No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING,
A DIVISION OF THE NOEL CORP.,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 760,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITION

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International Brotherhood of Teamsters Local 760 – the charging party before the National Labor Relations Board and the intervenor in the court of appeals – files this brief in support of the petition for a writ of certiorari.

STATEMENT

This case arises out of the 2010 negotiations between Noel Canning and Teamsters Local 760 over a successor collective bargaining agreement. Pet. App. 65a-66a. At the December 8 bargaining session, the Company and Union negotiators reached agreement on all the terms of a new collective bargaining agreement. *Id.* at 66a-67a. One element of the agreement was that the covered employees would be allowed to vote to select one of two wage-benefit packages. *Id.* at 67a. On December 15, the employees voted to select one of the packages. *Id.* at 75a. The Union then drafted a collective bargaining agreement containing the agreed upon terms, including the wage-benefit package selected by the employees, and presented it to Noel Canning. *Id.* at 80a. The Company refused to execute the collective bargaining agreement, insisting that the parties had not reached agreement on the alternative wage-benefit packages. *Id.* at 83a-84a.

The Union filed unfair labor practice charges with the National Labor Relations Board alleging that the Company's refusal to execute the agreed-upon contract constituted bad faith bargaining in violation of

Section 8(a)(5) of the National Labor Relations Act. Pet. App. 63a. The NLRB General Counsel concluded that the Union's charges had merit and issued a complaint alleging that Noel Canning had violated NLRA § 8(a)(5). *Id.* at 64a.

Noel Canning "conceded to the Board that '[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations.'" Pet. App. 10a. "[T]he company's chief argument before the Board [was] that the parties failed to reach *any* agreement at the December 2010 negotiation session." *Id.* at 9a (emphasis in original). The Board, however, accepted the administrative law judge's determination that the witnesses who testified that an agreement had been reached were more credible than the witnesses who testified that an agreement had not been reached. *Id.* at 81a-82a. On this basis, the Board found that an agreement had been reached and that Noel Canning's failure to execute a collective bargaining agreement containing the agreed-upon terms was a violation of the Company's duty to bargain in good faith. *Id.* at 84a.

In challenging the Board's decision, Noel Canning advanced two perfunctory arguments on the merits. The Company argued first – contrary to the position it had taken before the Board and contrary to well-settled law – that it had a right under the State of Washington's statute of frauds to repudiate the oral agreement it had reached with the Union. Second, the Company challenged the credibility determination of the administrative law judge on the ground

that the affidavit submitted to the NLRB by one of the credited witnesses suggested that an agreement different than that reached by the negotiators had been presented to the Union membership for a vote. The court of appeals quickly disposed of both arguments. Pet. App. 7a-10a.

Noel Canning's principal argument in the court of appeals was that the NLRB lacked a quorum on the date the Board issued its decision in this case, because three of the sitting members had been invalidly appointed. The three members in question had been appointed on January 4, 2012 pursuant to the President's recess appointment authority. The Company argued that the Senate was not in recess on that date because it had convened in a pro forma session on January 3 and was scheduled to convene in another pro forma session on January 6.

The court of appeals ruled that the three challenged NLRB members had not been validly appointed but did so based on an interpretation of the Recess Appointments Clause that had not been advanced by any party or amicus. *See* D. C. Cir. Oral Arg. Tr. 10 & 25 (asking first the petitioner and then an amicus for petitioner why they had not advanced the interpretation ultimately adopted by the court of appeals). The court of appeals first held unanimously that the President can exercise his recess appointment authority only during the recesses that occur between sessions of Congress. Pet. App. 34a. Since the January 4, 2012 appointments were made after the second session of the 112th Congress had begun, the court held that the appointments were invalid on that basis. A majority of the court of appeals panel

further held that the President may exercise his recess appointment authority to fill only those vacancies that first arise during the intersession recess in which the appointments are made. The panel majority held that the three vacancies filled by the January 4, 2012 appointments did not arise during the recess and that the appointments were invalid on that basis as well.

