No. 22-16552

In the United States Court of Appeals for the Ninth Circuit

GONZALES & GONZALES BONDS & INSURANCE AGENCY, INC., *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brian@theusconstitution.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC has a strong interest in preserving the checks and balances set out in our nation's charter, as well as the proper interpretation of laws that help maintain those safeguards. Accordingly, CAC has an interest in this case.

INTRODUCTION

For over a year, Chad Wolf illegally ran one of the federal government's most powerful departments, approving an array of sweeping policy changes. Because his tenure as Acting Homeland Security Secretary was unlawful, Wolf's approval of these new rules was invalid. Despite that, the Department's current leadership has tried to capitalize—selectively—on Wolf's illegal actions. Where it disagrees with Wolf's policies, the leadership has dropped appeals and allowed those rules to languish. But where it supports those policies, the leadership has found an easy way to retain the fruits of Wolf's unlawful appointment: the Secretary simply signs a half-page document ratifying the rule, *see* ER-133, skipping the rigor and hassle of notice-and-comment rulemaking.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief.

The panel decision blessed that maneuver, although the FVRA states that agency actions performed unlawfully during vacancies "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3448(d). The panel's rationale was that rulemaking is a function that DHS Secretaries may delegate to subordinates. The panel never explained why that should matter if an unauthorized person illegally wields the Secretary's powers when there is no Secretary—or why Congress would have conceivably written the statute this way.

The panel decision badly misreads the FVRA, deviates from Supreme Court guidance, and leaves the statute "a near-dead letter." *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS*, 107 F.4th 1064, 1086 (9th Cir. 2024) (Christen, J., dissenting). *Amicus* submits this brief to make three points.

First, the panel decision perversely gives agencies *more* power to operate without Senate-confirmed officers than they had before the FVRA's enactment. The FVRA made two key changes to rein in agencies' violations of its predecessor statute: it prohibited agencies from using delegation authority to avoid filling vacancies properly, and it introduced penalties to enforce that prohibition. But in exchange, Congress gave agencies much greater flexibility to fill vacancies lawfully. The panel decision gives agencies all the benefits of that tradeoff without its constraints—leaving the Appointments Clause *less* vital than before Congress acted to shore up its critical safeguards.

Second, the panel failed to construe the FVRA's individual terms in the context of the entire statute, as the Supreme Court has "[o]ver and over" instructed. *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)). Yet the panel allowed its reading of four parenthetical words in one clause to subvert the entire FVRA, although a majority recognized that those words can be read differently.

Third, the panel decision ultimately hinged on misplaced deference to agency interpretations and a misreading of legislative history. The Supreme Court has made clear that the agencies in question merit no special solicitude on FVRA issues, rejecting their views in the only FVRA case it has ever heard. And the Court has renounced the *Chevron* deference that the concurrence applied in all but name. Finally, the concurrence's reliance on portions of a Senate report elevated legislative history over text, structure, and purpose, while misunderstanding that report in the process.

Because the panel gravely misconstrued the FVRA and the Supreme Court's guidance, virtually nullifying a statute essential to preserving the separation of powers, this case should be reheard.

ARGUMENT

I. Under the Panel Decision, the FVRA Implausibly Gave Agencies *More* Power to Operate Without Senate Confirmation.

The FVRA was a response to a "threat to the Senate's advice and consent power." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 295 (2017). It repudiated the notion that agencies' power to delegate responsibilities gave them "independent authority apart from the Vacancies Act to temporarily fill vacant offices." *Id.* at 294. And it imposed "penalties for noncompliance." *Id.* at 296.

By making those penalties illusory, the panel enabled precisely what the FVRA forbids: evasion of Senate confirmation whenever a vacant office's duties are delegable. And perversely, this decision gives agencies more power to operate without Senate-confirmed leaders than they had before the FVRA. That is not a plausible interpretation of the statute.

The FVRA made two fundamental changes to the longstanding Vacancies Act it replaced. First, it clarified that agencies may not delegate the powers of vacant offices to other personnel instead of complying with the rules on filling vacancies. *See* 5 U.S.C. § 3347(b) (specifying that agency authority to "delegate duties" or "reassign duties" is not an alternative to the FVRA). Instead, the FVRA is "the exclusive means" for authorizing officials to wield the powers of Senate-confirmed offices. *Id.* § 3347(a).

Second, the FVRA introduced penalties for filling vacancies illegally—penalties going beyond whatever relief might be available from other statutes. *See id.* § 3348(d) (unlawful agency actions "shall have no force or effect" and "may not be ratified"); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015) (explaining that FVRA penalties are uniquely strict because they prohibit ratification, foreclose various defenses, and render actions void *ab initio*).

