CASE NO. 24-2251

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION; ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS; BETTY MAGNUSON; IVAN M. IVAN; AHTNA TENE NENE; AHTNA, INC.; ALASKA FEDERATION OF NATIVES,

Intervenor-Plaintiff- Appellee,

v.

STATE OF ALASKA; STATE OF ALASKA DEPARTMENT OF FISH AND GAME; DOUG VINCENT-LANG, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ALASKA DEPARTMENT OF FISH & GAME,

Defendant- Appellant.

On Appeal from the United States District Court
for the District of Alaska, 1:22-cv-54-SLG (Honorable Sharon L. Gleason)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because the right to individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framers' design.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Of the many abuses that the Founders listed in the Declaration of Independence, the Crown's unilateral creation of new offices was considered especially tyrannical. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."). To protect against similar abuses by America's President, the Framers devised a constitution that stripped him of that power. THE FEDERALIST NO. 69, at 382 (Alexander Hamilton) ("The king of Great

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. . . . There is evidently a great inferiority in the power of the President, in this particular, to that of the British king.") (emphasis added).

Yet the district court below held that the Constitution permits the President (or his subordinate officers in the executive branch) to create offices by regulation, supposedly authorized by a generic, catch-all rulemaking statute: "The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title." 16 U.S.C. § 3124. That holding is wrong, and it is contrary to the Founder's careful restriction of the executive power. It should be reversed.

This case arises from the Federal Subsistence Board's ("the Board's") recent decision to close a 108-mile section of Alaska's Kuskokwim River to non-subsistence fishing. *United States v. Alaska*, No. 1:22-cv-00054-SLG, 2024 U.S. Dist. LEXIS 58810, at *7–8 (D. Alaska Mar. 29, 2024). Although the Board permitted *some* subsistence fishing in the river, it extended that privilege only to federally qualified *rural* residents. *Id*. at *8–9.

The Board has twice limited the river to subsistence fishing, once in 2021 and again in 2022. *Id.* Those same years, the Alaska Department of Fish and Game issued its own emergency orders respecting the Kuskokwim River. Unlike the Board's

orders, the state orders allowed *all* Alaskans, including those not recognized as rural under federal law, to subsistence fish in the closed portions of the river. *Id*. at *9–10. The state said it implemented these orders to allow displaced urban Alaskans "to practice their traditional and cultural subsistence way of life that is closely tied to the Kuskokwim River." *Id*. at *10. In response, the United States sued Alaska, seeking both a declaration that the state's emergency orders were preempted by federal law and a permanent injunction blocking the state from implementing future orders that contradicted federal subsistence regulation.

As a defense to the government's preemption arguments, Alaska alleged that the Board's regulations were void because the Board was not established in accordance with the Appointments Clause of the United States Constitution. The state argued that the Board was not created "by Law" as required by the plain language of the Appointments Clause since the Board was created by regulation rather than by statute. Additionally, Alaska argued that the Board members were principal officers who must be nominated by the President and confirmed by the Senate. Since none of the Board members were appointed pursuant to this process, Alaska argued that the Board's regulations were void.

The district court below disagreed with these arguments and ruled in favor of the United States. The court held that the Constitution does not require that inferior executive offices be created by legislation. Instead, the court ruled that the

Constitution allows executive officials to create inferior offices via regulation. *Id*. at *20–21. And although the court concluded that the Board members were "officers of the United States," it determined that they were "inferior officers" whose appointments were properly vested in the secretaries of the interior and agriculture. *Id*. at *21.

For the reasons Alaska has explained, both of the district court's conclusions regarding the Appointments Clause are wrong. *Amicus* writes separately to make two points related to office creation and vesting the power to appoint inferior officers.

