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, et al.,

Respondents.

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

BRIEF OF DAYCON PRODUCTS COMPANY, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

RULE 29.6 DISCLOSURE

Daycon Products Company, Inc., is a wholly owned subsidiary of P4, Inc., a Maryland corporation, and no publicly held corporation owns 10 percent or more of P4, Inc. Daycon is a manufacturer and distributor of cleaning and maintenance supplies.

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus curiae* is petitioner in *Daycon Products Company, Inc., v. National Labor Relations Board*, No. 12-1445, which challenges Board action on essentially the same grounds as the instant case. The only relevant distinction is that Daycon, like hundreds of other employers, was subject to Board action tainted by the unlawful "recess" appointment of Craig Becker, rather than the three Members who were "recess" appointed while the Senate was convening in *pro forma* sessions in January 2012.

While Daycon supports Respondent Noel Canning's position that the decision below should be affirmed, it specifically urges the Court to rule definitively on either or both of the two alternative holdings of the decision below. Failure to do so would leave unresolved the issues raised in its case and others challenging Board action reliant on Becker's lawful appointment. Whether or not the question of the President's authority to make "recess" appointments while the Senate convenes in *pro forma* sessions presents a narrower basis of decision than the two holdings of the decision below—as explained herein, it does not—the Court will inevitably be

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

forced to confront the issues implicated by those holdings in a future case, such as Daycon's or others now pending before the courts of appeals. *See, e.g., NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013) (holding invalid orders reliant on Becker's lawful appointment). For the sake of judicial economy, party economy, and the vitality of the Constitution's separation of powers, it should do so here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amicus curiae* agrees with the Respondent that the decision below should be affirmed and, rather than present duplicative briefing on that point, joins the Respondent's arguments. This brief's focus, instead, is on the Court's exercise of its discretion to choose from among three possible grounds of decision, corresponding with the three "Questions Presented" at the outset of the Petitioner's brief. Although any of the three would be sufficient to affirm the decision below—*i.e.*, each provides an independent basis to conclude that the "recess" appointments at issue were constitutionally invalid—only two could lay to rest the controversy over the "recess" appointment of Craig Becker to the Board, an issue raised in numerous pending cases, and resolve ongoing conflicts of authority among the circuits. Those two are the alternative holdings of the decision below concerning the scope of the President's recess-appointments power: whether that power may be exercised during intrasession recesses and whether it

may be used to fill vacancies predating the present recess.

The third possible ground of decision—the constitutional status of the Senate's convening in *pro forma* sessions—would not alone resolve the lawfulness of Becker's appointment and would leave in place circuit splits on the two other holdings. Becker's appointment has already been declared invalid by one court of appeals, and a case challenging his appointment (the *amicus curiae's*) is already before this Court. And the circuit splits mean that government action undertaken by a recess appointee that is valid in some parts of the country would be invalid in others, causing substantial legal uncertainty and dislocation. The Court will almost certainly have to speak on the scope of the President's recess-appointments power. As possible, it should do so in this case, rather than base its decision on an issue that provides little or no guidance to the government officials, lower courts, and subjects of potentially unlawful government action embroiled in this ongoing dispute.

There is no good reason for the Court not to reach either or both of these issues. Whatever the basis of its decision, the Court will have to address substantial questions of constitutional law. Likewise, any decision, no matter its ground, will affect relations between the political branches. In particular, if the Court affirms the decision below on the *pro forma*-session ground, its ruling would confirm that either chamber of Congress can block the President from making recess appointments. That is no narrower, in

any meaningful sense, than a decision that upholds the reasoning of the court below.

Finally, contrary to the Board's assertion, a decision that adopts the reasoning of the court below would not significantly disrupt the operations of the federal government. While such a decision might call into question previous appointments, various doctrines of repose insulate settled government action from challenge on these particular grounds. Most potential claims would be barred by the six-year statute of limitations for claims challenging administrative action, and even actions unprotected by that bar could be cured through ratification. Finally, the *de facto* officer doctrine provides additional protection for certain actions. In sum, any impact is likely to be minimal.

STATEMENT

1. The National Labor Relations Board (the "Board") is governed by the National Labor Relations Act (the "Act"). The Act provides that the Board may not operate without a quorum of three validly appointed members. 29 U.S.C. § 153(b). *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010).