These innovations targeted rampant violations of the Vacancies Act and court decisions immunizing them from accountability. *See* S. Rep. No. 105-250, at 3-9 (1998). In the 1990s, the executive branch claimed that so-called vesting-and-delegation statutes, *i.e.*, "statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials," could "displace the Vacancies Act." *The Vacancies Act*, 22 Op. O.L.C. 44, 44, 47 (1998). Instead of pursuing Senate confirmation or obeying vacancies rules, departing officers would delegate all their powers to another official just before resigning. Or a department head would simply delegate the powers of a vacant office to someone else. *See* S. Rep. No. 105-250, at 3-6, 12.

This use of delegation to skirt Senate confirmation undermined the Appointments Clause. *See id.* at 4. Concluding that "the Justice Department's interpretation of the existing statute must be ended," Congress rewrote the law to "explicitly reject the position that general organic statutes for various agencies and

departments . . . trump the specific provisions of the Vacancies Act." *Id.* at 3; *see* 5 U.S.C. § 3347(a) (making the FVRA "exclusive"); *id.* § 3347(b) (prohibiting reliance on delegation as an alternative). In short, Congress banned the use of delegation to avoid properly filling vacancies and imposed strict penalties to enforce this prohibition.

But there were tradeoffs. In exchange, Congress significantly broadened agencies' flexibility to fill vacant offices. It expanded the pool of individuals who can be acting officers, allowing a wide range of mere employees to step into these roles. *Compare* 5 U.S.C. § 3345(a)(3), *with id.* § 3347 (1997). And Congress more than doubled the permissible length of acting service, allowing it to stretch through most of a presidential term if timely Senate nominations are made. *Compare* 5 U.S.C. § 3346, *with id.* § 3348(a) (1997).

Congress, in sum, "expanded the pool and tenure of potential acting officials but imposed more severe consequences for violations," while prohibiting the use of delegation as a workaround. Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613, 626 (2020). "The Act thus offered something to both the White House . . . and Congress." *Id.* at 632.

The panel decision, however, gives agencies all the benefits of that compromise without its drawbacks. That is why the panel's position is nearly indistinguishable from that of the executive branch *before* the FVRA's enactment.

In 1998, the executive branch claimed that "statutes . . . allowing delegation to subordinate officials" exempted agencies from penalty under the Vacancies Act for ignoring its limits. 22 Op. O.L.C. at 44. According to the panel, those same statutes now exempt agencies from penalty under the FVRA for ignoring *its* limits.

As a result, agencies may exploit all the added leniency to operate without Senate confirmation that the FVRA granted, but without the Act's new guardrails. Just as before, agencies may cite their vesting-and-delegation statutes to avoid complying with the Appointments Clause and vacancies legislation. Indeed, agencies can circumvent the FVRA without even using those delegation statutes—the mere fact that they *could* use them is enough. *See Gonzales Bonds*, 107 F.4th at 1067-68 ("Because the Secretary could have delegated promulgation of the Rule, Secretary Mayorkas could ratify the 2020 promulgation of the Rule, regardless whether the Rule's promulgation had been actually delegated.").

This delegation-based gloss on § 3348 means that almost no FVRA violation can ever be held void or ineligible for ratification. *See Kajmowicz v. Whitaker*, 42 F.4th 138, 151 (3d Cir. 2022) (giving § 3348 a "vanishingly small" scope) (quoting *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1337 (Fed. Cir. 2022)). Most critically, because all department secretaries can delegate essentially all their functions, *see L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 31 & n.11 (D.D.C. 2020), the most important powers that Congress entrusted to the highest-level officers will

never be shielded by the FVRA's penalties from abuse. The fact that those powers may be exercised by mere employees, *see* 6 U.S.C. § 112(b)(1) (permitting delegation to "any . . . employee . . . of the Department"), only heightens the "grave constitutional concerns" that some have perceived in allowing agency employees to wield the powers of principal offices without Senate confirmation. *SW Gen.*, 580 U.S. at 313 (Thomas, J., concurring).

The panel dismissed all this as merely a complaint about "undesirable policy consequences." *Gonzales Bonds*, 107 F.4th at 1080 (quotation marks omitted). Wrong. The point is that *Congress* would not plausibly have chosen illusory penalties for violations that undermine its own constitutional authority when the addition of new penalties was one of the FVRA's key innovations. Nor would Congress have allowed violations to go unchecked whenever agencies cite the very delegation authority that the FVRA forbids them from using to circumvent its rules.