First, the Appointments Clause permits only *Congress* to create executive offices by statute. The term "by Law" has a consistent meaning throughout the Constitution, including its two appearances in the Appointments Clause. The term refers to an action taken by Congress—namely legislation. By using that term, the Appointments Clause reserves for Congress the power to create executive offices. If federal regulators were allowed to create federal offices, they would be usurping an important legislative power from Congress. This would disrupt the Constitution's careful separation of the power to create offices from the power to appoint their occupants.

Second, courts should apply careful scrutiny when determining whether a statute has created a federal office or vested the appointment of an officer. When a

statute is alleged to have vested the appointment of an inferior officer, Congress must clearly signal that choice by echoing the Constitution's use of the word "appoint." Supreme Court precedent requires nothing less. And courts should not assume that Congress intended to create a federal office where the statute does not evidence this intention.

When applied to this case, these principles make clear that Alaska should win. No statute, properly understood, creates the Federal Subsistence Board or provides for its members' appointment. As a result, the putative Board's regulations regarding the Kuskokwim River are *ultra-vires* and thus void. For these reasons, this Court should reverse the decision of the district court below.

ARGUMENT

I. THE APPOINTMENTS CLAUSE REQUIRES THAT CONGRESS CREATE EXECUTIVE OFFICES BY STATUTE.

A. The term "by Law" refers to statutes, not regulations.

The Appointments Clause specifies that federal offices may only be created "by Law." The district court below held that the Board's creation satisfies this requirement even though the Board was created by regulation rather than by statute. The court reasoned that an office created via regulation has nonetheless been created "by Law" since it is a "black-letter principle that properly enacted regulations have the force of law." *Alaska*, 2024 U.S. Dist. LEXIS 58810, at *21–22 (quoting *Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986)). This holding is wrong.

The term "by Law" is consistently used to refer to congressional legislation throughout the Constitution. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 ("as they [Congress] shall *by Law* direct") (emphasis added); *id*. § 4, cl. 1 ("the Congress may at any time *by Law* make or alter such Regulations") (emphasis added); *id*. § 4, cl. 2 ("The Congress shall assemble . . . on the first Monday in December, unless they shall *by Law* appoint a different Day.") (emphasis added); *id*. § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*.") (emphasis added); *id*. art. II, § 1, cl. 6 ("the Congress may *by Law* provide for . . .") (emphasis added); *id*. art. III, § 2, cl. 3 (". . . Congress may *by Law* have directed") (emphasis added). Its meaning in the Appointments Clause is the same: An office can only be created "by Law" if it is created by legislation passed through Congress.

The Framers' expressed intentions when drafting the Appointments Clause support this reading. During the Constitutional Convention, several delegates were especially concerned with clarifying Congress's role in both the appointment of federal officers and the creation of their offices. Chief among them were James Madison and Charles Pinckney who, upon reviewing the Committee of Detail's first draft of the Appointments Clause, expressed concern about its lack of clarity regarding the role of Congress. 2 FARRAND'S RECORDS: RECORDS OF THE FEDERAL CONVENTION OF 1787 344–45 (M. Farrand ed. 1937). The committee's early draft of

the Appointments Clause read: "[the President] shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution." *Id*. at 185. To Madison, this language did not clearly enough define Congress's role in the proposed appointment regime. He and Pinckney therefore proposed a series of amendments to better specify Congress's responsibilities.

Their first proposal was to modify the Necessary and Proper Clause to give Congress the power to "establish all offices." They argued that without this addition, some might question whether the Necessary and Proper Clause granted Congress power over office creation. *Id*. at 344–45. This amendment was rejected as unnecessary, but their concern that the Constitution should more explicitly define Congress's role in creating federal offices animated discussions about the Appointments Clause moving forward. *See id*. at 345.

When the Convention returned to the issue of the Appointments Clause, its draft still did not specify a role for Congress in creating federal offices. Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1067 (1987). Taking note of this omission, Roger Sherman suggested inserting the language "*or by law*" after "*Constitution,*" so that the Clause would read "provided for by this Constitution *or by law.*" *See* Garrett E. West, *Congressional Power over Office Creation*, 128 YALE L. J. 166, 183–84 (2018).

