UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF Daniel Girmai NEGUSIE,
Respondent.

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Interim Decision #3943
27 I&N Dec. 481 (A.G. 2018)

BRIEF OF AMICI CURIAE THE AMERICAN IMMIGRATION COUNCIL, ASISTA IMMIGRATION ASSISTANCE, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, HER JUSTICE, IMMIGRANT DEFENSE PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND SOUTHERN POVERTY LAW CENTER ON REFERRAL TO THE ATTORNEY GENERAL

Robert N. Weiner
R. Stanton Jones
Kaitlin Konkel
Samuel F. Callahan*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
robert.weiner@arnoldporter.com

* *Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members*

Trina Realmuto
AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street, Suite 18
Brookline, MA 02446
(857) 305-3600
trealmuto@immcouncil.org

Karolina Walters
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7500
kwalters@immcouncil.org

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases—Continued

Constitutional Provisions

Statutes and Regulations

Statutes and Regulations—Continued

Legislative Materials

Legislative Materials—Continued

Executive Materials

Other Authorities

Other Authorities—Continued

INTRODUCTION[1]

On November 7, 2018, following the resignation of former Attorney General ("AG") Jeff Sessions, President Trump tweeted that Matthew G. Whitaker, Sessions' chief of staff, would "become our new Acting Attorney General of the United States."[2] President Trump's designation of Mr. Whitaker as Acting Attorney General—the Nation's highest law enforcement position—subverted fundamental constitutional checks and balances designed to safeguard our democracy. The designation violated the constitutional requirement that "Officers of the United States" serve only "by and with the Advice and Consent of the Senate," U.S. Const. art. II, § 2, cl. 2; it ignored the statute governing Attorney General succession, 28 U.S.C. § 508; and it misapplied the Federal Vacancies Reform Act of 1998 ("FVRA"), 5 U.S.C. §§ 3345–3349d. Because Mr. Whitaker's designation as Acting Attorney General is unlawful, he cannot preside over this case—or any other immigration matter referred to the Attorney General under 8 C.F.R. § 1003.1(h).

---

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than amici curiae, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

[2] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 7, 2018, 2:44 PM), https://twitter.com/realDonaldTrump/status/1060256619383193601.

SUMMARY OF ARGUMENT

Mr. Whitaker lacks authority to adjudicate immigration cases that, like this one, were certified pursuant to 8 C.F.R. § 1003.1(h). That regulation contemplates referral of certain immigration cases to the Attorney General for adjudication, including, as relevant here, "cases that . . . [t]he Attorney General directs the Board [of Immigration Appeals] to refer to him." *Id.* § 1003.1(h)(1)(i). Implicit in the regulation is the assumption that the responsible Attorney General or Acting Attorney General was lawfully installed in the role. Here, notwithstanding the analysis in a recent opinion by the Justice Department's Office of Legal Counsel ("OLC"), Mr. Whitaker's designation as Acting Attorney General was unlawful: it violates the Appointments Clause and 28 U.S.C. § 508 (the "AG Succession Law"), and reflects a misapplication of the FVRA.

The Supreme Court has emphasized that the Appointments Clause 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) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). The key aspect of that safeguard—the requirement that principal officers of the United States be appointed with the advice and consent of the Senate—is designed to "curb Executive abuses of the appointment power" and "ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Id.* at 659–

60. To bypass that protection raises, in Justice Thomas' words, "grave constitutional concerns." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring).

The basis of those concerns in this case is that the Attorney General is an "Officer of the United States," *i.e.*, a principal officer who must be nominated by the President *and* confirmed by the Senate. The Senate did not confirm Mr. Whitaker either as Attorney General, as "Acting Attorney General," as Mr. Sessions' chief of staff, or as any other officer in this Administration. On its face, Mr. Whitaker's designation as Acting Attorney General violates the Appointments Clause.

His designation also violates the plain text of the AG Succession Law. By its terms, that statute dictates that the Deputy Attorney General assume the duties of the Attorney General. Because the AG Succession Law specifically addresses "a vacancy in the office of Attorney General," 28 U.S.C. § 508(a), its automatic succession provisions, rather than the FVRA's mechanism for designating acting officials generally, control here. Under the AG Succession Law, Mr. Whitaker is not the legitimate Acting Attorney General. The Deputy AG is.

Finally, OLC's contrary analysis fails to overcome the unambiguous text of the Appointments Clause requiring the advice and consent of the Senate. The opinion in defense of Mr. Whitaker's designation extracts from a single case,

United States v. Eaton, 169 U.S. 331 (1898), the categorical proposition that a person temporarily acting as a principal officer is in fact an inferior officer and thus does not require Senate confirmation. Dep't of Justice, Office of Legal Counsel, *Designating an Acting Attorney General* 14 (Nov. 14, 2018) ("OLC Op."). OLC also claims that "historical practice" in designating acting officials is consistent with this holding. *Id.* at 2. But this justification for Mr. Whitaker's designation essentially ignores the key caveat in *Eaton*, as well as crucial features of the historical examples, that negate the position advanced there. The Court ruled in *Eaton* that a subordinate officer does not become a principal when charged with performing the principal's duties "for a limited time *and under special and temporary conditions.*" 169 U.S. at 343 (emphasis added). The "special condition" in *Eaton* was exigency. The choice was between installing as an acting officer either a person not in a Senate-confirmed position, or no one. The President's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, conflicted with the Advice and Consent requirement of the Appointments Clause. In such circumstances, one or the other of these constitutional duties must temporarily give way.[3] The historical examples that

[3] In various circumstances, the Court has recognized that a constitutional mandate must sometimes yield to a sufficiently powerful opposing interest. The First Amendment right of free speech, for example, can be overcome by a compelling state interest in avoiding corruption.