But that is what the panel held. Just like in 1998, vesting-and-delegation statutes continue to provide an escape hatch that excuses compliance with vacancies laws, despite § 3347(b). Vacancies legislation is still not the "exclusive means" for carrying out the functions of vacant offices, despite § 3347(a). And penalties for violations can still be averted by ratification, despite § 3348(d).

While acknowledging that its holding virtually writes § 3348 out of existence, the panel defended this as a plausible interpretation because "the FVRA is not the only limit on agency action." *Gonzales Bonds*, 107 F.4th at 1077. But even if FVRA violations can be held unlawful under other statutes, that does not afford the remedies that Congress specifically prescribed for FVRA violations. The panel also downplayed the impact of its decision because "ratification . . . is not inevitable." *Id.* That too substitutes the panel's judgment for Congress's. *See* S. Rep. No. 105-250, at 8 (if "anyone else can ratify the actions of a person who served [in violation of] the Vacancies Act, then no consequence will derive from an illegal acting designation," which "undermines the constitutional requirement of advice and consent").

In sum, agencies' use of delegation to circumvent the rules of vacancies legislation was *the* problem the FVRA was written to solve, as its text reflects. Congress made tradeoffs to halt that practice, allowing much greater flexibility in filling vacancies lawfully. The panel decision undoes Congress's handiwork and renders the Appointments Clause even less vital than before the FVRA's enactment. That would hardly have been a rational way for Congress to curb "a threat to the Senate's advice and consent power." *SW Gen.*, 580 U.S. at 295.

II. The Majority Failed to Conduct the Holistic Statutory Analysis Required by Supreme Court Precedent.

"A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (quotation marks omitted). Even if the panel's reading of the provision in dispute here is "plausible when viewed in isolation," it "is untenable in light of [the FVRA] as a whole." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994).

In lieu of the contextual analysis prescribed by the Supreme Court, the majority zeroed in on four words in parentheses at the end of a clause that concededly "is ambiguous." *Gonzales Bonds*, 107 F.4th at 1081 (Johnstone, J., concurring). After choosing one of two potential readings of those words, the majority then asked whether anything in the statute unequivocally contradicted that reading. Finding no irreconcilable conflicts, the majority considered its work done. *Id.* at 1076-80.

That is not the "holistic endeavor" the Supreme Court has prescribed, "which determines meaning by looking . . . to text in context, along with purpose and history." *Gundy v. United States*, 588 U.S. 128, 140 (2019). The majority's singular focus on smoothing over potential contradictions between its reading and the rest of the statute led it to brush off the many incongruities that its narrow reading produces, as well as how this reading subverts the statute's functioning.

Yet the more incongruities that pile up, and the closer a statute inches toward irrelevance, the less plausible the interpretation yielding those results.

Most egregiously, the majority failed to acknowledge the depth of the conflict between the FVRA's prohibition on delegating duties during vacancies and its conclusion that the same statute exempts illegally performed duties from penalty if they can be delegated. The FVRA specifically mentions vesting-and-delegation statutes like the one on which the majority opinion rests, *see Gonzales Bonds*, 107 F.4th at 1067 (citing 6 U.S.C. § 112(b)(1)), and far from providing that these statutes excuse compliance with the FVRA's rules, it says exactly the opposite. *See* 5 U.S.C. § 3347(b).

What is more, the FVRA imposes the *strictest* limits on the officers whose powers are *most* likely to be delegable. Its penalties expressly cover the duties of department secretaries—duties that are freely delegable in every department—and it gives agencies *less* leeway to perform those duties during vacancies than it does the duties of other officers. Specifically, when a lower-level office has no acting officer, the department head may step in to perform that office's duties. *Id.* § 3348(b)(2). But when the department head's office is *itself* vacant, Congress pointedly withheld any similar option. Instead, the department head's office simply "shall remain vacant." *Id.* § 3348(b)(1). Thus, the very offices that have

universal delegation authority granted by statute are the ones treated most strictly by the FVRA. The panel decision inverts that policy choice.

The FVRA also describes itself as "the exclusive means" for temporarily filling vacant offices. *Id.* § 3347(a). But the panel's evisceration of its penalties nullifies that critical provision too. Although agencies still have a nominal duty to obey the FVRA's rules, the panel took away the Act's only unique means of enforcement. In practice, therefore, agencies no longer need treat the FVRA as "the exclusive means" of authorizing a vacant office's functions to be performed. That concern is more than hypothetical. *See Arthrex*, 35 F.4th at 1337 ("the government contends that the FVRA imposes *no constraints whatsoever* on the [agency] because all the Director's duties are delegable" (emphasis added)). Courts "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 576 U.S. 473, 493 (2015) (quotation marks omitted), but reducing § 3347(a) to an empty admonishment does exactly that.