Sherman proposed this amendment to carve out a defined role for Congress in creating certain offices that the executive should not be permitted to create and appoint alone. *See* 2 Farrand's Records, *supra*, at 405. Building on Sherman's proposal, Madison moved to amend the Appointments Clause further by changing "officer" to "office" to assuage concerns "that the President might appoint officers without the previous creation of the offices by the Legislature.'" *Id*. During the remainder of the Convention, there were a series of revisions that oscillated between including the terms "office" or "officer," in line with Sherman and Madison's previous proposals. *See* West, *supra*, at 185. But during the final review of the Committee of Style's draft of the full Appointments Clause, Madison's position prevailed.

In the days before ratification, the Convention adopted two final amendments to the Appointments Clause. First, it accepted a proposal that provided Congress the power to vest the appointment of inferior officers in one of three qualified appointers—what is known today as the Vested Appointments Clause. *Id*. at 185. And second, the Convention finally added the phrase "and which shall be established by Law" to the Appointments Clause to specify Congress's exclusive role in creating federal offices. *Id*.

The understanding that "by Law" means by statute is also supported by longstanding Supreme Court precedents. In *United States v. Maurice*, Chief Justice

Marshall (riding circuit) was the first Justice to consider the significance of the words "established by Law" in the Appointments Clause. He concluded that the Framers intended this language to reserve for Congress the exclusive power to create all federal offices that are not already provided for by the Constitution. 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) ("[T]he general spirit of the constitution . . . seems to have arranged the creation of office among legislative powers[.]").

Since Marshall's opinion, the Supreme Court has repeatedly reaffirmed Marshall's understanding of the term "by Law" in the Appointments Clause (and elsewhere in the Constitution) as requiring congressional legislation. *See Weiss v. United States*, 510 U.S. 163, 187 n.2 (1994) (Souter, J., concurring) ("[T]he Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal offices."); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) ("Money may be paid out only through an appropriation made *by law*; in other words, the payment of money from the Treasury must be authorized by a statute.") (emphasis added); *Lucia v. SEC*, 585 U.S. 237, 254 (2018) (Thomas, J., concurring) ("For federal officers, that duty is 'established by Law'—that is, by statute."); *Trump v. United States*, 144 S. Ct. 2312, 2348 (2024) (Thomas, J., concurring) ("By requiring that Congress create federal offices 'by Law,' the Constitution imposes an important check against the President—he cannot create offices at his pleasure."). And past

presidential administrations have also recognized that the executive power does not include unilateral office creation. *See, e.g.*, Limitations on Presidential Power to Create a New Exec. Branch Entity to Receive and Administer Funds Under Foreign Aid Legis., 9 Op. O.L.C. 76, 77–78 (1995).

The novel theory that a regulation can satisfy the Constitution's "by Law" requirement ignores this longstanding consensus and is unsupported by the original meaning, history, and practice of the Appointments Clause. *See Trump*, 144 S. Ct. at 2349 (Thomas, J., concurring) ("Longstanding practice from the founding to today comports with this original understanding that Congress must create offices by [statute].").

For all these reasons, the district court's conclusion that the executive branch validly created the Board "by Law" via regulation was error.

B. Inferior offices must be created "by Law," just like principal offices.

The district court also held that that an inferior office need not be created "by Law" at all if Congress has vested a generic, catch-all appointment power in a qualified appointer and if that appointment power would allow the appointer to fill such an office (if it existed). *Alaska*, 2024 U.S. Dist. LEXIS 58810, at *21. And because the court found that the generic Section 3124 "vested" the secretaries with the power to appoint inferior officers within their departments generally, it

concluded that the Board was established in accordance with the Appointments Clause.

