such presidential maneuvers. *See id.* In response to a request from Congress, CRS recommended legislation to reiterate that the Vacancies Act is "the exclusive vehicle for temporarily filling advice and consent positions in all departments and agencies in the government" (*Rosenberg Memo I* at 33) and "cannot be overcome by the general authority of an agency head to assign functions . . . within an agency" (*id*. at 34–35). Instead, the Vacancies Act should control unless Congress provided—in statutory language that was "express[] and specific" (*id*. at 3)—that another statute would control the temporary appointment process for a particular office (*id*. at 27).

2. *Congress addressed the problem by enacting the Vacancies Reform Act.*

Congress accepted CRS's recommendation and enacted the Vacancies Reform Act to provide "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of any Senate-confirmable office in any "Executive agency" unless some other "statutory provision" empowers the President to make the appointment himself or "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(A) & (B). Indeed, Congress plucked the word "exclusive" directly from the CRS Report. *Rosenberg Memo I* at 33 (The Vacancies Act "is meant to be the exclusive vehicle for temporarily filling advice and consent positions"). The Act also embraced the Comptroller General's argument (and CRS's recommendation) that agency enabling statutes do not displace the Vacancies Act's limits on temporary appointments. 5 U.S.C. § 3347(b).

These effects were well understood at the time. As explained by Senator Thompson, the Vacancy Reform Act's original sponsor, the reforms served to "extend the provisions of the Vacancies Act to cover all advice and consent positions in executive Agencies *except* those that are covered by express specific statute that provide for acting officers to carry out the

functions and duties of the office." 144 Cong. Rec. S11022–S11023 (Sept. 28, 1998 (emphasis added). The corollary was equally true: When a specific statute provides for acting officers to carry out the functions of the office, the Vacancies Act cedes entirely. *See also* S. Rep. 105-250, at 2 (1998) (The Vacancies Reform Act would "appl[y] to all vacancies in Senate-confirmed positions in executive agencies with a few express *exceptions*," including "statutes that themselves stipulate who shall serve in a specific office in an acting capacity") (emphasis added); *id.* at 15 (describing office-specific statutes as "exceptions" to the Vacancies Reform Act).

Although these reforms did not specifically mention the position of Acting Attorney General, Congress was nevertheless forced to address that office while drafting the Vacancies Reform Act, because its legislative overhaul completely replaced the prior version of the Vacancies Act. Pub. L. No. 105-277, div. C, tit. I, § 151(b), 112 Stat. 2681, 2681-611 (noting that the Vacancies Reform Act "str[uck] sections 3345 through 3349" of title 5). The overhaul removed a specific carve-out stating that the Vacancies Act "d[id] not apply to a vacancy in the office of Attorney General," 5 U.S.C. § 3357 (1988); this carve-out meant to reflect that the process for designating Acting Attorneys General was handled outside the Vacancies

Act, in the Attorney General Succession Act, and had been for as long as the Justice Department had existed. This unique process arose during the earliest days of the Justice Department, at a time when the Attorney General had few real responsibilities, many U.S. attorneys were contract employees, and no central authority ensured that the Government maintained coherent legal interpretations across all agencies. *Rosenberg Memo I* at 9–15. In those days, interpretive responsibilities were distributed to individual agencies, producing conflicting interpretations between different agency lawyers advancing their agencies' interests rather than the national good. *Id.* at 15.

When those responsibilities were modernized and unified in a single office, it became untenable for its occupant to be subject to the conventional process of the then-applicable Vacancies Act. *Id*. Instead, Congress provided a special succession scheme: If a vacancy arose in the Office of the Attorney General, the Senate-confirmed deputy (originally, the Solicitor General) would automatically become Acting Attorney General. *Id.* Congress chose this specific succession method, located outside the Vacancies Act's default provisions, because it wanted Senate vetting to ensure that the candidate (1) was qualified and had the independent

judgment necessary to lead the office, (2) had the Department experience necessary to understand the office's sprawling responsibilities, and (3) was loyal to the Department's mission, free from outside allegiances and conflicts of interest. *Id*.