2. Craig Becker was a putative "recess appointment" to the Board. *Noel Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013), Pet. App. 15a. This appointment was entered on March 27, 2010, during a seventeen-day intrasession "recess" of the Senate. 156 Cong. Rec. S2180 (daily ed. Mar. 26, 2010) (adjourning until April 12, 2010); 156 Cong. Rec. S2530

(daily ed. Apr. 21, 2010) ("Nominations Received: Senate received the following nominations: . . . . Craig Becker, of Illinois, to be a Member of the National Labor Relations Board for the term of five years expiring December 16, 2014 (Recess Appointment)."). *See also New Vista*, 719 F.3d at 218 (Becker was "was appointed during an intrasession break that began on March 26, 2010, and ended on April 12, 2010.").

3. Due to the Act's quorum requirement, hundreds of Board decisions depend on the lawfulness of Becker's appointment. During the twenty months that Becker served on the Board, it issued 386 published decisions, and an equal or greater number of unpublished ones, for which Becker was necessary to complete a three-member quorum. John Raudabaugh, Impact of Noel Canning on Obama NLRB Decisions: Void NLRB Decisions (Published and Unpublished), http://www.nrtw.org/en/nlrb-watch/what-noel-canning-decision-means.

4. On January 25, 2013, the United States Court of Appeals for the D.C. Circuit issued its decision in the instant case, holding that the Board lacked power to act because Board members essential to maintaining a quorum had not been validly appointed under the Recess Appointments Clause. Pet. App. 35a, 52a. That Clause was "inapplicable," the Court explained, for two alternative reasons: first, the Senate had not been in an intersession recess at the time of the putative appointments; second, the vacancies at issue had not arisen during the intersession recess of the Senate in which the appointments were made. *Id*. at

34a-35a, 51a-52a. Accordingly, "[t]he Board had no quorum, and its order is void." *Id.* at 52a.

Becker had left the Board by the time it issued the decision challenged in this case, and so the D.C. Circuit did not address the validity of his appointment in its decision. Pet App. 15a. After issuing the decision below, the D.C. Circuit *sua sponte* ordered that dozens of undecided petitions challenging putative final orders of the Board be held in abeyance, preventing their enforcement, pending further order. Among these are petitions challenging orders for which Becker was essential to satisfying the quorum requirement. *See, e.g.,* Order, *Alden Leeds, Inc. v. NLRB*, Nos. 11-1267, 11269 (D.C. Cir. Feb. 19, 2013) (challenging *In re Alden Leeds et al.*, 357 NLRB No. 20 (Dec. July 19, 2011)). The D.C. Circuit has subsequently recognized that, under the reasoning of the decision below, Becker's appointment was "constitutionally invalid." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013).

5. The United States Court of Appeals for the Third Circuit confirmed the invalidity of Becker's appointment in *New Vista*, issued nearly four months after the decision below. The Third Circuit held that Becker's appointment did not comport with the original understanding of the Recess Appointments Clause and was therefore ineffective. That clause's reference to "the Recess of the Senate," the court found, "refers to only intersession breaks." 719 F.3d at 208. Accordingly, Becker, having been "appointed during an intrasession break," *id.* at 218, was "invalidly recess appointed to the Board," *id.* at 244. The Board therefore had fewer than three valid-

ly appointed members when it issued its orders, and therefore failed to satisfy the quorum requirement. *Id.* On that basis, the court vacated the orders. *Id.*

6. Actions similarly challenging Becker's "recess" appointment are currently pending before this Court and the Second, Third, Fourth, Fifth, Ninth, and D.C. Circuits. *See* Appendix ("Known Cases Implicating the Constitutional Validity of Craig Becker's Appointment to the Board").

7. In its petition for certiorari in the instant case, the Board disputed both of the alternative holdings of the decision below: that the President's recess-appointment power (1) may not be exercised during an intrasession recess of the Senate and (2) may not be exercised to fill vacancies that arose prior to a given recess. Pet. at I. The Respondent, in turn, proposed a third, "narrower," question, on which the Court has since requested briefing: "[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions." Brief of Respondent Noel Canning Regarding Certiorari at i.