This conclusion was also error. The Appointments Clause requires that *all* offices be established by law, whether principal or inferior. And even if a statute authorizes a qualified appointer to make appointments to fill inferior offices within a department, that statute cannot be understood to authorize the *creation* of new offices.

The Vested Appointments Clause does not change the requirement imposed by the Appointments Clause as a whole that all offices must be established by law. In fact, the Vested Appointments Clause was not understood to modify the Appointments Clause in any significant way. *See* Blumoff, *supra*, at 1068–69 n.194. Rather, the Vested Appointments Clause added an alternative option for the appointment of officers, so long as those officers are "inferior." The Framers included the Vested Appointments Clause to allow for the more expedient appointment of less powerful officers, so that the President and the heads of departments could more easily choose their own assistants and quickly fill out the federal government. *See id.* The Framers did not intend the Vested Appointments Clause to divest Congress of its power to create *all* federal offices not otherwise provided for, whether principal or inferior. *See Weiss*, 510 U.S. at 186–87 (Souter, J., concurring) (explaining that "the Framers still structured the [inferior officer]

alternative to ensure accountability and check governmental power" even though "[t]he strict requirements of nomination by the President and confirmation by the Senate were not carried over to the appointment of inferior officers.").

Contrary to the district court's holding, the Vested Appointments Clause does not weaken the role of Congress; it does just the opposite. That clause grants Congress an additional "vesting" power regarding inferior officers' appointments. Correctly understood, the Vested Appointments Clause alters only the *appointment* procedures for inferior offices by allowing *Congress* to dispense with Senate confirmation when it chooses to do so. *See id*. at 187 ("Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law.").

Under the district court's reasoning, whenever Congress creates a generic and broadly worded appointment power allowing the head of a department to fill many inferior offices, Congress also forfeits its power to first create and define those federal offices that may be filled via such appointment power. If that were so, then the Vested Appointments Clause's purpose of providing for an efficient, yet accountable executive would be greatly undermined.

Such a reading is not just counter to the purpose of the Appointments Clause; it is also incompatible with its text. The Appointments Clause does not distinguish between Congress's power to create inferior offices and its power to create principal

offices. Unlike Congress's power to vest appointments—where the Vested Appointments Clause explicitly spells out an alternative process—the Constitution's requirement that offices be created "by Law" is uniform throughout the whole Appointments Clause. *See* U.S. CONST. art. II, § 2, cl. 2. (providing that "all other Officers of the United States, whose Appointments are not herein otherwise provided for, . . . shall be established by Law"). The district court relied on the Vested Appointments Clause's alleged textual silence on the issue of office creation in concluding that the clause lacked an office creation requirement. But the Vested Appointments Clause cannot be divorced from the context of the whole Appointments Clause, which clearly contemplates legislative creation of *all* offices.

Finally, even if that bifurcated reading were a plausible interpretation, an alleged textual ambiguity in the Vested Appointments Clause should not be read to empower the executive branch to create new offices. Such a reading would contradict the spirit of the Appointments Clause and the Framers' understanding that the Clause reserved this power to Congress. *See* West, *supra*, at 185 (explaining that Madison's amendments mostly clarified the Convention's "seemingly unanimous" understanding that the Appointments Clause reserved the power to create offices exclusively for Congress).

The district court's approach conflates a blanket *appointment* power with a blanket *office creation* power. First, the district court interpreted Section 3124 to

grant the secretaries a broad power to appoint subordinate officers, even though the statute does not mention the word "appoint." Even if that dubious interpretation were correct (which it is not), the statute did not create any offices by law because it did not name or otherwise describe any offices.

To be sure, Congress may simultaneously create an office and vest the appointment of its officers in a single statute—even a single sentence. *See, e.g.*, 28 U.S.C. § 542 ("The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires."). But such statutes must name or otherwise describe the particular office being created, which Section 3124 does not do. When statutes provide a general appointment power but do not name any particular offices, they do not create any offices. Put simply, when Congress grants a general appointment power, it only allows for the appointment of officers to *existing* offices previously established by law; it does not allow the appointer to create *new* offices at will. This principle is best illustrated by the Supreme Court's decision in *Edmond v. United States*, 520 U.S. 651 (1997).