Footnote continued on next page

supposedly support Mr. Whitaker's designation generally present the same sorts of exigent circumstances—where the choice was between designating a person not confirmed by the Senate to temporarily perform important functions of the office, or letting the functions go unperformed.

With regard to the President's designation of Mr. Whitaker, however, there are no such special conditions, there is no exigency, and there is no threat to the President's "take care" obligation. The President talked for months about firing Mr. Sessions, and it was widely reported that he would do so just after the midterm election. The reports proved right. The President "requested" Mr. Sessions' resignation—a constructive discharge if there ever was one—less than 24 hours after the polls closed. The President thus had months to plan for the vacancy he created. Moreover, the Deputy AG, the official designated by statute to act as Attorney General until confirmation of a new one, was available to step in, as were numerous other Senate-confirmed officers in the Justice Department.

Footnote continued from previous page

Buckley, 424 U.S. at 26. The same logic applies when constitutional duties, rather than rights, are at issue—especially when the duty conflicts not just with an opposing interest, but with another constitutional duty. *See* Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 Colum. L. Rev. 1175 (2012) (setting forth criteria for choice where all options are unconstitutional).

Parachuting in Mr. Whitaker as Acting Attorney General also fails to meet the other constraints of *Eaton.* His role is not "limited" or "temporary." Under the FVRA, Whitaker potentially could serve until the Administration ends. *Eaton* thus cannot salvage this extraordinary evasion of the Appointments Clause.

Because Mr. Whitaker was unlawfully installed as Acting Attorney General, he cannot perform the duties of that office. Therefore, he cannot adjudicate this case.

INTEREST OF AMICI CURIAE

The American Immigration Council (the "Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as amicus curiae before the Attorney General, and regularly litigates issues relating to due process, removal defense, and government accountability before the Board and the federal courts. The Council has a direct interest in ensuring that decisions in immigration cases are made by fair, impartial, and open-minded adjudicators who are lawfully authorized to perform an adjudicatory role.

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for survivors of domestic

violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act and its progeny. ASISTA serves as liaison for the field with DHS personnel charged with implementing these laws. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

The Harvard Immigration and Refugee Clinical Program ("HIRC") at Harvard Law School has been a leader in the field of refugee and asylum law for over 30 years. The Clinic has an interest in the appropriate application and development of U.S. asylum and immigration law, so that claims for asylum protection and other immigration relief receive fair and full consideration under existing standards of law. HIRC has worked with hundreds of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories, policy, and national advocacy. HIRC has been engaged by the Justice Department in the training of immigration judges, asylum officers and supervisors on issues related to asylum law. In addition HIRC provides advice, support, and supplemental services to advocates around the United States representing asylum seekers.

Since 1993, Her Justice has been dedicated to making quality legal representation accessible to low-income women in New York City in family, matrimonial, and immigration matters. Her Justice recruits and mentors volunteer attorneys from the City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Her Justice's immigration practice focuses on representing immigrant survivors of gender-based violence pursuing relief under the Violence Against Women Act, many of whom are in removal proceedings. Her Justice has appeared before Courts of Appeals and the United States Supreme Court in numerous cases as amicus.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that supports, trains, and advises criminal defense and immigration lawyers, immigrants themselves, as well as judges and policymakers on the intersection between immigration law and criminal law. IDP is dedicated to promoting fundamental fairness for immigrants at risk of detention and deportation based on past criminal charges and therefore has a keen interest in ensuring the integrity and fairness of agency removal proceedings.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP

provides direct representation to low-income immigrants, including those seeking asylum after being placed in removal proceedings.

The Southern Poverty Law Center ("SPLC") has provided pro bono civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees and to ensure that they are treated with dignity and fairness. In 2017 the SPLC began the Southeast Immigrant Freedom Initiative ("SIFI"), a pro bono project dedicated to representing immigrants detained by ICE. SIFI is the largest project of its kind in the United States. It represents clients in both custody and removal proceedings. SIFI serves detainees in Jena and Pine Prairie, Louisiana; and Lumpkin, Ocilla, and Folkston, Georgia. The SPLC has a strong interest in protecting the due process rights of all immigrants in removal proceedings.

ARGUMENT

MR. WHITAKER LACKS AUTHORITY TO ADJUDICATE THIS CASE

I. Mr. Whitaker's Designation as Acting Attorney General Violates the Plain Text of the Appointments Clause

Interpretation of a constitutional provision must start with—and here, can end with—its plain language. The Appointments Clause of Article II states unambiguously that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Clause differentiates these "principal officers," who must be

nominated by the President and confirmed by the Senate, from "inferior officers," who may be appointed by "the President, . . . the Courts of Law, or . . . the Heads of Departments." *Edmond*, 520 U.S. at 660–63.

The Attorney General is the Nation's top law enforcement official and, without doubt, is a principal officer who requires Senate confirmation. *See id.* at 663. He is responsible for "guid[ing] the world's largest law office and the central agency for enforcement of federal laws." Dep't of Justice, *About the Office* (July 17, 2018), https://www.justice.gov/ag/about-office. He "represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested." *Id.* And, directly relevant here, he exercises vast authority over the immigration system, including overseeing all removal proceedings and appointing members of the Board of Immigration Appeals. *See* 8 U.S.C. § 1103(g). The Attorney General is the quintessential "Officer of the United States" under the Appointments Clause.

Yet the President has not nominated Mr. Whitaker to be Attorney General, and the Senate has not confirmed him. While the Appointments Clause may allow another "Officer of the United States" serving in a different position with Senate confirmation to act as Attorney General, Mr. Whitaker's prior position as Mr. Sessions' chief of staff did not require Senate confirmation. The plain language of the Appointments Clause thus bars him from serving as Acting Attorney General.

