CASE NO. 24-60055

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE D. ARNESEN; JEFFREY RYAN BRADLEY,
Plaintiffs-Appellants,
v.

GINA RAIMONDO, SECRETARY, U.S. DEPARTMENT OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE; JANET COIT, NMFS ASSISTANT ADMINISTRATOR; SAMUEL D. RAUCH, III, NMFS DEPUTY ASSISTANT ADMINISTRATOR FOR REGULATORY PROGRAMS; GULF OF MEXICO FISHERY MANAGEMENT COUNCIL, ET AL.,
Defendants-Appellees.

KAREN BELL; A.P. BELL FISH COMPANY, INC.; WILLIAM COPELAND,
Plaintiffs-Appellants,
v.

GINA RAIMONDO, SECRETARY, U.S. DEPARTMENT OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE; JANET COIT, NMFS ASSISTANT ADMINISTRATOR,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi, No. 1:23-cv-160 (Honorable Taylor B. McNeel)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Thomas A. Berry
Counsel of Record
Alexander R. Khoury
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
202-789-5202
tberry@cato.org

Dated: March 25, 2024

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 24-60055

Arnesen, et al v. Raimondo, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Thomas Berry	Counsel to *Amicus*
Alexander Khoury	Counsel to *Amicus*
Cato Institute	*Amicus curiae*

Amicus Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Thomas A. Berry

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. AN "APPOINTMENT" LIMITED TO ONLY THREE OPTIONS DOES NOT COMPLY WITH THE APPOINTMENTS CLAUSE, WHETHER THE APPOINTEE IS PRINCIPAL OR INFERIOR. 5

II. THE APPOINTMENTS CLAUSE DOES NOT PERMIT STATE GOVERNORS TO PLAY A ROLE IN THE APPOINTMENT OF FEDERAL OFFICIALS. 13

III. *HARTWELL* DOES NOT CHANGE THE OUTCOME OF THIS CASE. 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Arnesen v. Raimondo, No. 1:23-cv-160-TBM-RPM, 2024 U.S. Dist. LEXIS 16775 (S.D. Miss. Jan. 31, 2024) .... passim

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 15

Delta Commer. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council, 364 F.3d 269 (5th Cir. 2004) 17

Freytag v. Comm'r, 501 U.S. 868 (1991) 20

Morrison v. Olson, 487 U.S. 654 (1988) 10

Myers v. United States, 272 U.S. 52 (1925) 9, 13

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) 8

United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) 5

United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868) 4, 18, 19

Weiss v. United States, 510 U.S. 163 (1994) 12

Statutes

16 U.S.C. § 1852(b)(2)(A) 13

16 U.S.C. § 1852(b)(2)(C) 13, 14, 20

The General Appropriations of July 23, 1866, ch. 208, 14 Stat. 202 (1866) 19

Other Authorities

Brief for the Federal Appellees, Delta Commer. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council, 364 F.3d 269 (5th Cir. 2004) (No. 03-30545), ECF No. 33 17

E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166 (2018) 11

Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008) 10

Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process is Constitutional*, 32 CARDOZO L. REV. 615 (2010) 8

RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand rev. 1966) 8

THE FEDERALIST NO. 76 (Alexander Hamilton) (Scott, Foresman & Co., 1898) 7, 8

Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037 (1987) 6, 12

Constitutional Provisions

U.S. CONST. art. II, § 2, cl. 2 .... 5, 10, 11

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*. This case interests Cato because the separation of powers is crucial to the protection of individual liberty and property. When the government deprives individuals of these rights through unaccountable administrative processes, it raises serious constitutional issues. For Appellants, those unaccountable processes have caused substantial harm to their family-owned businesses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Appointments Clause is a paradigmatic example of the separation of powers. The clause carefully divides the process of appointing executive officers between at least two branches of government (sometimes three). The clause was carefully constructed, and it should be applied just as carefully. In this case, the district court's overly permissive reading of that clause upheld a scheme that violates

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

both the plain text of the Appointments Clause and Supreme Court precedent. The decision should be reversed.

Appellants in this case are a collection of small-boat fishers and other fishing operations. They have been deprived of a vital fishing resource by an unaccountable rulemaking board, namely the Gulf of Mexico Fishery Management Council. The Council members' appointments are provided for by the Magnuson-Stevens Fishery Conservation and Management Act. Under the Act, eleven of the Council members are jointly appointed by a governor of one of the five Gulf Coast states and the secretary of commerce. For each member, a governor selects as few as three nominees, from whom the secretary must select one so long as they are statutorily qualified.