In *Edmond*, the Supreme Court considered, *inter alia*, whether the appointment of multiple Court of Criminal Appeals judges complied with the Appointments Clause. *Id*. In so doing, the Court found that Congress had properly vested the judges' appointments in the secretary of transportation. To support this conclusion, the Court cited to a statute that vested the secretary with the power to

"appoint and fix the pay of officers and employees of the Department of Transportation." 49 U.S.C. § 323(a). And the Court held that this authority extended to "Court of Criminal Appeals judges"—officers who were created by a *different* statute and situated within the department. *See* 10 U.S.C. § 866 (creating the "Court of Criminal Appeals"); *see also Edmond,* 520 U.S. at 662 (discussing the duties of the Appeals Court).

Crucially, *Edmond* did not hold that the general appointment authority of Section 323 *created* the office of the Court of Criminal Appeals. *See generally id*. Rather, the Supreme Court held that the clear appointment authority conveyed in Section 323 permissibly empowered the secretary to appoint officers to fill all *existing* inferior offices within the department that had been created by other statutes. *Edmond* makes clear that even when a statute grants a broad *appointment* power without naming any particular office, it does not simultaneously vest a broad office *creation* power.

For these reasons, the district court erred in concluding that the Board was created in accordance with the Vested Appointments Clause.

II. CONGRESS MUST VEST THE APPOINTMENT OF INFERIOR OFFICERS USING EXACT LANGUAGE.

Where the Constitution has established a default balance of power, the Supreme Court has required a high degree of statutory clarity before ruling that Congress intended to depart from that default balance. *See* Amy Coney Barrett,

Substantive Canons and Faithful Agency, 90 B.U.L. REV. 109, 118 (2010). This clear statement rule applies across a wide range of constitutional provisions. "For example, absent a clear statement to the contrary, the Court will not interpret a statute to waive the federal government's immunity from suit, to abrogate a state's sovereign immunity from suit in federal court, to regulate 'core state functions,' to abrogate Indian treaty rights, to abrogate the inherent power of a federal court, or to apply retroactively." *Id.* at 118–119.

Clear statement rules are perhaps most frequently applied in disputes between the federal government and the states. When Congress enacts a law, it supersedes any conflicting state laws. U.S. CONST. art. VI, cl. 2. But the states are still co-equal sovereigns, and absent congressional legislation, they may enact laws with equal authority. And within our federalist system, it is generally preferred that states handle most legislative matters. *See Alden v. Maine*, 527 U.S. 706, 759 (1999). For these reasons—sovereignty and our constitutional preference for federalism—courts often apply a clear-statement standard to congressional legislation "affecting the federal balance" of power. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (holding that although federal-state balance can be altered by means of "intrusive exercises of Congress' Commerce Clause powers," the Court "must be absolutely certain that Congress intended such

an exercise" and thus will never "'give the state-displacing weight of federal law to mere congressional ambiguity.'").

But clear statement rules are not limited to this context; they also function to protect the Constitution's balance of purely federal powers. For example, in *Kucana v. Holder*, the Supreme Court considered a statute that purported to preclude judicial review of certain asylum claims. 558 U.S. 233 (2010). There, the Court applied a clear statement rule to find that the statue did not strip the courts of jurisdiction. In so holding, the Court noted that "[s]eparation-of-powers concerns . . . caution us against reading legislation, absent [a] clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.* at 237.