II. Mr. Whitaker's Designation as Acting Attorney General Contravenes the Plain Text of Both the AG Succession Law and the FVRA

President Trump purported to install Mr. Whitaker under the FVRA, 5 U.S.C. §§ 3345–3349d. That Act allows the President, upon the death, resignation, or other incapacity of a Senate-confirmed officer, to designate certain government employees "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* § 3345(a)(3).

In invoking the FVRA, the President overrode the AG Succession Law. That statute applies only when the Attorney General spot becomes vacant, and it unambiguously specifies the order of succession. In the event of a vacancy in the office of Attorney General, the statute says, "the Deputy Attorney General may exercise all the duties of that office." 28 U.S.C. § 508(a). If both the AG and Deputy AG are unavailable, the law directs that the Associate AG "shall act as Attorney General." *Id.* § 508(b).[4] And as a further safety valve, the law authorizes the Attorney General to "designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* Nothing in the provision allows the President to override that statutory sequence.

[4] The notion that the designation of the Deputy AG is permissive because the AG Succession Law says the Deputy "may" exercise the duties of the Attorney General would render the statute nonsensical. The provision also states that if both the AG and Deputy AG spots are vacant, the Associate AG "shall" become Acting Attorney General. It makes no sense to read the statute as merely permitting the Deputy AG to assume the acting role, but mandating that the Associate AG do so if the Deputy is unavailable.

Since the creation of the Justice Department in 1870, the law has always specified an order of succession for the office of Attorney General.[5] Since 1868, Congress also has maintained a general vacancies statute, *see* Act of July 23, 1868, ch. 227, 15 Stat. 168, which has co-existed with the mandatory AG succession provisions for nearly 150 years—without incident, until now. The most recent iteration, the FVRA, was enacted in 1998. *See* Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, div. C, tit. I, § 151, 112 Stat. 2681–611. In contrast to the AG Succession Law, which addresses a vacancy in one and only one office, the FVRA prescribes the general mechanism for temporarily filling vacancies in more than a thousand Senate-confirmed positions throughout the federal government. 5 U.S.C. §§ 3345–3349d. Reflecting its broad applicability, it sets out three alternative ways of designating an acting officer. If the President does nothing, the first assistant of the departed official assumes those duties. Second, the statute allows the President to designate a sitting official confirmed to another position. Third, the President may install certain non-confirmed officials depending on their pay level and tenure in the agency.

---

[5] The founding statute identified the Attorney General as the head of the Department and provided that the Solicitor General, his then-top deputy, would be the immediate successor. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162. Congress has amended the statute to alter the order of succession as the lineup of Senate-confirmed offices changed over time. *See* Reorganization Plan No. 4 of 1953, 67 Stat. 636; Act of Oct. 19, 1977, Pub. L. No. 95-139, 91 Stat. 1171, 1171. None of these previous provisions reflect any exceptions or caveats.

With one important exception, Congress made the FVRA "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" a Senate-confirmed officer. *Id.* § 3347(a)(1). The important exception was that the FVRA would *not* provide the exclusive mechanism where another "statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(B). The AG Succession Law falls precisely within this exception, because it expressly designates the Deputy Attorney General—and others if the Deputy is unavailable—to "exercise all the duties of that office." 28 U.S.C. § 508(a)–(b).

"[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, the plain language of these provisions spells out how they mesh. The FVRA provides the exclusive mechanism for designating an acting official where a more specific statute does not apply, and the more specific statute here, the AG Succession Law, applies—and necessarily is exclusive—where the FVRA is not. Treating each statute as exclusive in its own sphere not only is true to the statutory language, but also is required to give the AG Succession Law independent effect. *See infra* Section III.C. In any event, where there is a conflict, the accepted canon of

statutory construction dictates picking the specific provision, the AG Succession Law, over the more general one, the FVRA, which covers the entire Executive Branch. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general . . . . That is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." (internal quotation omitted)).

The AG Succession Law, moreover, serves a function that effectuates the purpose of the Appointments Clause and is particularly important as to the Attorney General. The Law assures that any person who assumes the responsibilities of the Attorney General has been vetted by the Senate and received its imprimatur as to his or her integrity, experience, and competence to be part of the leadership of the Justice Department. Indeed, when the Senate confirms the Deputy AG, it does so knowing that he or she could well need to serve as Acting Attorney General.

Statutes must be interpreted to avoid constitutional problems, not to create them, and to respect the constitutional functions of the Senate, not to usurp them. The reading most faithful to the text of the two laws—and the only interpretation that gives the AG Succession Law independent effect, *see infra* Section III.C —is to treat the AG Succession Law as exclusive where it applies. Under that

interpretation, Mr. Whitaker cannot act as Attorney General. This straightforward, textual construction would have avoided the serious constitutional problems created here. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) .

III. The Justice Department's Contrary Analysis Misinterprets the Constitution, the AG Succession Law, and the FVRA

In an opinion issued November 14, 2018, the Justice Department, through OLC, attempted to justify Mr. Whitaker's designation, asserting that the Appointments Clause does not mean what its text clearly says. According to this defense, Mr. Whitaker is a lawful temporary appointee under the FVRA. The theory—untethered from the constitutional text—is that an individual who temporarily exercises the duties of a principal officer is only an *inferior* officer under the Appointments Clause, and thus the President can appoint him without Senate confirmation.