The Appointments Clause carefully lays out who may play a role in the appointment of federal officials: The selection must be made by the president, a department head, or a court. And the Senate has the power to confirm or reject a nominee, unless an inferior officer is exempted from Senate consent. These are the only four relevant actors; nowhere does the text of the clause suggest that *state* governors may play a role in the appointment of *federal* officers. Yet the district court upheld the Act's appointment scheme with respect to these eleven members as

consistent with the Appointments Clause. In so holding, the district court erred in at least two important ways.[2]

First, the district court concluded that the constitutional subclause providing for the appointment of "inferior" officers affords Congress comparatively more "leeway" to impose "front end" restrictions on *who* can be appointed. *Arnesen v. Raimondo*, No. 1:23-cv-160-TBM-RPM, 2024 U.S. Dist. LEXIS 16775, at *47 (S.D. Miss. Jan. 31, 2024). But there is no such distinction between the rules for appointing "inferior" and "principal" officers—neither permits the scheme at issue here. The Framers understood that the appointment power is the power to *freely* choose an appointee. A choice narrowed down to only three options is not a free choice. Narrowing an appointer's options down to only three choices is equally unconstitutional whether the appointee is a principal or inferior officer.

Second, the district court also erred by misinterpreting the relationship between state governors and the secretary when jointly appointing Council members. The court incorrectly concluded that the secretary sets nominee qualifications, which are binding on the state governors. Because the court believed

[2] Petitioners present strong arguments that the Council members are so independent as to be principal officers, in which case their appointments would be unconstitutional since they were neither nominated by the president nor confirmed by the Senate. This brief will focus on why the eleven relevant members' appointments were unconstitutional even assuming, for the sake of argument, that they were inferior officers.

that the secretary had this control over the state governors' selections, it concluded that the governors' nominations simply "help[ed]" the secretary exercise her informed choice. *Id.* at *49–51, n.18.

This is incorrect. The governors are given an independent and significant role in the appointment process over which the secretary wields no influence: The governors exercise their choice and their policy judgments when selecting as few as three nominees to be Council members. The secretary, in turn, is profoundly limited in her power to reject the governors' nominees; she can do so only if at least one fails to meet the qualifications set by *statute*. Because the governors exercise independent judgment free of the secretary's influence, they have been granted part of the appointment power in violation of the Appointments Clause. The district court's misunderstanding also constitutes reversible error.

Finally, the Supreme Court's decision in *United States v. Hartwell,* 73 U.S. (6 Wall.) 385 (1868), does not change the outcome of this case. *Hartwell* concerned a unique officer structure that bears little resemblance to those of the Act, as explained further below. The district court's decision should be reversed and the appointments of the eleven Council members discussed in this brief should be found unconstitutional, even if they may be appointed as inferior officers.

ARGUMENT

I. AN "APPOINTMENT" LIMITED TO ONLY THREE OPTIONS DOES NOT COMPLY WITH THE APPOINTMENTS CLAUSE, WHETHER THE APPOINTEE IS PRINCIPAL OR INFERIOR.

The Appointments Clause sets out two modes of appointment: a mandatory procedure for principal officers and an optional procedure for "inferior" officers. Principal officers must be appointed via nomination by the president and confirmation by the Senate. This is also the default manner of appointing inferior officers, but Congress may choose to vest the appointment of an inferior officer in the president alone, a department head, or a court. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). When Congress chooses to do so, Senate consent is not necessary to appoint that inferior officer. U.S. CONST. art. II, § 2, cl. 2.

The district court concluded that the Appointments Clause not only gives Congress the option to waive Senate consent for an inferior office but also gives Congress more power to restrict the appointer's choice as to who will fill that inferior office. Concluding that the eleven governor-nominated Council members' appointments satisfied the Appointments Clause, the court interpreted the clause as granting Congress "much more leeway in setting forth who and by what manner inferior officers can be appointed." *Arnesen*, 2024 U.S. Dist. LEXIS 16775 at *59.

This interpretation is wrong. To be sure, Congress possesses the authority to create and define executive offices, and in doing so it may restrict an appointer's choice to some extent by imposing certain office qualifications. But even with this

power, Congress surely could not narrow an appointer's choice to only three qualified persons in the world. Nor can Congress create some alternative mechanism to narrow an appointer's choice down to only three persons, as it has done here with the governor-nomination scheme. Indeed, Congress has no justification to narrow an appointer's choice *at all* when it does so for reasons other than establishing office qualifications. That is equally true for both principal officers and inferior officers.