Still other incongruities flow from the panel decision. Congress expressly excluded certain officers from the FVRA's penalties, *see* 5 U.S.C. § 3348(e), but the panel functionally added to that list every other officer whose duties are delegable. *See Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 24 (D.D.C. 2022). The panel's reading also makes these express exemptions superfluous. None of the officers the statute excludes had any nondelegable functions in 1998 (or now). *See*

Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 Ga. St. U. L. Rev. 699, 796-97 (2020). So their functions would already have been exempt from penalty if the panel's reading were correct.

Moreover, another portion of Section 3348 plainly indicates that the FVRA's penalties are meant to encompasses delegable functions. Separate from the provision in dispute here, which concerns duties "established by statute," 5 U.S.C. § 3348(a)(2)(A)(i), the FVRA's penalties also cover duties that are "established by regulation," *id.* § 3348(a)(2)(B)(i)(I). Duties established by regulation are typically—if not always—delegable. They arise when officers delegate their powers to lower-level personnel through regulations. *See* ER-108 (delegation from DHS Secretary to Deputy Secretary). But even though duties established by regulation are inherently delegable, the FVRA treats them just as stringently as it treats duties established by statute. *See* 5 U.S.C. § 3348(a)(2)(B)(i). It even prevents agencies from circumventing the rules by manipulating their delegations in anticipation of a vacancy. *Id.* § 3348(a)(2)(B)(ii). Given this treatment of duties established by regulation—which are subject to penalty even when their very existence arises from delegation—it makes no sense that the FVRA would exclude duties established by statute from penalty simply because they too are delegable.

Instead, correctly interpreted, both provisions together ensure that where a specific duty is assigned to a single office, whether by statute or regulation, a valid

acting officer is needed for that duty to be performed during a vacancy. That is the whole point of the FVRA and its "exclusive" procedures. *Id.* § 3347(a).

III. The Majority's Reliance on Agency Deference and Legislative History Is Misplaced.

Ultimately, the panel decision rested on a misreading of legislative history and undue deference to agency interpretations of the FVRA. Explaining his deciding vote, Judge Johnstone wrote that "even after considering text and structure, the phrase 'the applicable officer (and only that officer)' is ambiguous. So we *must* look to extrinsic evidence from our co-equal branches to determine its meaning." *Gonzales Bonds*, 107 F.4th at 1081 (Johnstone, J., concurring) (emphasis added). He then resolved the case by relying on portions of a Senate report and deferring to the positions of the Government Accountability Office and the Office of Legal Counsel.

Judge Johnstone's reliance on the views of GAO and OLC is flawed on many levels. To start, the Supreme Court rejected both agencies' views without hesitation in the only FVRA case it has ever heard. *See SW Gen.*, 580 U.S. at 307 (explaining that GAO and OLC were on the losing side of that dispute). Although the FVRA provision at issue in *SW General* was ambiguous enough to divide the Justices, the Court never suggested that deferring to these agencies was the way to resolve that ambiguity. On the contrary, it explicitly refused to give weight to their views. *See id.*; *cf. Util. Air*, 573 U.S. at 321 ("an agency interpretation that is

inconsisten[t] with the design and structure of the statute as a whole does not merit deference" (citation and quotation marks omitted)).

Were that not enough, just weeks before the panel decision the Court admonished that every statute "has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit"; underscored the "futility" of judicial attempts to "identify ambiguity"; and made clear that deferring to agency interpretations to resolve such perceived ambiguity is unacceptable, unless a statute delegates discretion to an implementing agency. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2271 (2024). Although the concurrence cited *Skidmore* and disclaimed "formal deference," it employed *Chevron* in all but name. It did not describe any persuasive reasoning from GAO or OLC that helped illuminate the FVRA's meaning. It did not identify any grant of discretion to those agencies. Instead, it simply recited those agencies' bottom-line conclusions and declined to "unsettle this mutual understanding." *Gonzales Bonds*, 107 F.4th at 1086 (Johnstone, J., concurring). That is what the Supreme Court has made clear judges are *not* to do. And it departs from the Court's own approach in *SW General*.