The opinion is yet another in a series where OLC has misinterpreted the Constitution, as well as statutes like the FVRA, to aggrandize presidential power over appointments.[6] The argument here rests on the Supreme Court's decision in

---

[6] Repeatedly, the Supreme Court has rejected these attempts. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014) (rebuffing OLC's position allowing recess appointments during *de facto* intra-session Senate recesses with frequent *pro forma* sessions); *SW General*, 137 S. Ct. at 942–43 (rejecting OLC's position that the FVRA restricts only first assistants, as opposed to all acting officers, from serving after their nomination). Congress, too, has sought to block OLC's weakening of the Appointments Clause. The FVRA itself was enacted to stop "aggressive" practices of the Executive Branch, especially in the Justice Department, in the designation of acting officials. S. Rep. No. 105-250, at 4 (1998); *see also id.* at 3 (characterizing OLC's

Footnote continued on next page

Eaton, but it misses principles critical to the ruling. *Eaton* establishes *only* that unconfirmed, inferior officers may act as principal officers *in exigent circumstances*, where their performance of the principal's functions is necessary to satisfy the President's coordinate constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. The historical practice OLC cites is consistent with this holding *as so limited*. Because there is no emergency here and this case does not involve an inferior officer, *Eaton* does not validate Mr. Whitaker's designation.

A. *Eaton* Does Not Excuse Mr. Whitaker's Designation from the Constraints of the Appointments Clause

1. *Eaton* Is Limited to Exigent Circumstances

To justify Mr. Whitaker's designation, OLC overreads the holding in *Eaton*. In that case, the Senate-confirmed consul in Bangkok, Siam had to return to the United States for medical treatment. 169 U.S. at 331. A statute provided that the vice-consul—an inferior officer appointed by the Secretary of State—could take over for a consul "when [he] shall be temporarily absent or relieved from duty." *Id.* at 336 (quoting Rev. Stat. § 1674 (2d ed. 1878)). Because the vice-consul was abroad and could not reach Siam for months, the consul made an "emergency

---

Footnote continued from previous page

interpretation excluding certain appointments from prior Vacancies Act as "wholly lacking in logic, history, or language").

appointment" of Lewis Eaton under a regulation allowing the appointment of "a person to perform temporarily the duties of the consulate" if both the consul and vice-consul offices were vacant. *Id.* at 338, 340.

Acknowledging that the Appointments Clause expressly requires Senate confirmation of consuls, the Court in *Eaton* explained that a vice-consul was an inferior officer who could be appointed without Senate approval and then act for the consul. That Mr. Eaton, the "subordinate officer," was "charged with the performance of the duty of the superior for a limited time, and *under special and temporary conditions*," did not "thereby transform[] [him] into the superior and permanent official." *Id.* at 343 (emphasis added).

The Court made clear what it meant by "special conditions." To bar temporary appointments like Eaton's, the Court held, "would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered." *Id.* In other words, the Court recognized that no Senate-confirmed official would be available to perform the legal duties of the consul for months. Although the Court did not expressly invoke the "take care" clause, that was the obligation the Court described. *See Williams v. Phillips*, 482 F.2d 669, 670 n.1 (D.C. Cir. 1973)) ("[T]he traditional view is that an emergency creates the condition for the exercise of power" to make temporary appointments);

see also Power of the President to Designate Acting Member of the Federal Home Loan Bank Board, 1 Op. O.L.C. 150, 151 (1977) ("[OLC] has taken the position that the power to make . . . interim designations flows from the President's responsibility to keep executive branch agencies in operation . . . ."). Preventing imminent default on one constitutional obligation—in particular, the obligation to implement the laws prescribed by Congress—justified a limited, temporary relaxation of another. *Cf. Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, (1931) (Holmes, J.) ("[T]he machinery of government would not work if it were not allowed a little play in its joints.").

The defense of Mr. Whitaker's appointment ignores the exigency in *Eaton*, instead focusing solely on the time limitation to validate the appointment of a fill-in. But the Court did not hold that the President has unfettered power to bypass Senate confirmation for short-lived appointments. If a President on inauguration day nominated an Attorney General but specified she would resign in six months, she still would need Senate confirmation. The time limitation ***plus*** the "special condition" were the prerequisites for *Eaton's* dispensation from the unambiguous strictures of the Appointments Clause, and the "special condition" there was *exigency*.

2. No Temporary or Special Conditions Excuse the Violation of the Appointments Clause Here

In designating Mr. Whitaker as Acting Attorney General, the President cited no exigent circumstances necessitating a departure from the plain language of the Appointments Clause. There were none.

First, the AG's "resignation" was not a surprise to the President. The AG's letter of resignation expressly stated that the President "asked" him to step down. *See* Letter from Atty. Gen. Jefferson B. Sessions III to Pres. Donald J. Trump at 1 (undated) ("At your request, I am submitting my resignation."). Nor was the "resignation" a surprise to anyone else. For months, reports circulated that the President planned to fire the AG after the midterm election. *See, e.g.*, Jacqueline Thomsen, *Rosenstein Goes to White House for "Preplanned" Meeting After Sessions Departure*, The Hill (Nov. 7, 2018), https://thehill.com/policy/national-security/415594-rosenstein-goes-to-white-house-for-preplanned-meeting-after-sessions. The President thus had plenty of time to identify a successor and to select a Senate-confirmed officer to take Mr. Sessions' place. Nor has the President articulated a reason Mr. Sessions could not have remained in office until a successor was confirmed. The contrived vacancy here neither reflected nor produced any exigent circumstances.

Second, the official specifically designated in the AG Succession Law to act as Attorney General—the Deputy AG—was available to serve. And there were at

least ten other Senate-confirmed officials in the Justice Department, among them the Solicitor General and nine confirmed Assistant AGs who head the Department's divisions, at the time Mr. Sessions resigned. *See Nominations Confirmed (Civilian)*, U.S. Senate, https://www.senate.gov/legislative/nom_confc.htm (last visited Nov. 25, 2018); S. Comm. on Homeland Sec. & Gov't Affairs, 114th Cong., *United States Government Policy and Supporting Positions* 92–93 (Comm. Print 2016). By ignoring not only the line of succession dictated by the AG Succession Law, but also the availability of other Senate-confirmed officials in the leadership of the Justice Department, the President has ceded any possible claim that some emergency compelled installation of an Acting Attorney General from a non-confirmed position.