* * *

To understand why the scheme Congress created in this case is unconstitutional, it is necessary to understand what role the Framers anticipated Congress would play in the appointments process. Under the Appointments Clause, all executive-branch appointments must be made by one of three options: the president, a department head, or a court. Notably absent from these options is Congress; the Framers considered but rejected giving Congress the power to fill executive offices. The Framers were concerned that vesting the appointment power in the "national legislature" would result in the appointment of less qualified officers. Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1062–63 (1987). The Framers reasoned that the legislative process was unfit to select the best qualified candidate for a federal vacancy because legislative decisions were often the product of political considerations or compromises. *Id*. The Framers feared that the "choice" of these

bodies would be the result of "a victory gained by one party over the other, or of a compromise between the parties [themselves]." THE FEDERALIST NO. 76, at 415–16 (Alexander Hamilton) (Scott, Foresman & Co., 1898). "In either case, the intrinsic merit of the candidate [would] be too often out of sight." *Id*.

Because the Framers believed that the legislative process was ill-suited to producing quality appointments, they concluded that the power to appoint federal officers should be vested "in a single man, or in a select assembly of a moderate number; or in a single man, with the concurrence of such an assembly." *Id*. at 414–15. This led the Framers to design a system in which the single president nominates all principal officers, with the concurrence of the Senate necessary to appoint the nominees. Although the Framers allowed two additional options for appointing inferior officers, namely department heads and courts, the Framers still pointedly declined to allow any inferior officers to be appointed by the legislature.

Crucially for this case, the Framers also made clear that the power to appoint is synonymous with the power to choose. According to Alexander Hamilton, the Appointments Clause isolated "every advantage" of the sole power to *choose* in the president. *Id.* at 415–16. In exercising his duty to nominate, the president's "responsibility would be as complete as if he were to make the final appointment," and "every man who might be appointed would be, in fact, his *choice*." *Id*. at 416 (emphasis added). "There can, in this view, be no difference between nominating

and appointing." *Id.* Put simply, the Framers expected that the nominator of an officer would bear full *responsibility* for the choice of that officer—a responsibility that comes only when the choice is a *free* choice. *See id*; *see also* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 539 (M. Farrand rev. 1966) ("Mr. Govr. Morris said that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.").

But although Congress may not appoint any executive-branch officers, it does have a separate and important role to play in the appointment process. The president may not unilaterally create any of the offices that are filled via appointment. That power is reserved for Congress. *See Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976). By ensuring that no branch of government can both create a federal office and appoint its members, the Framers struck a careful balance that promotes accountability and prevents the aggrandizement of power. *See* Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process is Constitutional*, 32 CARDOZO L. REV. 615, 627 (2010); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring) (noting that "[t]he Appointments Clause sets out the respective powers of the Executive and Legislative Branches with admirable clarity").

Congress has no authority to limit executive appointments (executive choice) outside of its office creation power. But Congress's power of office-creation raises a sometimes-difficult question: To what extent, if at all, may Congress limit an appointer's choice via statutory qualifications established when creating an office? Such qualifications necessarily limit whom the appointer may choose, and thus arguably weaken the accountability and responsibility placed in the appointer. The Supreme Court has nonetheless held that some reasonable qualifications are permissible. *Myers v. United States*, 272 U.S. 52, 128–29 (1925). But Congress may not impose office qualifications that "so limit [the] selection [of]" and "so trench upon" the *choice* of the appointer as to usurp the appointment power and become effectively "legislative designations." *Id*. The Supreme Court has not fleshed out precisely when such qualifications cross the line and become legislative designations. Nor did *Myers* suggest that Congress may place other restrictions (besides office qualifications) pursuant to its office creation power. But if this principle has any force, any statute drafted so that only three living persons in the world were eligible for appointment would surely run afoul of *Myers* and qualify as a "legislative designation."