ARGUMENT

I. A Decision Addressing Only the *Pro Forma*-Session Issue Would Not Resolve the Many Pending Legal Challenges to Becker's "Recess" Appointment

The live dispute over Craig Becker's "recess" appointment to the Board presents the very same issues as this case, with one important difference: at the time of Becker's appointment, during an in-

trasession recess, Congress was not convening in *pro forma* sessions. For that reason, a decision that holds President Obama's other "recess" appointments to the Board constitutionally invalid because Congress was convening in *pro forma* sessions around the time of those appointments would provide little or no guidance on the lawfulness of Becker's appointment. If the Court does not resolve the circuit splits on the scope of the President's recess appointment power in this case, it will have to do so in the next one, in light of the legal and practical confusion currently surrounding orders reliant on Becker's lawful appointment.

A. As the Board acknowledges, the scope of the President's recess-appointment power is the subject of two splits of authority among the circuits. *See* Pet. at 12. On one side of the first split are decisions by the D.C. Circuit (under review here), Third Circuit, and Fourth Circuit that have held, at a minimum, that this authority may be exercised only during an intersession recess of the Senate. *See* Pet. App. 34a; *New Vista*, 719 F.3d at 244; *NLRB v. Enter. Leasing Co. Se.*, LLC, 722 F.3d 609, 652 (4th Cir. 2013). On the other side is the Eleventh Circuit's decision in *Evans v. Stephens*, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 942 (2005), which held that the President may make recess appointments during either an inter- or intrasession recess of the Senate. These holdings are squarely in conflict.

The D.C. Circuit additionally held, in the decision below, that the President's recess-appointment power extends only to vacancies arising during the same recess in which the appointment is made. Pet. App. 51a-52a. That holding, in turn, is in conflict with decisions of the Second, Ninth, and Eleven Circuits. *United States v. Allocco*, 305 F.2d 704, 709–15 (2d Cir. 1962); *United States v. Woodley*, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc); *Evans*, 387 F.3d at 1226-27.

Affirming the decision below on the third ground proposed by the Respondent would leave these circuit splits unresolved. To begin with, the D.C. Circuit's two holdings would remain the law of the circuit, fully applicable in future cases brought there. *Cf. Balintulo v. Daimler AG*, 727 F.3d 174, 191 n.26 (2d Cir. 2013) (adhering to the reasoning of a decision that this Court affirmed on other grounds); *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (same). In addition, the position of the Third and Fourth Circuits on whether the President may make recess appointments during an intrasession recess would still be opposed to that of the Eleventh Circuit. Thus, a party challenging government action that relies on the lawfulness of a intrasession recess appointment would prevail in the D.C., Third, and Fourth Circuits, but fail in the Eleventh Circuit. Similarly, a party challenging government action that relies on the lawfulness of recess appointments to fill preexisting vacancies would prevail in the D.C. Circuit, but fail in the Second, Ninth, and Eleventh

Circuits. The Board is correct to suggest that this Court's guidance is necessary to resolve these splits in authority. *See* Pet. at 31.

B. More specifically, such a decision would not resolve the lawfulness of Becker's appointment to the Board, which is an issue in numerous ongoing proceedings. As described above, Becker was appointed during an intrasession recess when the Senate was not convening in *pro forma* sessions. A decision that addresses the scope of the recess-appointment power by affirming either of the alternative holdings of the decision below, or by reversing both of them, would be dispositive of the issue of Becker's appointment. By contrast, a decision that addresses only the legal import of *pro forma* sessions would say nothing concrete about whether Board actions that rely on Becker's "recess" appointment may stand.

That is no small matter. Becker's status has been challenged in dozens of cases, and several hundred more potentially could be filed. *See* Appendix (pending cases); Raudabaugh, *supra* (cases that potentially could be filed). At least one of those challenges—that of the *amicus curiae*—is already before this Court, and the Third Circuit has already held that Becker's appointment was constitutionally invalid. *New Vista*, 719 F.3d at 244. Moreover, if the D.C. Circuit adheres to its reasoning in *Noel Canning* following a decision on the *pro forma*-session issue by this Court, any party subject to Board action reliant on Becker's lawful appointment will be able to have

it vacated merely by filing a petition for review in that court. *See* 29 U.S.C. § 160(f) (allowing petitioners to seek review of NLRB final orders in either the local court of appeals or the D.C. Circuit, at the petitioner's choice).