Nor does Mr. Whitaker's service as Acting Attorney General clearly satisfy *Eaton*'s requirement that it be "limited" and "temporary." 169 U.S. at 343; *see also SW General*, 137 S. Ct. at 946 n.1 (Thomas, J., concurring). The FVRA allows Whitaker to serve for 210 days, and even longer if President Trump nominates an Attorney General during Whitaker's service. 5 U.S.C. § 3346. In fact, were the President's nominee to remain pending before the Senate, Mr. Whitaker could serve *indefinitely*. *Id.* § 3346(a)(2).

3. In Contrast to the Consul in *Eaton*, the Attorney General Is a Cabinet-Level Officer and One of the Most Powerful Officials in the Federal Government

The defense of Mr. Whitaker's designation overlooked another limitation in *Eaton*. The case involved consuls, not Cabinet officers. Although the Appointments Clause expressly designates consuls as principals, they report to the Secretary of State, not the President. They are not even the chief U.S. representatives in foreign countries. And their responsibilities focus primarily on facilitating trade and reporting on commercial and political developments in their regions. *See* Thomas Jefferson, Circular to American Consuls (Aug. 26, 1790), https://founders.archives.gov/documents/Jefferson/01-17-02-0123 (memorandum defining duties of consular officials).

In contrast, the Attorney General reports directly to the President and exercises a level of supervisory and decision-making authority rare even among Cabinet officials. *See supra* Part I. That *Eaton* treated an acting consul as an inferior officer due to "special and temporary conditions" does not mean that a far more powerful, responsible, and independent position like Acting Attorney General is likewise an inferior office. On all the criteria the Court has articulated for differentiating between principal and inferior officers, the Acting Attorney General is a principal: he is not supervised by a Senate-confirmed cabinet official, but rather reports directly to the President; he oversees the federal law-enforcement

regime; and he has jurisdiction over enforcement of the federal criminal code. *Cf. Edmond*, 520 U.S. at 663 (citing as relevant to inferior-officer status that officer was "directed and supervised" by another Senate-confirmed officer); *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (citing as relevant to inferior-officer status the officer's limited duties and narrow jurisdiction). Only an official confirmed by the Senate can the exercise the functions of the Attorney General.

B. Historical Practice Undermines the Validity of Mr. Whitaker's Designation as Acting Attorney General

According to OLC, *Eaton* ratified a "historical practice" of non-Senate-confirmed individuals stepping in for principal officers. *See* OLC Op. at 7. On closer examination, the examples on which the defense of Mr. Whitaker's designation relies do not corroborate its attempted aggrandizement of presidential power. In fact, the history of presidential appointments shows that only emergency circumstances justify departing from the clear requirements of the Appointments Clause.

1. The Earliest Provisions for Filling Vacancies Sought to Adhere to the Appointments Clause Absent Exigent Circumstances

To begin with, early Congresses strictly limited the President's authority to designate non-Senate-confirmed individuals as acting officers. A 1792 statute authorized the President, when "necessary," to appoint "any person" to fill in for the Secretaries of State, the Treasury, or the War Department, but only "in case of

the *death*, *absence* from the seat of government, or *sickness* . . . whereby they cannot perform the duties of their said respective offices." Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (emphasis added). The circumstances contemplated in the statute were thus paradigmatically vital and pressing: death and sickness are unexpected and, in the 1790s, trips from Washington were usually lengthy, perilous, and unpredictable. Further, Congress could reasonably expect that vacancies would occur when no one confirmed by the Senate was available to fill them. The Departments of State and War, for example, had no Senate-confirmed personnel other than the Secretary residing in the capital. *See* List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792, *in* 1 *American State Papers* 57, 57–58 (Walter Lowrie & Walter S. Franklin eds., 1834).[7] These early statutes are thus strong evidence that the first few Congresses—which included Framers of the Constitution—were prepared to allow relaxation of the Appointments Clause only under exigent circumstances.

[7] Even so, Presidents Washington and Adams relied only on Senate-confirmed cabinet officials to step in for principal officers. OLC Op. at 9; *see* Joint Comm. on Printing, *Biographical Directory of the United States Congress 1774-2005*, H.R. Doc. No. 108-222, at 3 (2005). Not until 1809 did President Jefferson designate a non-confirmed employee as Acting Secretary of War when the Secretary resigned. *Biographical Directory of the United States Congress 1774-2005*, *supra*, at 4.

2. Historical Practice from 1809–1860 Continued to Adhere to the Appointments Clause Absent Exigent Circumstances

OLC's opinion asserts that there were 160 instances between 1809 and 1860 where a non-Senate-confirmed officer temporarily served as an acting principal officer. OLC Op. at 10. These examples, however, do not establish any presidential license to ignore the Appointments Clause. Quite the contrary, they support the notion that the Clause's requirements were understood to give way only when truly necessary.

A large share of the examples supposedly supporting Mr. Whitaker's designation come from State Department records used as evidence in President Johnson's impeachment trial. *See* OLC Op. at 10. These records list individuals who between 1829 and 1860 "discharged the duties of officers of the cabinet," either on an "acting" or an "*ad interim*" basis. 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 585 (1868); *see id.* at 575–81, 585–88, 590–94. An "acting" officer was someone who stepped in when the Senate-confirmed cabinet secretary was ill or travelling but remained in office; an "*ad interim*" officer temporarily filled a gap following a Secretary's death or resignation. *See id.* at 575, 585; *see also* Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional?: An Examination of the Early Vacancies Acts*, Yale J. on Reg.: Notice & Comment (Nov. 26, 2018),

http://yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry.