The district court below did not suggest any disagreement with this view when it comes to *principal* offices. But the district court reasoned that when Congress creates *inferior* offices, Congress has more "leeway" to impose "front end"

restrictions on *who* can be appointed. *Arnesen*, U.S. Dist. LEXIS 16775, *47–49. The court found this distinction in the portion of the Appointments Clause that permits Congress to "vest the Appointment of such inferior Officers, as they think proper," in either the president alone, a department head, or a court. U.S. CONST. art. II, § 2, cl. 2. The district court interpreted the phrase "as they think proper" to grant Congress more leeway to restrict an appointer's freedom of choice when the appointee at issue is an inferior officer. *Id.*; *see also* Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 760–62 (2008). On that basis, the district court held that Congress may create a statutory scheme that restricts an appointer's freedom of choice to only three options, even when that scheme is entirely separate from any office qualification.

This interpretation is wrong. The phrase "as they think proper" refers only to Congress's choice of one of three potential options for the appointer of any particular inferior officer: the president alone, a department head, or a court. When an officer is inferior, Congress may choose whichever of these three options it thinks proper. *See Morrison v. Olson,* 487 U.S. 654, 673 (1988) ("Indeed, the inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials [in the courts of law].").

This language does *not* change the standard for how much Congress may restrict an appointer's freedom of choice. Nor does this language change the narrow context in which Congress may limit executive choice (a context not present here): when Congress imposes office qualifications pursuant to its office creation function. That standard is the same for both principal and inferior officers. In either case, and no matter the nature of the restriction, when an appointer's freedom of choice is so restricted as to no longer be a designation made by the appointer alone, the Appointments Clause has been violated. The district court's conclusion that an appointer's freedom of choice can be more restricted in the context of inferior officer appointments was reversible error.

This conclusion is reinforced when we consider that Congress's power to set some reasonable qualifications for appointees derives from its power to establish an office "by Law." *See, e.g.*, E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 201–05 (2018). The Appointments Clause does not distinguish Congress's power to create inferior offices from its power to create principal offices. Rather, Congress's power to create offices "by Law" is uniform throughout the 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"). Congress has more leeway to choose *who* appoints inferior officers, but it does not have more leeway to restrict

the choices available to the designated appointer. *See Weiss v. United States*, 510 U.S. 163, 186–87 (1994) (explaining that "the Framers still structured the [inferior officer] alternative to ensure accountability and check governmental power: . . . 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").

Further, a key reason that the Framers allowed for inferior officers to be appointed without Senate consent was to allow both the president and the heads of departments to more easily choose their own assistants and quickly fill out the federal government. *See* Blumoff, *supra*, at 1068–69 n.194 (noting that "[t]he lack of discussion" about the inferior officer subclause "no doubt reflects the unspoken consensus that the President (as well as the judiciary, and the heads of executive departments) must have the authority to hire and fire their own assistants"). It would be inconsistent with this purpose if Congress could set restrictions on the free choice of inferior officers so that presidents and department heads would no longer be free to choose aides who align with their policy views.

The Act restricts the secretary's choice to as few as three persons, and it does so by a novel mechanism divorced from Congress's authority to set reasonable office qualifications. The Act has thus unconstitutionally usurped the commerce secretary's appointment power. Even under the standard for office qualifications

(which does not apply to this novel scheme), the Act's restrictions "so trench upon" and "limit" the secretary's choice of Council member nominees that she is not free to select someone who aligns with her views, but instead must select someone who aligns with the views of a state governor. That abridgment of the secretary's freedom of choice violates the Appointments Clause. *See Myers*, 272 U.S. at 128–29.

II. THE APPOINTMENTS CLAUSE DOES NOT PERMIT STATE GOVERNORS TO PLAY A ROLE IN THE APPOINTMENT OF FEDERAL OFFICIALS.

The district court held that the secretary of commerce had validly appointed the eleven Council members at issue despite the secretary's choice for each seat having been narrowed to only three options nominated by a state governor. This was error not only because of the power taken away from the secretary, but also because of the power given *to* the governors. Under the Appointments Clause, state governors have no role to play in the federal appointment process.

Under the Act, Gulf Coast state governors select three nominees for each one of the eleven Council seats at issue. 16 U.S.C. § 1852(b)(2)(C). The governors must choose nominees who meet the qualifications set forth under the Act. *Id*. Those qualifications are enforced by the secretary, but the secretary has no power to alter those qualifications; she only has the power to promote those qualifications through regulation. *See id.* § 1852(b)(2)(A) (mandating that "the Secretary shall, by

regulation, prescribe criteria for determining whether an individual satisfies the requirements of this subparagraph”).