Accordingly, if the Court's decision in this case does not resolve the lawfulness of Becker's appointment, it will almost certainly have to face that issue in a future case. In the meantime, both the Board and employers will face enormous and unnecessary uncertainty regarding the enforceability of orders reliant on Becker's appointment.

The Court can and should put the matter to rest in this case. A decision that affirms either of the D.C. Circuit's alternative holdings on the scope of the President's recess-appointment power would definitively resolve Becker's status. Those issues were considered by the court below, are fully briefed here, and are ripe for the Court's consideration. As such, there is no good reason for the Court to begin, and potentially end, its inquiry with the *pro forma*-sessions issue.

C. Uncertainty regarding Becker's status would be only one of several consequences if the Court were to decline to resolve the scope of the President's recess-appointment power. In addition, the President would face great uncertainty in considering whether to make recess appointments during intrasession recesses, even ones of substantial duration undivided by *pro forma* sessions. At the same time, the Congress would be in the dark about what it can do to

either facilitate or block the President's ability to make recess appointments. In the face of such uncertainty, compromise between the political branches is stymied, and the President's practical ability to make recess appointments is effectively curtailed—whether or not that is actually what the Constitution actually requires. This uncertainty may explain, at least in part, why no recess appointments have been made since the ones at issue here. *See* Pet. Br. Appx. at 64a, 89a.

But if the President were to "recess" appoint officials during intrasession recesses or to vacancies predating the recess, those officials would serve under a cloud, with uncertain legal status and authority. Their actions that are subject to challenge within the footprint of the Third and Fourth Circuit (and perhaps others) could be invalidated in every case, while those within the footprint of the Eleventh Circuit would be immune from such attacks. Presumably, the other circuits would soon have to choose sides in this dispute, dividing the nation into states where these recess appointees' actions on behalf of the federal government have the force of law, and states where they do not.

Again, the Court may avoid these consequences quite easily by settling the scope of the President's recess-appointment power.

II. The "Narrower" Ground Proposed by the Respondent Is No Narrower in Effect than the D.C. Circuit's Holdings

Contrary to the Respondent's contention, the *pro forma*-session issue is in no manner "narrower" than the bases of the decision below concerning the scope of the President's recess-appointment power. *See* Brief of Respondent Noel Canning Regarding Certiorari at 8. Either approach requires the Court to meet and decide weighty constitutional questions. Likewise, either approach will shape constitutional relations between the Executive and Legislative Branches going forward. While the Court should abide by its practice "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885), that policy does nothing to distinguish between the different grounds of decision available in this case.[2]

A. Addressing the *pro forma*-session issue raised by the Respondent would require the Court to decide at least two substantial questions of constitutional law. To begin with is the question of who decides

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[2] To be clear, the *amicus curiae* supports the Respondent's argument that the January 4, 2012 appointments are invalid because they were made at a time when the Senate had not adjourned for more than three days, and argues only that, for prudential reasons, the Court should first consider the other questions presented before, if necessary, addressing that one.

when the Senate in recess, such that the recess-appointment power is inapplicable. In the Respondent's view, that decision is for the Senate itself, which may undertake *pro forma* sessions at any time to block the President from making recess appointments. *See* Resp. Br. at 49-66. Others have argued, however, that "the textual commitment of temporary appointment discretion to the Executive is absolute"—*i.e.*, the President gets to decide when the Senate is unavailable to receive and consent to nominations. Br. of Prof. Victor Williams, at 9. And the Board, in turn, contends that the courts get to decide, based on the facts and circumstances of each case, with some uncertain degree of deference due to the President. *See* Pet. Br. at 44-45, 51.

If the courts are to decide, that presents a second constitutional question: what standard are they to apply? According to the Board, "[t]he Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process." *Id.* at 45. This standard, however, is nowhere to be found in the constitutional text and, on its face, appears to conflict with the Adjournment Clause, which provides that "[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . . ." U.S. Const. Art. I, § 5, cl. 4. In other words, under the Board's proposed standard, the Senate could apparently be in recess even when the House has specifically refused to consent to the Senate's adjournment.