The Appointments Clause is another context in which the Supreme Court has applied something akin to a clear statement rule to preserve the balance of federal power. In *Edmond*, the Supreme Court considered whether Congress had properly vested the appointment of Court of Criminal Appeals judges in the secretary of transportation or improperly vested their appointment in the Coast Guard's judge advocate general. 520 U.S. at 651. In analyzing one of the statutes purporting to vest the judge advocate general with that power, the Court applied a strict textual analysis that distinguished between Congress's use of the words "appoint" and "assign." The Court ultimately concluded that the provision could not be read to vest the appointment of the judges in the judge advocate general because the statute spoke

"explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections [was] mention made of a separate appointment." *Id*. at 658 (quoting *Weiss*, 510 U.S. at 172).[2] By contrast, a separate statute that used the word "appoint" was found to vest their appointment in the secretary of transportation. *Id*.

In *Edmond*, the Court established a straightforward rule: When Congress intends to vest the appointment of an inferior officer in a qualified appointer, it uses the term "appoint." *See, e.g.*, *United States v. Janssen*, 73 M.J. 221, 224 (C.A.A.F. 2014) ("Words have meaning, and we interpret *Edmond* to require statutory language specifically granting the head of a department the power to appoint inferior officers."). The *Edmond* Court thus applied the same exacting standard used in other clear statement cases to discern whether Congress vested an appointment power in the secretary. And the Court's demand for precise language in *Edmond* aligns with its other clear statement rule precedents. This makes sense, given the Constitution's

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[2] The Court in *Edmond* echoes Justice Marshall's understanding of the Appointments Clause's vesting requirement articulated in *Maurice*:

> I know of no law which has authorized the secretary of war to make this appointment. There is certainly no statute which directly and expressly confers the power; and the army regulations, which are exhibited as having been adopted by congress, in the act of the 2d of March, 1821, declares that agents shall be appointed, but not that they shall be appointed by the secretary of war. … [Therefore,] James Maurice cannot be considered as a regularly appointed agent of fortifications.

26 F. Cas. at 1216.

strong preference for Senate-confirmed appointees and the institutional importance of the Appointments Clause.

The Appointments Clause establishes a constitutional preference that officers be nominated by the President and confirmed by the Senate. "The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers." *Edmond*, 520 U.S. at 660. Congress can only change that default rule through the cumbersome process of bicameralism and presentment. *See* U.S. CONST. art. II, § 2, cl. 2. ("but the Congress may *by Law* vest the Appointment of such inferior Officers . . . .") (emphasis added). This was no accident. The Framers intended advice-and-consent appointment to aid the decision-making process and act as a "bulwark" against the branches' "aggrandizement" of their own powers. *See Ryder v. United States*, 515 U.S. 177, 182 (1995); 2 Farrand's Records, *supra*, at 539 ("as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security").

The Constitution's strong institutional preference for senate-confirmed officers deserves deference. This case is no different. If this Court concludes that the Board members are inferior officers, Congress no doubt has the power to vest their appointment in the secretaries. But in determining whether Congress in fact vested their appointment, this court should apply no less than the strict analysis the Supreme Court applied in *Edmond* and its other clear statement cases.

III. CONGRESS DID NOT BY LEGISLATION CREATE THE FEDERAL SUBSISTENCE BOARD OR VEST THE APPOINTMENT OF ITS MEMBERS IN THE SECRETARIES.

The secretaries cite several statutes as granting them authority to create the Board and vest the appointment of its members. *See* 50 C.F.R. § 100.10. But none of these authorities can be interpreted as creating the Board or granting the secretaries the power to appoint its members.

A. No statute creates the Federal Subsistence Board.

The Federal Subsistence Board was created pursuant to regulation. *See* 50 C.F.R. § 100.10. The federal government argues that 16 U.S.C. § 3124 provides statutory authority for the Board's creation. *See* U.S. Reply Br. at 32–33. The district court agreed, finding that the statute granted the secretaries the power to create the Board.[3] This holding is wrong. Section 3124 cannot reasonably be interpreted to create any office, let alone one akin to the Board.