The governors may submit as few as three qualified nominees to the secretary. *Id*. § 1852(b)(2)(C). In choosing these nominees, the governors are free to select only those who share their own policy preferences, even if none share the secretary’s policy preferences. Because a governor can easily select three nominees who share that governor’s policy preferences, the governor has the power to make determinative judgments about the policy preferences that will be held by an appointee.

The significant role given to the governors in the appointment process means the secretary’s role is necessarily circumscribed. The secretary may not reject a slate of nominees on policy grounds. *See id*. Rather, the secretary may only reject a slate of nominees if at least one nominee is unqualified to serve on the Council. *Id*. So long as the slate of nominees meets the statutory qualifications, the secretary may only choose from the nominees submitted by the state governors. *See id*. The governors and the secretary thus share in the appointment power, with the governors given the power to effectively determine the policy priority of whomever the secretary is permitted to select.

State governors are not listed in the Appointments Clause as a permissible recipient of any part of the federal appointment power, so this scheme violates the Constitution's plain text. Not only that, it also violates Supreme Court precedent.

In *Buckley v. Valeo*, the Supreme Court considered whether members of the Federal Election Commission were appointed in accordance with the Appointments Clause. 424 U.S. 1 (1976). The Commission comprised eight members. *Id*. at 113. Relevant here, two of those members were nominated by the president, but could not take office until being confirmed by *both* houses of Congress. *Id*.

The Court ruled that these two members of the FEC were appointed in contravention of the Appointments Clause. *Id*. at 137. Confirmation by both houses was a problem, because the House of Representatives has no role to play in any of the modes of appointment set out in the Appointments Clause. Granting the House a veto power over the president's selection thus placed a portion of the appointment power in a body that could not wield it. *Id*.

The governor-nominated, secretary-approved Council members under the Act are like the president-nominated, House-approved officers in *Buckley*. In both cases, an actor not mentioned in the Appointments Clause has been given authority to effectively veto anyone whom the constitutional appointer wishes to choose. Under the Act, the secretary cannot appoint anyone to the Council unless a governor has permitted that choice by nominating that person. And in *Buckley*, the president could

not fill the two relevant seats on the FEC unless the House permitted a choice by approving a selection.

In *Buckley,* the Supreme Court rightly found that the House had no business exercising discretion over the president's choice of appointee. And the governors' power here is even more significant than the House's power in *Buckley*, because the governors possess not an *ex-post* veto power but an *ex-ante* nomination power. It follows from *Buckley* that the role given to governors in determining appointees to the Council is an even more blatantly impermissible violation of the Appointments Clause.

In avoiding this conclusion, the district court misinterpreted the Act's appointment regime and believed the secretary to have influence over the governors' nominations that she does not have. The court incorrectly concluded that the secretary sets the qualifications rules for Council members that are binding on the state governors' nominations. *Arnesen*, 2024 U.S. Dist. LEXIS 16775 at *50–51. The court thus determined that the secretary had the ability to influence the state governors' selections, and on that basis concluded that the governors' nominations merely aided the secretary's informed choice. *Id*.

This is not a correct reading of the Act. The secretary is only allowed to *enforce* the qualifications; the qualifications themselves are defined by the Act and cannot be altered by the secretary. The secretary is not permitted to create new

qualifications, and thus cannot adjust the qualifications to influence or determine whom the governors nominate.[3]

Indeed, the secretary's complete inability to influence governor nominations has led at least one previous commerce secretary to complain that he "has no control" over Council member appointments[4] and was unable to perform his Council balancing obligations under the Act. *See Delta Commer. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 271 (5th Cir. 2004) ("[t]he Association complained to the Secretary about this imbalance, but the Secretary responded that his ability to ensure 'fair and balanced' representation is limited because the governors control the pool of available appointees"). And as Appellants explain, from 2020 to 2022 the Gulf Coast state governors got their "first choice" of nominee more than 80% of the time when they expressed a preference—and had one of their first three nominees accepted 100% of the time. *See* Pet. Bell Br. at 48–49. These facts demonstrate what is already evident: The secretary holds little power in this

[3] Even if the secretary *could* prescribe qualifications, that would still not fix the constitutional problem. Just as Congress may set reasonable qualification requirements without crossing the line to a "legislative designation," a secretarial power to set reasonable qualifications would still fall short of the power to freely appoint the secretary's choice. And the Appointments Clause requires that this power of free choice be left with the secretary.