Many if not all of these temporary officers—both acting and *ad interim*—served because of exigencies in the sense contemplated by *Eaton*. For one, the acting officers in this period outnumbered *ad interim* officers 178 to 15. *See Trial of Andrew Johnson*, *supra*, at 585–88. Acting service *implies* exigency: the Secretary remained at the helm of his department but was unable to perform important duties for a short but indeterminate period of illness or travel.[8] As for the *ad interim* appointments, it is telling that Presidents typically chose other Senate-confirmed secretaries to fill in, "especially if the vacancy was to last a significant time." Berry, *supra* (analyzing State Department records). And even in the relatively few cases where Presidents chose non-Senate-confirmed *ad interim* officers, other options were sparse or nonexistent, as the federal workforce well into the 1800s was very small, with few Senate-confirmed officers available.[9] Indeed, it appears that all of these cases involved exigent circumstances. Reply

---

[8] In describing these historical examples, OLC makes no reference to the difference between acting and *ad interim* service. It instead incorrectly labels all periods of temporary service during this period *ad interim* despite the relative rarity of such appointments. OLC Op. at 10. This error is not merely semantic: historical examples of acting service do nothing to show that there was a historical practice *relevant to this case—i.e.*, one of temporary appointments following firings or resignations.

[9] *See, e.g.*, Act of Mar. 2, 1831, ch. 55, 4 Stat. 452, 453 (showing that, as of 1831, State Department employed only clerks and similar functionaries in Washington).

Supp. Mot. Substitute 20–22, *Michaels v. Sessions*, No. 18-496 (S. Ct. Nov. 28, 2018). Thus, in the first half of the 1800s, the constitutional choice of evils—between defaulting on the obligation to faithfully execute the laws or temporarily installing an acting principal officer who had not received Senate confirmation—was sufficiently stark and frequent as to dispel any probative value of the examples tendered in support of Mr. Whitaker's appointment. Most significantly, never in history has a President removed a Senate-confirmed Cabinet member to install a person from a non-confirmed position. *Id.* at 21.

3. Vacancy Statutes From 1868 Continued to Respect the Requirements of the Appointments Clause

Congress's response to these decades of temporary appointments further confirms a common understanding that only an emergency could justify relaxing the strictures of the Appointments Clause. Following President Johnson's impeachment—alleging abuses of the appointment and removal power—Congress tightened its limits on temporary appointments. In 1868, Congress replaced the various statutes governing executive vacancies with a single Vacancies Act. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. By default, if a department head died, resigned, left Washington, or fell ill, "the first or sole assistant" automatically took over until a successor was confirmed or the incumbent could resume his service. *Id.* § 1. If the cause of the vacancy was death or resignation, the acting official could serve *a maximum of ten days*. *Id.* § 3. And while the President had

discretion to choose another officer instead of the first assistant, that officer had to be in a Senate-confirmed position. *Id.*

The defense of the Whitaker designation describes the 1868 Act as "preserv[ing] the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department." OLC Op. at 8. The word "possibility" masks some very long odds: as of 1868, *every single cabinet department* had a Senate-confirmed assistant.[10] And, importantly, neither the 1868 Act nor any previous vacancies statute applied to the Attorney General. OLC Op. at 11–12. In fact, OLC identifies only *one instance* in the history of the Republic (until now) where a non-Senate-confirmed individual served as Acting Attorney General—for a single week in 1866, two years before the creation of a Senate-confirmed Assistant Attorney General position. *Id.* at 12 & n.10.

In any event, historical practice from many decades after the founding sheds scant light on the original meaning of the Appointments Clause. "[A] self-aggrandizing practice adopted by one branch well after the founding . . . does not

---

[10] *See Biographical Directory of the United States Congress 1774-2005*, *supra*, at 10 (listing cabinet positions during Johnson administration); 11 J. Exec. Proc. Sen. 291 (March 8, 1861) (Assistant Secretary of State confirmed); 15 J. Exec. Proc. Sen. 1057, 1168 (July 27, 1866) (War); *id.* at 1172-73 (July 28, 1866) (First Assistant Postmaster-General); *id.* at 835, 840 (May 31, 1866) (Navy); 13 J. Exec. Proc. Sen. 97, 104 (Jan. 3, 1863) (Interior). There was no confirmed Assistant Secretary of the Treasury at the time the 1868 Act was passed, but President Johnson submitted nominees for Senate consideration before and after its passage. *See, e.g.*, 18 J. Exec. Proc. Sen. 363 (July 25, 1868).

relieve [courts] of [their] duty to interpret the Constitution in light of its text, structure, and original understanding." *Noel Canning*, 134 S. Ct. at 2594 (Scalia, J., concurring in the judgment). In other words, "[p]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

The historical stray cats collected in defense of Mr. Whitaker's designation thus do not provide the advertised "compelling support" for the conclusion "that the position of an *acting* principal officer is not itself a principal officer," OLC Op. at 8. Quite the contrary, the history comports with the premise underlying *Eaton* that the requirements of the Appointments Clause bend only in exigent circumstances, and then only as necessary to ensure that the Executive Branch can faithfully execute the laws.

C. Whitaker's Designation Improperly Nullifies the AG Succession Law

Aside from being inconsistent with the plain statutory language—the best evidence of congressional intent—the analysis of the AG Succession Law advanced in defense of Mr. Whitaker's designation necessarily presumes Congress intended to render that statute a nullity in the primary situation where it applied. The law heavily disfavors such a conclusion. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant" (quoting *Market Co. v. Hoffman*, 101 U.S.