[3] The federal government and district court frame the statute as "delegating" the secretaries the power to create federal offices. U.S. Reply Br. at 32. We do not believe this framing is appropriate. The Appointments Clause clearly requires that offices be created by statute. As Chief Justice Marshall put it, every office "ought to be established by law, and cannot be considered as having been established by the [statutes] empowering the president, generally," to exercise powers that the President then assigns to an office. *Maurice*, 26 F. Cas. at 1214. Therefore, the operative question is not whether Congress sufficiently delegated office creation power, but whether the *statute* set forth enough detail about an office to itself create that office. And even though Congress need not set forth every detail of an office in a statute creating it, Section 3124 does not purport to establish an office *at all*.

Courts interpret statutes with reference to Congress's drafting history on similar subjects. *See, e.g.*, *Nebraska v. Biden*, 600 U.S. 477, 514–15 (2023) (Barrett, J., concurring)) (discussing Congresses history of specifying large grants of federal rulemaking authority) (citing A. Gluck & L. Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003–1006 (2013) (finding that a large majority of members of Congress adopted the same meaning when drafting statutes that delegated rulemaking powers to agencies)). The objective when analyzing any statute is to "situate text in context." *See id*. at 511. Importantly, "[c]ontext is not found exclusively '"within the four corners" of a statute.'" *Id*. (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003)). That context may be informed by our "common sense" understanding of the text and other "background legal conventions." *Id*. at 512. These principles are no less forceful here.

With these principles of statutory interpretation in mind, it is impossible to read Section 3124 as establishing the Board. Start with the plain language of the statute: "The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title." 16 U.S.C. § 3124. This language is typical when Congress intends to grant federal officers general rulemaking powers. But nothing in this provision discusses office creation. And

interpreting "necessary and appropriate" regulations as creating the office of the Board would stretch the statute's meaning too far.

Congress has historically created federal offices by reference to either the office itself, or to the officers that comprise it. *Amicus* was unable to find any instance where Congress created an office without reference to the office at all. And in this case, this drafting practice is illustrated best by reference to other statutes creating other regulatory (or advisory) boards in Title 16. For instance, 16 U.S.C. § 582a-4(b) uses broad language to create an "advisory council" to assist the secretary in effectuating policy: "The Secretary shall appoint a council of not fewer than sixteen members which shall be constituted to give representation to Federal and State agencies concerned with developing and utilizing the Nation's forest resources . . . . " Although the language in this statute does not establish the advisory council by name, it explicitly provides for its members' appointments, from which we can reasonably infer the council's existence. This reading is further supported by the section's continued outlining of the council's duties:

> The council shall meet at least annually and shall submit a report to the Secretary on regional and national planning and coordination of forestry research within the Federal and State agencies, forestry schools, and the forest industries, and shall advise the Secretary on the apportionment of funds . . . .

Id.

Section 3124 possesses no such similar language. Section 3124 does not reference the position of Board member or outline the Board's powers. Absent any reference to officer appointment or officer duties, it is unreasonable to infer that Section 3124 created an office when other statutes in the same title are more explicit.

But what illustrates this drafting practice best is Section 582a-4(b)'s inclusion of a rulemaking provision separate from the provision establishing the council: "The Secretary shall prescribe such regulations as may be necessary to carry out this Act." *Id*. § 582a-4(a). If Congress thought that "necessary" regulations included the ability to establish an advisory council to aid the secretary, it would not have provided for that council in the same section. This drafting scheme is consistent throughout title 16. *See, e.g.*, 16 U.S.C. § 583j (creating the "Forest Foundation"); *id.* at § 545b(e) (in broad terms, creating an advisory council to the secretary of the interior and providing for members' appointment); *id*. at § 543e (creating the "Scenic Area Advisory Board"). And the federal government cannot cite to another authorizing statute to justify the Board's creation in more explicit terms. *See* 50 C.F.R. § 100.10; U.S. Reply Br. at 32–33.