Over time, this procedure became the succession scheme codified at 28 U.S.C. § 508. Indeed, the Senate Committee Report accompanying Senate Bill 2176 (1998), which became the Vacancies Reform Act, specified that section 508, and its 150-year old practice for designating an Acting Attorney General, would survive the 1998 legislative overhaul—ensuring "that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General." S. Rep. No. 105-250, at 13.

At first, the Senate tried to preserve the Attorney General Succession Act's exclusivity by inserting into 5 U.S.C. § 3345 a provision stating that "[w]ith respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable." S.2176, 105th Cong., § 3345(c) (1998). Yet that approach introduced a different problem: By specifically referring to section 508, Senate Bill 2176 seemed to suggest that section 508 would be the *only* office-specific statute to which the

Vacancies Act would cede. That suggestion would have permitted the inference that the Vacancies Act allowed appointments alongside office-specific statutes—an inference possibly reinforced by the original bill's language making the Vacancies Reform Act "available" rather than "exclusive." S.2176, § 3347. But that was not Congress's intent. On the contrary, the Senate Report accompanying the bill listed some 39 of these other statutes, alongside 508(a) & (b), and stated that all 39 of them would be "retain[ed]"—not replaced with mechanisms for evasion. S. Rep. No. 105-250, at 15–17.

Congress eliminated this confusion in the version of the Vacancies Reform Act that actually became law. The version actually enacted more clearly retained the exclusive character of office-specific statutes by hewing more closely to CRS's original proposal. In particular, 5 U.S.C. § 3345 removed the reference to section 508 that had appeared in Senate Bill 2176, and changed the word "applicable" to "exclusive" in 5 U.S.C. § 3347 (as CRS had originally recommended in *Rosenberg Memo I* at 33). These changes ensured that "the Vacancies act provide[d] the sole means by which temporary officers may be appointed unless contrary statutory

language . . . creates an explicit exception." 144 Cong. Rec. S12823 (Oct. 21, 1998) (Sen. Johnson).

In sum, the office-specific statutes, which provided the exclusive path for designating an acting official before the Vacancies Reform Act, remained exclusive after Congress enacted the Vacancies Reform Act. And because section 508 was just as exclusive as the other retained office-specific statutes, this more general phrasing eliminated any need for a specific reference to section 508—while still vindicating Congress's explicit aim of preserving its 150-year-old practice for designating an Acting Attorney General.

B. The Government's defense of Whitaker's appointment contradicts text, history, and precedent.

In nonetheless attempting to defend the appointment of Whitaker to Acting Attorney General, the Government turns the Vacancies Reform Act on its head. The Vacancies Reform Act was enacted to foreclose the Justice Department from arguing that DOJ's enabling statutes provided alternatives to the Vacancies Act; Congress made the Vacancies Act exclusive where it applies. And it did so to constrain the President's temporary appointment powers for all appointees—even run-of-the mill sub-Cabinet positions and underling DOJ officers.

Congress would never have allowed the exact opposite result with respect to the Attorney General personally—the head of the federal government's most powerful and consequential agency. Congress likewise would not have, with one hand, ended the mischief resulting from allowing the President to evade Congress's mandated scheme for filling lower positions within the Justice Department, and then, with the other hand, enlarged the potential for mischief by allowing the President to evade the mandatory scheme for appointing the Acting Attorney General. Nor would Congress have silently disregarded a 150-year practice in temporary Attorney General appointments—a practice that has long protected the Department and the nation against incompetence, cronyism, and presidential interference.

Yet the Government's argument demands that the Court indulge each of these fictions, no matter how improbable. Unsurprisingly, nothing in the Act's text, history, or precedent supports the Government's position.