ARGUMENT

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The decision below reads this clause as providing that "the President shall have Power to fill up [only those] Vacancies that [first arise] during the [intersession] Recess of the Senate, by granting Commissions [during the recess in which the vacancies first arise]." This construction of the Recess Appointments Clause would nullify the President's recess appointment power during any period in which Congress – as it has done since the Civil War – follows the practice of taking relatively long *intra*session recesses but short *inter*session recesses.

"[T]he main purpose of the Recess Appointments Clause [is] to enable the President to fill vacancies to assure the proper functioning of our government" during periods when the Senate is absent and thus unavailable to give its "Advice and Consent" on Presidential appointments. *Evans v. Stephens*, 387

F.3d 1220, 1226 (11th Cir. 2004) (*en banc*). As Attorney General Stanbery observed 150 years ago, "it is of the very essence of executive power that it should always be capable of exercise," and "to meet this necessity, there is a provision . . . against vacancies in all the subordinate offices [providing] that at all times there is a power to fill such vacancies." *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen 32, 35 & 38 (1866). By construing the Recess Appointments Clause in a manner that radically constricts the President's authority to fill vacancies during periods when the Senate is absent and unable to pass on nominations, the decision below "contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. ___, 130 S.Ct. 3138, 3147 (2010) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

The interpretation of the Recess Appointments Clause adopted by the court below conflicts with the settled understanding of the Executive and Legislative branches as to the meaning of that constitutional provision. The decision below adopting that interpretation also conflicts with the decisions of every other federal court to have addressed the meaning of the Recess Appointments Clause. What is more, the effect of the decision below is to render the National Labor Relations Act unenforceable with respect to any employer who chooses to petition for the review of an NLRB decision in the D.C. Circuit. This Court should, therefore, grant the petition for a writ of certiorari.

A. The D.C. Circuit's interpretation of the phrase "the Recess of the Senate" was first advanced in the opinion of Attorney General Knox advising President Theodore Roosevelt that "[t]he interval between the[] two sessions [of Congress] is *the* recess" within the meaning of the Recess Appointments Clause. *President – Appointment of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 604 (1901) (emphasis in original). Acting on this understanding of the clause, President Roosevelt made a large number of appointments during the "constructive recess" between the end of the first session and the immediate beginning of the second session of the 58th Congress at noon on December 7, 1903. Vivian S. Chu, Cong. Res. Serv., *Recess Appointments: A Legal Overview* at 8 (2011).

The Senate immediately responded to President Roosevelt's action with a resolution instructing the Committee on the Judiciary "to report what constitutes a 'recess of the Senate,' and what are the powers and limitations of the Executive in making appointments in such cases." 39 Cong. Rec. 3823 (1905) (describing the 1903 resolution). The result was the influential 1905 Senate Report rejecting Attorney General Knox's understanding that the term "recess" as used in the Recess Appointments Clause is a technical term referring to "[t]he interval between the[] two sessions [of Congress]," 23 Op. Att'y Gen. at 604, and concluding, to the contrary, that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S.Rep. No. 4389, 58th Cong., 3d Sess., p. 1 (1905), reprinted in 39 Cong. Rec. 3823-24 (1905).

Attorney General Daugherty accepted the Senate's interpretation of the term "Recess" in 1921. *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25 (1921). Since then, "[t]he Department of Justice has long interpreted the term 'recess' to include intrasession recesses if they are of substantial length." *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989). "[T]he Comptroller General[,] an officer in the legislative branch," later expressed "his full concurrence in the position taken by the Attorney General in 33 Op. Att'y Gen. 20." *Recess Appointments*, 41 Op. Att'y Gen. 463, 469 (1960). *See Appointments – Recess Appointments*, 28 Comp. Gen. 30, 35-37 (1948). More than four hundred intrasession recess appointments have been made over the last century with no objection from the Senate. *See* Hogue, *Intrasession Recess Appointments*, Cong. Res. Serv. 3-4 (2004); Hogue, et al., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, Cong. Res. Serv. 22-28 (2013).

