Press Release

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FOR IMMEDIATE RELEASE September 26, 2016

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WLF Calls on High Court to Uphold Statutory Limits on President's Power to Fill Vacancies

(NLRB v. SW General, Inc.)

"If the President is permitted to install his chosen appointees … without obtaining the Senate's advice and consent, it will resurrect the very problem that Congress sought to remedy when it enacted the Federal Vacancies Reform Act."
—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today encouraged the U.S. Supreme Court to reject the government's reading of a federal law designed to prevent presidents from evading the Senate's constitutional advice-and-consent function. In an *amicus* brief filed in *NLRB v. SW General, Inc.*, WLF argues that the government's self-serving interpretation of the Federal Vacancies Reform Act of 1998 (FVRA)—which the U.S. Court of Appeals for the D.C. Circuit already rejected below—improperly expands the President's power to install his permanent nominees as "acting" officers in high-level positions without first obtaining the advice and consent of the Senate. WLF's brief was joined by the Allied Educational Foundation.

Before Congress enacted the FVRA, Presidents from both parties often flouted the Appointments Clause by directing their chosen replacements to serve indefinitely in an acting capacity, rather than nominating them for Senate approval. Now, under the FVRA, when a government post subject to the Appointments Clause becomes vacant, the President may appoint a temporary, acting officer subject to strict limits on who may serve and for how long. Because Congress did not want presidents to install their chosen replacements without Senate approval, the FVRA broadly prohibits the President's permanent nominee from serving in an acting capacity. The Executive Branch has read that broad prohibition to cover only "first assistants," a very narrow subset of federal employees.

This particular case arises from a challenge to Lafe Solomon's acting service as General Counsel of the National Labor Relations Board (NLRB). Concluding that Solomon's appointment was improper, the D.C. Circuit held that the government's interpretation of the FVRA contravenes the plain text and purpose of the statute. Urging affirmance of that decision, WLF's brief argues that allowing the permanent nominee to begin work immediately as an acting official would enable the President to advance his agenda without first submitting to important constitutional prerequisites. WLF's brief also urges the Supreme Court not to defer to the government's statutory interpretation, given the important separation-of-powers concerns that are at stake in the case.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: "If the President is permitted to install his chosen appointees on an acting basis without obtaining the Senate's advice and consent, it will resurrect the very problem that Congress sought to remedy when it enacted the Federal Vacancies Reform Act in the first place."

WLF is a national, public-interest law firm and policy center that regularly advocates in support of the Constitution's strict, liberty-promoting separation of powers among the three branches of government.

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