Title 16 consistently separates provisions that establish executive boards and councils from provisions that grant the secretary general rulemaking powers. Congress, through this drafting practice, clearly did not intend its grants of general

rulemaking authority to include office creation. And this is even more evident when we consider the history of the Reorganization Acts.

The Reorganization Acts are a series of statutes that allowed the President to submit reorganization plans that proposed to restructure departments within the executive branch. Henry B. Hogue, CONG. RSCH. SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS 1 (2012). The Reorganization Acts were never permanently enshrined in law; there were decades where Congress let the acts lapse. *See id*. at 3. Importantly, the Reorganization Acts reserved for Congress either a one-house or two-house veto on any plan submitted by the President. *See id*. at 1. Congress never intended to give the President the power to unilaterally create federal offices. However, in the 1980s, the Supreme Court ruled that the legislative veto was unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983). Immediately after the Court's decision, Congress ratified every reorganization plan submitted by past administrations to eliminate any constitutional doubt. Pub. L. No. 98-532, 98 Stat. 2705. Crucially, Congress let the final Reorganization Act lapse in 1984. 5 U.S.C. § 904. And Congress has not since reauthorized the law despite requests from multiple administrations.[4] Hogue, *supra*, at 31–32.

[4] *Amicus* does not contend that the congressional veto scheme in the Reorganization Acts would satisfy the Appointments Clause's requirement that all offices be created

It is clear why Congress never reauthorized the act: Without the legislative veto, this reorganization authority would grant the President nearly unfettered power to unilaterally create federal offices. With the legislative veto, Congress maintained control over office creation and used that power to strike down many plans submitted by past Presidents. *See id*. at 4. Without the legislative veto, Congress was not willing to give the President that much unilateral power over office creation and has since provided for the creation of new offices explicitly by statute. But if this Court were to adopt the lower court's reading of Section 3124, it would effectively grant the President power over office creation that far exceeds the power Congress explicitly took away and has repeatedly refused to restore.

For these reasons, the lower court's reading of Section 3124 as granting the secretaries office creation powers was error.

B. No statute provides for members' appointment to the Federal Subsistence Board.

No statute cited as authority by the regulation creating the Board provides for the appointment of Board members. *See* 50 C.F.R. § 100.10. Those statutes only grant the secretaries general rulemaking powers. *See id*. And they do not contain any provisions for the appointment of inferior officers. Nor can the federal government point to another statute that provides the secretaries general appointment powers

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by statute. However, this issue is moot because all reorganization plans have since been codified via legislation after the Supreme Court's decision in *Chadha*.

over statutorily created offices. *See* U.S. Reply Br. at 32–33. And if such a statute exists, it still would not provide for the Board members' appointments, since the Board itself was not created by statute.

The Supreme Court requires, at minimum, that when Congress vests the appointments of inferior officers in a qualified appointer, it do so using precise language. *See Edmond,* 520 U.S. at 658; *see also Janssen*, 73 M.J. at 224. Since no statute explicitly vests the secretaries with the power to "appoint" Board members,[5] this Court should not read that power into a grant of general rulemaking authority. For this reason, the lower court's conclusion that Congress sufficiently vested the appointment of Board members in the secretaries was error.

CONCLUSION

For the foregoing reasons, as well as those presented by Defendant-Appellee, this Court should reverse the district court's ruling.

[5] *See, e.g.*, 16 U.S.C. § 1852 (b)(2)(C) ("The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State."); *id.* § 832i(b) ("The Administrator, the Secretary of War [Secretary of the Army], and the Federal Power Commission, respectively, are authorized to appoint, subject to the civil-service laws, such officers and employees as may be necessary to carry out the purposes of this Act"); *id*. § 832a(a) ("The administrator shall be appointed by the Secretary of the Interior.").

Respectfully submitted,

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/s/ Thomas A. Berry

August 2, 2024

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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August 2, 2024