[4] Brief for the Federal Appellees at 23, Delta Commer. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council, 364 F.3d 269 (5th Cir. 2004) (No. 03-30545), ECF No. 33.

appointment regime. She is simply tasked with picking the least-objectionable option among three nominees whose selection is entirely at the discretion of a state governor.

The Act's appointment provisions for the eleven governor-selected Council members thus clearly violate the Appointments Clause. State governors may not possess any portion of the appointment power under the Constitution. In vesting the appointment power in state governors, Congress violated its constitutional mandate under the Appointments Clause.

III. *HARTWELL* DOES NOT CHANGE THE OUTCOME OF THIS CASE.

In *United States v. Hartwell*, the Supreme Court considered whether a clerk of an assistant treasurer in the Treasury Department was an "officer" for the purposes of a criminal statute that prohibited the embezzling of public money by "officers" or other agents of the United States. 73 U.S. (6 Wall.) at 394. The defendant was a clerk of the Boston assistant treasurer. *Id*. at 392. The defendant was appointed to his position upon his selection by that assistant treasurer, with the "approbation" of the secretary of the treasury. *Id*. The clerk's appointment was provided for by statute, which read:

> That in lieu of the clerks heretofore authorized, the Assistant Treasurer of the United States at Boston is hereby authorized to appoint, with the approbation of the Secretary of the Treasury, one chief clerk at a salary of three thousand dollars per annum; one clerk at a salary of twenty-five hundred dollars per annum . . . .

The General Appropriations of July 23, 1866, ch. 208, 14 Stat. 202 (1866). The defendant was hired for the clerk position with a salary of "2,500 annum." *Hartwell*, 73 U.S. at 389.

In *Hartwell*, the Supreme Court chose to define "officer" within the meaning of the statute by reference to the Appointments Clause. *Id.* at 393–94. And the Court held that the defendant clerk was an officer because he possessed "continuing" duties established by law and was appointed by a head of department. *Id*.

The Court's decision in *Hartwell* does not change the outcome of this case. *Hartwell* considered the factual scenario where an inferior officer (the defendant clerk) was nominated by another, higher ranking inferior officer (the Boston assistant treasurer) for appointment by the head of a department (the secretary of the treasury). *See id*. at 394. Best understood, *Hartwell* stands for the proposition that inferior officers within the *federal* government may be empowered to make initial nominations of other "subordinate" inferior officers who would report directly to them, subject to ultimate appointment by the head of the department. *Id*.

The appointment structure considered in *Hartwell* is easily distinguishable from the appointment structure under the Act. Under the Act, the eleven relevant Council members are nominated by *state* governors, not by federal officials. But state governors have no formal control or supervision over the eleven relevant Council members. Put another way, the eleven relevant Council members are not the

"subordinates"—to use the terms of *Hartwell*—of the state governors who nominated them.

Further, the commerce secretary's authority to reject nominees for Council membership is not equivalent to the treasury secretary's appointment power in *Hartwell*. Under the Act, the secretary cannot reject the governors' nominees unless they are statutorily unqualified; she is required to choose from as few as three qualified candidates of a governor's choosing. 16 U.S.C. § 1852(b)(2)(C). In *Hartwell*, the secretary of the treasury had complete authority to reject any nominee proposed by the assistant treasurer for any reason until the assistant treasurer nominated an acceptable choice. And crucially, the treasury secretary ranked above the assistant treasurer within the same federal department, meaning that the treasury secretary had an inherent supervisory power to influence the assistant treasurer's choice of nominee. The commerce secretary, of course, has no such supervisory authority over the chief executive of any *state* government.

Thus, in *Hartwell* there was no "diffusion" of the appointment power, *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991), because the secretary of the treasury had supervisory control over the assistant treasurer, and the appointees for the office at issue served directly under the assistant treasurer. For these reasons, *Hartwell* does not establish a precedent permitting the statutory scheme at issue here, which splits

the appointment power not just between separate officials within the same federal department but between entirely separate levels of government in our federal system.

CONCLUSION

The Court should find that the eleven relevant Council members were not appointed in compliance with the Appointments Clause.

Respectfully submitted,

<u>/s/ Thomas A. Berry</u>

Dated: March 25, 2024

Thomas A. Berry
Counsel of Record
Alexander Khoury
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
202-789-5202
tberry@cato.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,783 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. 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 in Times New Roman, 14-point font.

/s/ *Thomas A. Berry*

March 25, 2024

CERTIFICATE OF SERVICE

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.

/s/ *Thomas A. Berry*

March 25, 2024