And elsewhere, the Board suggests an entirely different standard: whether the President reasonably believed that the Senate would conduct "no business." Pet Br. 51. This latter standard, the Board indicates, need not account for whether the Senate can or actually does conduct business during the period that the President has identified as its "recess." Pet. Br. 52-55. The key factor is apparently whether Senate business requires "unanimous consent." Pet. Br. 54-55. Of course, that is also how the Senate conducts most business when it is indisputably *in session*. *See* Senate Legislative Process, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (noting "the use of unanimous consent to conduct most of [the Senate's] business"). So choosing the proper standard is no small matter.

Neither is applying it to the circumstances here. Even accepting the Board's proffered standard—*i.e.*, that the *sine qua non* of the *Senate's* in-session status is whether it is appropriately responsive to the *President's* prerogatives—the application of those broad criteria to the Senate's *pro forma* sessions is not clear-cut. After all, the Senate did, in fact, pass legislation while it convened in *pro forma* sessions, *see* Pet. Br. at 48 n.47 (conceding as much), and the Board seems to argue that minor changes to Senate rules (regarding, for example, the routing of messages, scheduling practices, and the referral of litigation among committees) could be determinative of the question. Pet. Br. at 50-51. The weight, if any, that

the Court assigns to each of these kinds of factors would necessarily govern future activity within and between the political branches, encouraging them to jockey for advantage by altering their rules and conduct. That could have far-reaching, and unexpected, consequences.

The virtue of instead addressing the scope of the President's recess-appointment authority head-on is that it is comparatively straightforward. Either the President has authority to make appointments during intrasession recesses, or he does not. Either the President may fill vacancies predating the current recess, or he may not. Each of these issues, unlike the *pro forma*-session issue, calls for a bright-line rule that would be easy for the political branches to follow and for the courts to administer. There is no room for, and no likelihood of, political gamesmanship.

The point is that the Court does not get to duck difficult and important constitutional questions if it chooses to address the constitutional effect of the Senate's *pro forma* sessions as opposed to the scope of the President's recess-appointment power. Either way, the Court will have to formulate a rule of constitutional law, with some impact on the relations between the political branches.

B. It is certainly not apparent that this impact would be any less if the Court were to rest its decision on the *pro forma*-session issue. Although the Respondent is correct that "affirming the court of appeals on that basis would not call any appoint-

ments into question beyond those made on January 4, 2012," Brief of Respondent Noel Canning Regarding Certiorari at 35, what really matters is the impact going forward. Such a ruling would confirm that either chamber of Congress can block the President from making recess appointments. The Senate can do so directly, by declining to go into recess, while the House (as happened in this case) can exercise its authority under the Adjournment Clause to prevent the Senate from adjourning for long enough to support exercise of the recess-appointment power.

Accordingly, whenever the Presidency and at least one of the chambers of Congress are held by different political parties, the President's recess-appointment power could only be exercised at the sufferance of his opponents. That result would not be "narrower" in any meaningful sense than a decision that affirms either or both of the constitutional holdings of the decision below.

III. Contrary to the Board's Claims, a Decision Affirming the Logic of the Court Below Would Cause No "Disruption"

In its petition, the Board warned that the decision below "threatens a significant disruption of the federal government's operations," because it would open the floodgates to cases challenging long-ago government action dependent on now-invalidated recess appointments. Pet. at 30. But this point is misplaced: "It goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, stand-

ing alone, will not save it if it is contrary to the Constitution.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

The Board's claim is also overblown, which may explain why the Board declined to repeat it, or anything like it, in its merits brief. While some number of the Board's recent decisions could be vulnerable to challenge under the reasoning of the decision below—hardly a novel phenomenon, given the Board's recent history, *see New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010) (holding the Board improperly constituted for failure to satisfy the Act's quorum requirement)—the broader effects are likely to be muted, due to ordinary doctrines of repose.