1. The Government's argument contradicts the Act's text.

At the outset, the Government strays from the statutory text. The Government invokes two provisions within 28 U.S.C. § 508, but neither supports the Government's argument.

First, the Government points to a part of section 508(a) providing "that the Deputy Attorney General 'may' serve as Acting Attorney General, not that he 'must,'" and argues that this language suggests "that the Vacancies Reform Act remains an alternative means of appointment." *Flood Memo* 5. Not so. The use of the permissive "may" accounts only for the prospect that there might not be a Senate-confirmed Deputy Attorney General available to assume the role of Acting Attorney General. Section 508's succession scheme remains mandatory, however, because subsection (b) states that the Associate Attorney General "shall" take up the role of Attorney General if the Deputy is not available—signaling that the Deputy must take up the rule if he *is* available.

If the statute were optional, any option would belong only to the Deputy Attorney General, who could decide whether to assume the office. *See Air Line Pilots Ass'n, Int'l* v. *U.S. Airways Grp., Inc.*, 609 F.3d 338, 342 (4th Cir. 2010) (defining "may" as providing authorization without obligation). If the Deputy declined, then the Assistant Attorney General or other available officer in section 508's line of succession would need to assume the role. But this language does not allow the President himself to

disregard the Attorney General Succession Act's provisions, and thus it does not expand his authority to appoint an Acting Attorney General.

Second, the Government notes that section 508(a) makes the Deputy Attorney General the "'first assistant to the Attorney General' 'for the purpose of Section 3345 of title 5'" and argues that this language makes vacancies in the Office of the Attorney General subject to the Vacancies Act. *Flood Memo* 5. But if it did, then section 508(b)'s chain of succession—which automatically transfers power from the Attorney General to the Deputy or to the Associate Attorney General—would break. For that chain of succession is incompatible with the requirement, in 5 U.S.C. § 3348(b), that the office be filled by holders appointed under "sections 3345, 3346, and 3347" of the Vacancies Act or else remain vacant. Further, if section 508 were subject to the Vacancies Act, then the Deputy Attorney General could never serve beyond the Vacancies Reform Act's time limits (*see* 5 U.S.C. § 3346). Given these anomalies, even the Government does not seriously contend that this language makes the Vacancies Act controlling.

Congress adopted the "first assistant" language in an early version of the Attorney General Succession Act for reasons that were more mundane and are now superfluous: to conform that statute to the predecessor

Vacancies Act. The latter specified that the "first assistant" was the successor to an absent officer and that the President's authority to override that default rule did not apply to the Attorney General. 5 U.S.C. §§ 3345, 3347 (1998). As noted, the Vacancies Reform Act replaces that specific exemption with broader—but equally applicable—language stating that the Vacancies Reform Act is not exclusive when any statute designates a specific successor. *See* 5 U.S.C. § 3347(a)(1). In enacting the Vacancies Reform Act, Congress simply neglected to delete the outdated reference to the Deputy Attorney General as the "first assistant."

Finally, it is meaningless that section 3349c "is used to exclude certain offices together." *Flood Memo* 4 n.3. Those exclusions apply only to multi-member bodies that had "always" been considered separate from the Vacancies Act. S. Rep. No. 105-250. In such multimember bodies, the President need not appoint interim officers for the body to keep functioning. Nothing about that provision suggests that Congress intended to exclude, by mere implication, single-member offices governed by more specific succession statutes.

Ultimately, none of the provisions invoked by the Government overrides section 508's absolute succession commands. Certainly these

provisions do not speak with the clarity necessary to interrupt unbroken congressional practice lasting 150 years.