With the sole exception of the D.C. Circuit, the various federal courts that have addressed the matter agreed with the Executive and Legislative branches that the phrase "the recess of the Senate" as used in the Recess Appointment Clause "includes an intrasession recess." *Evans*, 387 F.3d at 1224 (capitalized heading in original). *See Nippon Steel Corp. v. International Trade Comm'n*, 239 F.Supp.2d 1367, 1374 n. 13 (Ct. of Int'l Trade 2002) (relying on "the long history of the practice (since at least 1867) without serious objection by the Senate"); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884).

The *Noel Canning* opinion – like the 1903 opinion of Attorney General Knox – rests on the understanding that "[t]he interval between the[] two sessions [of Congress] is *the* recess" within the meaning of the Recess Appointments Clause. 23 Op. Att'y Gen. at 604. *See* Pet. App. 34a ("'[T]he Recess' is limited to intersession recesses."). That mechanical interpretation of the phrase is contrary to the Senate's conclusion – a conclusion that has been embraced by both the Executive and Legislative branches for more than one hundred years – that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S.Rep. No. 4389, 58th Cong., 3d Sess., p. 1. That understanding of the phrase is consistent with the constitutional language and best accomplishes the purpose of granting the President the authority to make recess appointments.

B. The D.C. Circuit's holding that the word "happen" as used in the Recess Appointments Clause "means 'arise' or 'begin' or come into being,'" Pet. App. 35a, is likewise contrary to the long-held view of the Executive and Legislative branches, which has been endorsed by three circuits.

The Recess Appointments Clause states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." Consistent with this broad statement of the President's recess appointment power – to "fill up *all* vacancies that may happen during the Recess" – the long accepted interpretation of the Clause has been that the President is authorized to fill up all vacan-

cies that may "happen to exist" during the recess of the Senate regardless of when the vacancies first arise. *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632 (1823).

Nearly two hundred years ago, Attorney General Wirt explained why the recess appointment authority of the President should not be confined to vacancies that first occur while the Senate is in recess:

> "In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act." 1 Op. Att'y Gen. at 633.

As the Eleventh Circuit observed, Congress has expressed its agreement with the common sense interpretation of the Recess Appointments Clause by passing a law addressed to the "salary requirements for officers appointed to fill a vacancy that existed while [the] Senate was in session." *Evans*, 387 F.3d at 1226 (describing 5 U.S.C. § 5503). *See also Appointments – Recess Appointments*, 28 Comp. Gen. at 33 (interpreting the Pay Act to "permit the payment of persons appointed to fill offices requiring Senatorial confirmation during periods while the Senate was not in session, if nominations had been submitted during the session of the Senate and not acted upon"). Prior to the *Noel Canning* decision, every federal court addressing the question adopted this view. *See Evans*, 387 F.3d at 1226-27; *United*

States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962).

The long-held view of the Executive and Legislative branches that the President has authority to fill *all* vacancies that exist during a recess of the Senate is the correct interpretation.

C. The circumstances of this case demonstrate that construing the Recess Appointments Clause in a manner that "enable[s] the president to fill vacancies" is necessary "to assure the proper functioning of our government." *Evans*, 387 F.3d at 1226.

There is no question that Noel Canning has blatantly violated the National Labor Relations Act. The Company barely pretended otherwise in challenging the Board's decision. Rather, the Company has depended entirely on the asserted lack of an NLRB quorum to escape enforcement of that federal law. Not only has the Company's past violation gone completely unremedied, but the Company has continued to violate the law by refusing to negotiate for a successor collective bargaining agreement, citing the pendency of this case as an excuse.

The D.C. Circuit has jurisdiction to review every decision of the National Labor Relations Board. That court has dozens of cases coming from the National Labor Relations Board currently pending before it, and all of those cases are being held in abeyance awaiting resolution of the recess appointment issue in this case. With regard to the enforcement of the NLRA, then, there is no question that the decision of the court below is currently frustrating "the

President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise Fund*, 130 S.Ct. at 3147 (quoting *Morrison*, 487 U.S. at 693).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted,

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