A. Most prominently, any challenge to government action under the Administrative Procedure Act is subject to the ordinary six-year catch-all statute of limitations for civil actions against the government of 28 U.S.C. § 2401(a). *See, e.g.*, *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712-13 (9th Cir. 1991); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997). The limitations period begins when the right of action "accrues," which occurs at the time of "final agency action." *Slater*, 120 F.3d at 631. So there is absolutely no risk that a decision which calls into question long-ago "recess" appointments would disrupt settled administrative action. Such claims would necessarily fail at the earliest stage of litiga-

tion. Nor may such claims be shoehorned into actions challenging an agency's application of longstanding regulations. *NLRB v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987) ("A petitioner's contention that a regulation suffers from some *procedural* infirmity . . . will not be heard outside of the statutory limitations period.").

B. Even government action that is still subject to challenge may be immunized—at least with respect to any recess appointment-related defects—by the ratification of properly appointed officials. Ratification "occurs when a principal sanctions the prior actions of its purported agent." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998) (citing Restatement (Second) of Agency § 82 (1958)). Ratification has been employed in the past to cure administrative action tainted by legal defect, on the basis that it is nothing more than a routine exercise of an official's or agency's authority to act. *See, e.g., Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) (taking "the FEC's post-reconstitution ratification of its prior decisions at face value and treat[ing] it as an adequate remedy" where the agency had initially been improperly constituted); *Doolin*,, 139 F.3d at 212-14 (ratification of order by properly appointed official approved where undertaken in "the normal course of agency adjudication"). Although ratification may not have retroactive effect, and may require the normal procedures for administrative action, *see Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S.

88, 98-99 (1994), it provides a basis for a properly-appointed official or properly-constituted agency to address any lapse in authority due to questionable appointments.

C. Even where ratification is unavailable, some agency actions may be insulated from challenge by the *de facto* officer doctrine. That doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). To be sure, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182-83. *See also Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (challenge to official's authority "should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation").

But that does not deprive the doctrine of all force. Thus, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), upheld the validity of certain actions by the FEC, despite its finding that the appointment of four members of the Commission by Congress, rather than the President, violated the Appointments Clause. In support, *Buckley* cited *Connor v. Williams*, 404 U.S. 549, 550-551 (1972), which similarly upheld "legisla-

tive acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment were not therefore void." *Ryder*, 515 U.S. at 183. While the application of the *de facto* officer doctrine is not without its uncertainties, at the least it provides an additional basis for repose where the legality of government action has already been tested and upheld and no further direct review is available.

CONCLUSION

The Court should affirm the decision below and should do so, as fairly possible, on the same grounds as that decision.

Respectfully submitted,

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APPENDIX

APPENDIX

KNOWN CASES IMPLICATING THE CONSTITUTIONAL VALIDITY OF CRAIG BECKER'S APPOINTMENT TO THE BOARD

United States Supreme Court

Daycon Prods. Co. v. NLRB, No. 12-1445

D.C. Circuit

Alden Leeds, Inc. v. NLRB, Nos. 11-1267, 11-1296

Avista Corp. v. NLRB, Nos. 11-1397, 11-1432

Bruce Packing Co., Inc., v. NLRB, Nos. 12-1054, 12-1137

Caribbean Int'l News Corp. d/b/a El Vocero De Puerto Rico, Nos. 11-1487, 11-1490, 12-1079

Camelot Terrace, Inc. et al. v. NLRB, Nos. 12-1071, 12-1218

Chamber of Commerce et al. v. NLRB, No. 12-5250

Douglas Autotech Corp. v. NLRB, Nos. 12-1001, 12-1168, 12-1247

DHL Express, Inc. v. NLRB, Nos. 12-1072, 12-1143

DirectTV, Inc. v. NLRB, Nos. 11-1273, 11-1274, 11-1294

Dodge of Naperville, Inc. et al. v. NLRB, Nos. 12-1032, 12-1122

Europa Auto Imports, Inc., d/b/a Mercedes-Benz of San Diego v. NLRB, Nos. 11-1458, 11-1488

Hundai Am. Shipping Agency v. NLRB, Nos. 11-1351, 11-1413

KLB Indus., Inc. v. NLRB, No. 11-1280, 11-1322

Manhattan Ctr. Studios, Inc. et al. v. NLRB, Nos. 12-1017, 12-1104

NOVA Se. Univ. v. NLRB, Nos. 11-1297, 11-1331

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