The need for such clarity, moreover, is more than a technicality. It implicates Congress's rightful place within the division of powers in the Appointments Clause, U. S. Const. art. II, § 2, cl. 2—"among the significant structural safeguards of the constitutional scheme,'' *Edmond v. United States,* 117 S. Ct. 1573, 1579 (1997). The Appointments Clause reflected that ''[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. *Commissioner of Internal Revenue,* 501 U.S. 868, 883 (1991) (citations omitted). To guard against those abuses, Congress has the absolute right to set conditions for those temporary appointments—a consequences of its power to confirm the temporary occupant's permanent replacement. If Congress could be deemed to forfeit that power through elliptical and artfully constructed arguments like the Government's, the President might exploit statutory vagueness or ambiguities to concoct "options" for temporary appointments when Congress afforded them

none. And whatever the Vacancies Act's default provisions might say about temporary appointments in general, they do not speak with sufficient clarity about designating an Acting Attorney General to overcome the automatic and mandatory succession scheme laid out in 28 U.S.C. § 508.

2. The Government's argument contradicts the Act's legislative history.

The Government's position also deviates from the Vacancies Reform Act's legislative history. The Office of Legal Counsel points to a single sentence in S. Rep. 105-250 stating that, in certain circumstances, "'the Vacancies Act will continue to provide an alternative procedure for temporarily occupying the office.'" *Flood Memo* 4 (quoting S. Rep. 105-250, at 16). But this sentence does not suggest that the Vacancies Act was an "alternative" to *all* office-specific statutes. Rather, this passage is a product of the paragraph in which it appears, and that paragraph addresses a different possibility altogether: that the office-specific statutes would be repealed or amended. In the Report, the Committee on Government Affairs contemplates that in response to the Vacancies Reform Act, other "authorizing committees" might change office-specific designation procedures within their areas of authority. S. Rep. 105-250, at 17. And the

Report anticipated that some committees might opt to repeal their existing procedures entirely "in favor of the procedures contained in the Vacancies Reform Act." *Id*. In that event—and *only* in that event—"the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office" if the committees wished to tinker with the existing procedure. *Id.*

For that reason, the sentence in question does not say the Vacancies Reform Act as adopted definitively "will serve" as an alternative procedure to the office-specific statute. It says instead that that the Vacancies Act conditionally "would"—thus anticipating some *future* legislative change, not the changes provided in the Senate Bill itself. Furthermore, the Government's reading contradicts the Report's statement that appointments to the office of Acting Attorney General would always be pulled from Senate-confirmed positions within the Justice Department. *Id*. at 13. Congress could not have said that if the Vacancies Act were an option.

In any event, that legislative history arose from a bill whose language did not become law. So even if the Senate Report's lone statement was

actually meant to make the Act optional for *any* office, that option thus did not survive the lawmaking process.

3. The Government's argument is unsupported by prior cases.

The cases likewise do not treat the Attorney General Succession Act and the Vacancies Act as dual-track, non-exclusive options for presidential appointments of the Acting Attorney General. The Office of Legal Counsel relies on two cases: *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), and *Hooks v. Kitsap Tenant Support Services*, 816 F.3d 550 (9th Cir. 2016). *See Flood Memo* 6. But neither case addressed the Attorney General Succession Act or otherwise applies to these circumstances.

First, in *English*, the district court held that the President could invoke the Vacancies Reform Act to appoint an Acting Director of the Consumer Financial Protection Board ("CFPB"), even though a provision of the Dodd-Frank Act specifically addressed succession. In that case, the CFPB's Director named someone as his Deputy then immediately resigned. *English*, 279 F. Supp. 3d at 313–16. The Deputy argued that she became Acting Director under a provision of the Dodd-Frank Act stating that the Deputy shall "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). She then argued that her succession to

that role precluded the President from naming a different Acting Director. *English*, 279 F. Supp. 3d at 317.