112, 115 (1879))). In order to give both the AG Succession Law and the FVRA effect, each statute must be interpreted as exclusive where it applies. Contrary to OLC's analysis, the available evidence comports with the statutory text and belies the idea that Congress intended to retain the mandatory mechanism of the AG Succession Law, but allow the President to displace it at will by invoking the FVRA. The defense of Mr. Whitaker's selection thus misses the mark in concluding that the non-exclusive FVRA remains an "option" for the President to invoke whenever he chooses to ignore the order of succession prescribed in the AG Succession Law. *See* OLC Op. at 4.

1. Under the Structure of the Appointments Process, the AG Succession Law Is Exclusive When There is a Vacancy in the Office of the Attorney General

On the theory advanced in support of the designation of Mr. Whitaker, the Congress that enacted the FVRA intended to authorize the President to override the AG Succession Law at will. But Congress included no such authorization in the statutory text. On the contrary, it provided that the FVRA's exclusivity provision would not apply where another "statutory provision expressly . . . 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).

The contrary interpretation would leave the AG Succession Law with no independent effect. If the Attorney General position became vacant and the

President could rely on the FVRA to displace the AG Succession Law, he would have three options under that statute: to choose a Senate-confirmed official (including the Deputy AG), *see* 5 U.S.C. § 3345(a)(2), to direct an agency employee who was not Senate-confirmed to perform those duties, *see id.* § 3345(a)(3), or to do nothing, in which case the responsibilities of the Attorney General automatically would transfer to the "first assistant"—statutorily defined as the Deputy AG, 28 U.S.C. § 508(a)—to act as Attorney General, *see id.* § 3345(a)(1). The provisions of the AG Succession Law, which likewise automatically designate the Deputy AG to act for the Attorney General, would be rendered a nullity in precisely the situation that triggers them.

Critically, under the interpretation offered in support of Mr. Whitaker's designation, there is no instance in which the AG Succession Law would operate as the statute Congress enacted: a mandatory, automatic succession statute that limits the individuals authorized to act as Attorney General to the Attorney General's top Senate-confirmed deputy and other Senate-confirmed Justice Department leaders. Instead, the congressionally specified succession order would apply only where the President declined to expressly invoke the FVRA and designate an Acting Attorney General, in which case both the FVRA and the AG Succession Law automatically would install the Deputy AG in the acting role. Even then, though, it would be impossible to know whether the succession

occurred under the "first assistant" provision of the FVRA or the automatic succession provisions of the AG Succession Law.[11] The provisions of the AG Succession Law, if they applied at all to an AG vacancy, would no longer be mandatory or automatic, but rather would turn on presidential choice. Such a construction does not "regard each [statute] as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). If Congress had intended the FVRA to supersede the AG Succession Law in this manner, it could have repealed the AG Succession Law to make the FVRA the only way to designate an Acting Attorney General. It could have amended the AG Succession Law to allow the President to override the default order of succession. Or it could have expressly provided that the FVRA applies to designation of an Acting Attorney General. It took none of those steps.

The flaws in this defense of Mr. Whitaker's designation, however, go beyond rendering the AG Succession Law a nullity. If it is correct that both the FVRA and AG Succession Law remain an "option" for the President, OLC Op. at 4, a conflict would arise every time the office of Attorney General became vacant and the President did nothing. Under the AG Succession Law, when the Deputy AG automatically assumes the duties of the Attorney General, no time limits apply to that service. *See* 28 U.S.C. § 508. By contrast, if the Deputy AG becomes

[11] The President might seek to clarify which one controls, but given that both statutes operate automatically, it is not clear whether the President gets to make that call.

Acting Attorney General under the default "first assistant" rule of the FVRA, all of the FVRA's limitations apply, including the time limits. *See* 5 U.S.C. § 3347. Plainly, these conflicting default states cannot simultaneously exist. "When faced with a conflict between two statutes, courts must attempt to interpret them so as to give effect to both statutes," *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004) (citing *Morton*, 417 U.S. at 551)—here, by interpreting the AG Succession Law as exclusive. Moreover, under accepted canons of statutory construction, the more specific statute, the AG Succession Law, applies in preference to the more general. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–46 (2012).[12]

2. The Background of the FVRA and the AG Succession Law Shows that the AG Succession Law Is Exclusive

For 130 years, from the establishment of the Justice Department until the adoption of the FVRA, the AG Succession Law, not the general vacancies statute in place since 1868, governed the designation of an Acting Attorney General. Under the theory proffered in support of Mr. Whitaker's selection, Congress in the

[12] The one narrow exception, where the FVRA could provide a mechanism to designate an Acting Attorney General, proves the rule. Where no Senate-confirmed official specified in the AG Succession Law is available to perform the duties of the Attorney General—for example, because all offices in the line of succession are vacant—the FVRA would allow the President to direct another qualified official to act as AG. In that limited instance, such a designation would not conflict with the mandatory ladder in the AG Succession Law. For all other vacancies in the office of Attorney General, the AG Succession Law is exclusive.

FVRA reassigned the authority regarding AG vacancies from the AG Succession Law to the FVRA (when the President chooses to invoke it). It is implausible that Congress would adopt such a sea change from 130 years of legislative practice subtly rather than expressly, and without discussing the issue.

Following the first compilation and reconciliation of federal statutes at the direction of Congress, the revised federal code provided that the Vacancies Act of 1868 did not authorize the President to depart from the succession order mandated in the more specific AG statute. Rev. Stat. § 179 (1st ed. 1875); *see also* OLC Op. at 13 (acknowledging this fact). There, the compilers of the revised statutes resolved the question whether the general vacancies provisions or the AG-specific statute should control, in favor of the latter. Congress then codified the revised statutes as official U.S. law and repealed all prior statutes. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449 & n.4 (1993) (describing 1874 Revised Statutes as "a massive revision, reorganization, and reenactment of all statutes in effect at the time, accompanied by a simultaneous repeal of all prior ones").