Contrary to the concurrence's assertion, moreover, GAO is charged only with monitoring compliance with the FVRA's time limits, *see* 5 U.S.C. § 3349(b)(6), not its many other rules, and still less its provisions governing

judicial penalties for violations. GAO is not, therefore, "uniquely situated to interpret the statute." *Gonzales Bonds*, 107 F.4th at 1085 (Johnstone, J., concurring). As for OLC, the concurrence itself acknowledged that it was "[p]erhaps unsurprising[]" for that agency to take a position minimizing constraints on the executive branch. *Id.* Worse, the OLC opinions cited by the concurrence are merely "guidance documents" consisting of "conclusory statements . . . with no analysis," *SW Gen.*, 580 U.S. at 308, which the Supreme Court has indicated should not be given weight when interpreting the FVRA.

The concurrence's use of legislative history is a classic example of "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Any fair reading of the Senate report "leaves no doubt that [its] unambiguous aim was to avoid the very result that the majority urges." *Gonzales Bonds*, 107 F.4th at 1093 (Christen, J., dissenting). And despite the concurrence's claim that only the permissive reading of Section 3348 finds support in the Senate report, the report explains that "[t]he bill's enforcement mechanism" covers "the functions and duties specifically to be performed by the vacant officer." S. Rep. No. 105-250, at 2.

Indeed, the White House threatened to veto the FVRA for this very reason—sharing the view of Plaintiffs here that its penalties covered "functions assigned to

that office and no other." Migala, *supra*, at 796 (quoting Letter from Erskine Bowles to the Senate Majority Leader, The White House (July 28, 1998)). Congress responded not by changing the penalty provision, but by broadening the time limits for acting service and the pool of acting officers. *Compare* 5 U.S.C. §§ 3345, 3346, *with* S. Rep. No. 105-250, at 25-26.

The concurrence was misled by the Senate report's use of the word "nondelegable." Those passages, however, refer to what can and cannot be delegated *during a vacancy*, when the FVRA's restrictions kick in. The FVRA is not concerned with what can be subdelegated to subordinates when an office is filled, and it had no rational reason to draw lines on that basis—Congress knew that virtually everything can normally be subdelegated. *See* 5 U.S.C. § 3347(b)(2) (referencing vesting-and-delegation statutes). Instead, the FVRA is concerned with an entirely different type of "delegation," namely, the practice of reassigning the powers of *vacant* offices to other personnel instead of validly filling them. Thus, when a vacant office has no acting officer, duties assigned only to that office by statute or regulation may not be performed, except by the agency head. *Id.* § 3348(b)(2). But because officers perform many functions beyond those specifically assigned to them by statute or regulation, *see* S. Rep. No. 105-250, at 10, Congress allowed *those* functions to be delegated to others during vacancies, *id.* at 18-19.

One can test whether this reading or the concurrence's reading is correct. The Senate report discusses the "non-delegable duties" of two specific officials: the general counsels of the National Labor Relations Board and the Federal Labor Relations Authority. In explaining why the FVRA excludes these unusual positions from its penalty provision, the Senate report refers to "the non-delegable duties of these general counsel." *Id.* at 20. But in 1998, as today, those officers had no nondelegable duties. *See* 5 U.S.C. 7104(f) (1998); 29 U.S.C. 153(d) (1998). So what was the Senate report referring to? The answer is that Congress did not want to allow their duties to be delegated to others *during a vacancy*. *See* S. Rep. No. 105-250, at 20.

At bottom, the concurrence and lead opinion both erred by equating "exclusive" duties with "nondelegable" duties. *Gonzales Bonds*, 107 F.4th at 1074. They failed to appreciate that officers who delegate to subordinates are performing their duties *through* those subordinates. *See* ER-108 (a Deputy Secretary who approves DHS rules does so "on behalf of the Secretary" and "[a]cting for the Secretary"); *SW Gen.*, 796 F.3d at 80 (the NLRB's general counsel "delegated his authority to . . . issue complaints," but "if the General Counsel's office were vacant, the NLRB would not be issuing complaints" (quotation marks omitted)).

The majority never explains why the FVRA would establish rules for vacancies based on what officers can delegate when there is no vacancy. Only Plaintiffs' interpretation here unites the FVRA's various provisions into a coherent whole that fulfills the statute's purpose.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

/s/ Brian R. Frazelle
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brian@theusconstitution.org

Counsel for Amicus Curiae

Dated: October 10, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) and Circuit Rule 29-2(c)(2) because it contains 4,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 10th day of October, 2024.

/s/ Brian R. Frazelle
Brian R. Frazelle

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2024.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 10th day of October, 2024.

/s/ Brian R. Frazelle
Brian R. Frazelle

Counsel for Amicus Curiae