But the potential availability of the Vacancies Act as an option in *English* says nothing about its availability as an option in this case. For one, and as stressed by the district court in *English*, Dodd-Frank's officer-specific provision applies only to the Director's "absence or unavailability," 12 U.S.C. § 5491(b)(5), and thus did not displace the Vacancies Reform Act in the event of a resignation, 279 F. Supp. 3d at 322–23. And the court specifically identified the Attorney General Succession Act as a statute that *would* have displaced the Vacancies Reform act in similar circumstances. *Id.*

In addition, the court noted that Dodd-Frank specifically incorporates pre-existing federal statutory law, which includes the Vacancies Reform Act. *Id.* at 322–27. The Attorney General Succession Act contains no such incorporation provision.

Finally, the court reasoned that the plaintiff's position would constrict the President's appointments power, because the Deputy Director is selected not by the President but by the Director of the CFPB. *Id.* at 327–28. Conversely, all Justice Department officials in the Attorney General Succession Act's order of succession are selected by the President.

Accordingly, adopting the Government's position here is not necessary to preserve presidential prerogatives, and would also undermine congressional power by nullifying Congress's authority to confirm the Attorney General as a principal officer.

Second, in *Hooks*, the Ninth Circuit stated that the Vacancies Reform Act might offer an alternative to an officer-specific provision for appointing an Acting General Counsel for the National Labor Relations Board ("NLRB"). But the applicability of the Vacancies Reform Act in that case was purely theoretical, because the parties agreed that the appointment at issue lasted too long to be authorized by the officer-specific provision in the National Labor Relations Act. *See id.* at 555 (citing 29 U.S.C. § 153(d)). The Ninth Circuit then held that the appointment also violated the Vacancies Reform Act. *Id.* at 557–64.

Thus, when the Ninth Circuit mused that the Vacancies Reform Act might supply another way to appoint an Acting General Counsel, it spoke in dicta—misguided dicta at that. *See id.* at 556. Like the OLC, the Ninth Circuit misinterpreted the sentence in the Senate Report about the Vacancies Act serving as an "alternative"; its mistaken reading of unenacted language is thus unpersuasive.

In any event, the dicta from *Hooks* would not apply here even if it were well reasoned. The Ninth Circuit did not address any of the arguments against reading the Vacancies Reform Act to override a statute such as the Attorney General Succession Act, and it did not need to. Because both the National Labor Relations Act and the Vacancies Reform Act call for the President to appoint an interim official, they involve a slimmer conflict than arises here: The Attorney General Succession Act specifies a particular successor to the Attorney General and does not permit a presidential appointment; and *Hooks* did not present any issue under the Appointments Clause, as the NLRB's General Counsel is better viewed as an inferior officer whom the Constitution does not require to be confirmed by the Senate.

Neither *English* nor *Hooks*, then, anoints the Vacancies Act to replace all officer-specific statutes. At best, those cases suggest the Vacancies Act might provide an alternative in some cases—but only where the officer-specific statute specifically provides that the Vacancies Act is an alternative.

* * *

The Government's reading of the Vacancies Reform Act thus lacks any basis in text, history, or precedent. It discards 150 years of practice. And it would enable the President to bypass Congress and appoint, as the nation's chief law-enforcement official, an unvetted individual whose loyalties lie to the President rather than to the nation and its laws.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because, excluding the parts of the brief exempted by Rule 32(f), the brief contains 5,360 words. The brief has been prepared in 14-point Book Antiqua, using Microsoft Word 16.17. As permitted by Federal Rule of Appellate Procedure 32(g), I have relied on Microsoft Word's word-count feature.

This brief complies with Local Rule 31.1(c) because the PDF file has been scanned for viruses by ClamXav version 2.1.14, which reports the file to be virus free.

As required by Local Rule 31.1(c), the electronic version of this brief is identical to the text of the paper copies that will be filed with the Clerk's office.

Finally, as required by Local Rule 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Gregory M. Lipper
Gregory M. Lipper
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

On December 7, 2018, I served a copy of this amicus brief on all counsel of record through the Court's ECF system.

/s/ Gregory M. Lipper
Gregory M. Lipper
Counsel for amicus curiae