Over the next 130 years, Congress revised both the AG succession provisions and the general vacancies statute multiple times, but retained the automatic succession provisions. Following the revision and codification of federal personnel law in 1966, the general vacancies provisions authorized the

President to direct certain Senate-confirmed officials to serve as acting officials in place of the "first assistant," but specifically provided that "[t]his section does not apply to a vacancy in the office of Attorney General." Pub. L. No. 89-554, 80 Stat. 378, 426 (1966). In 1998, when it enacted the FVRA, Congress expressly exempted from the FVRA's exclusivity provision not only the Attorney General but various other offices subject to specific succession statutes. *See* 5 U.S.C. § 3347(a)(1) (deeming the FVRA the exclusive mechanism for determining an acting successor for a Senate-confirmed position unless "a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity").

To argue that Congress in the FVRA junked its approach of the prior 130 years, the defense of Mr. Whitaker's designation must offer more than congressional silence. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Finally, the theory that the President has the "option" of overriding the otherwise applicable AG Succession Law by invoking the FVRA, *see* OLC Op. at 4, is at odds with the statute's purpose of preventing presidential evasion of the confirmation requirement by installing acting officials, *see, e.g.*, 144 Cong. Rec.

27,497 (1998) (statement of Sen. Byrd) (purpose of the statute was to "bring[] to an end a quarter century of obfuscation, bureaucratic intransigence, and outright circumvention"). Congress enacted the FVRA amidst significant concern regarding this topic, in particular, the Justice Department's perceived encroachment on the Senate's advice and consent prerogative. *SW General*, 137 S. Ct. at 936 (explaining that, following the designation of Bill Lann Lee to serve as Acting Assistant AG for the Civil Rights Division after the Senate refused to confirm him, Congress "[p]erceiv[ed] a threat to the Senate's advice and consent power" and "replaced the Vacancies Act with the FVRA").

Prior to the FVRA, the Department of Justice had taken the position that the Administration could bypass the Vacancies Act (including time limitations) by invoking the general authorization in its organic statute, permitting the head of an agency to delegate powers and functions of the office to subordinates. *Id.* at 935–36; *see also* Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 1 (Jan. 14, 1998) (describing history of the FVRA). The FVRA expressly overrode this position, allowing exceptions to the FVRA's exclusivity provision only for statutes that "designate[d]" specific officials for acting service,

as opposed to granting general authority "to delegate duties statutorily vested in th[e] agency head." 5 U.S.C. § 3347(a)(1)(B), (b).[13]

Far from reining in presidential abuses as Congress intended, the FVRA as interpreted in support of Mr. Whitaker's designation would vastly expand the President's authority to circumvent the nomination process by allowing him—at any time, and for any reason—to demand the resignation of or fire a Senate-confirmed officer and replace that officer with a hand-picked successor who is not Senate-confirmed. The President would have the opportunity not only to fill vacancies with non-Senate-confirmed persons, but to create the opportunity to do so. A President armed with this authority could staff the entire Administration for the 210 days allowed by the FVRA, and perhaps longer. If Congress had intended to alter the AG Succession Law and prior vacancies act in such a significant way, it would have said so in the text.

* * *

[13] Further, the legislative record shows that the provision allowing the President to select a non-confirmed employee of the relevant agency was added to avoid a situation where no confirmed person with the right skill set was available. The bill as reported out of committee did not contain that option. *See* S. Rep. No. 105-250, at 25 (1998). President Clinton threatened a veto, complaining that it would force the President to bypass qualified civil servants and select someone unqualified as an acting officer—a type of exigency argument. *See Statement of Administration Policy*, S. 2176 - Federal Vacancies Reform Act of 1988 (Sept. 24, 1998), https://clintonwhitehouse2.archives.gov/OMB/legislative/sap/105-2/S2176-s.html. To allay these concerns, Congress added the third prong.

CONCLUSION

Because Mr. Whitaker is not a Senate-confirmed officer, a proper reading of the AG Succession Law and the FVRA, consistent with the requirements of the Appointments Clause, precludes him from exercising the powers of the AG. Therefore, Mr. Whitaker cannot adjudicate this case.

Dated: November 30, 2018

Respectfully submitted,

Robert N. Weiner
R. Stanton Jones
Kaitlin Konkel
Samuel F. Callahan*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
robert.weiner@arnoldporter.com

** Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members*

Trina Realmuto
AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street
Brookline, MA 02466
(857) 305-3600
trealmuto@immcouncil.org

Karolina Walters
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7500
kwalters@immcouncil.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated October 18, 2018 because the brief contains 8,721 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

Dated: November 30, 2018

/s Robert N. Weiner
Robert N. Weiner

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

I further certify that, on November 30, 2018, copies were sent via FedEx to the parties at the following addresses:

Andrew Pincus, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006

Kirstjen M. Nielsen
c/o Office of the General Counsel
Department of Homeland Security
Mail Stop 3650
Washington, DC 20528

Hiroko Kusada, Esq.
Loyola New Orleans College of Law
Immigration Clinic
7214 St. Charles Street
Box 902
New Orleans, LA 70118

Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

DHS/ICE Office of Chief Counsel
1250 Poydras Street Suite 2100
New Orleans, LA 70113

Rhonda M. Dent, Acting Chief
Immigration Law and Practice Division
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW, Mailstop 5900
Washington, DC 20536

Dated: November 30, 2018

/s Robert N. Weiner
Robert N. Weiner