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 AMICUS CURIAE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION IN SUPPORT OF RESPONDENT NOEL CANNING

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INTEREST OF AMICUS CURIAE[1]

The International Longshore and Warehouse Union ("ILWU") is an unincorporated international labor union with more than 45,000 members among more than sixty local unions in California, Oregon, Washington, Alaska, and Hawaii. It represents public and private sector workers in a wide range of industries, including the longshore, warehousing, manufacturing, distribution, agriculture, trade, and service industries. The ILWU constitutes a "labor organization" within the meaning of section 2(5) of the National Labor Relations Act and has been subject to the jurisdiction of the National Labor Relations Board ("NLRB" or "Board") since the founding of the ILWU in 1937. Throughout this time, the NLRB has adjudicated countless labor disputes with profound and sweeping implications for the ILWU and its various bargaining relationships coast wide. The ILWU therefore has a strong interest in guaranteeing the integrity and legitimacy of the NLRB.

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[1] This brief is filed with the consent of the parties, all of whom have granted blanket consent to *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* ILWU affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made any monetary contribution to the preparation or submission of this brief. No person other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief.

As a labor organization subject to the NLRB's jurisdiction, the ILWU has experienced firsthand the uncertainty that arises from constitutionally dubious Board appointments. The ILWU also has witnessed the politicized nature of Board appointments and the proclivity of various interest groups to adopt shifting positions regarding the recess appointment power depending on the political affiliation of the President. However, the ILWU consistently has asserted that there must be a firm constitutional footing for appointments to the Board and other administrative agencies. Most recently, the ILWU has challenged the President's putative recess appointments to the Board in several other cases before the NLRB and the Ninth Circuit Court of Appeals. The ILWU takes this position without regard to the existing political climate. The ILWU asserts that the decisions issued by the NLRB without the requisite three-member quorum are void *ab initio* and urges this Court to restore the stability and legitimacy provided by constitutionally sound Board appointments. Further, since the decisions rendered by the Board in the last two years have significant implications for the ILWU's collective bargaining relationships, the ILWU urges the Court to reject the notion that this case presents a non-justiciable political question and finally lay this issue to rest.

SUMMARY OF ARGUMENT

The ILWU submits this brief in support of Respondent Noel Canning and affirmance to urge

the Court to reach the merits of the case and finally to provide much-needed clarity regarding the proper scope of the Recess Appointments Clause. The ILWU agrees with the arguments advanced by Noel Canning and the reasoning of the Court of Appeals below. The D.C. Circuit rightly held that the Board appointments at issue here were an unconstitutional over-extension of the President's limited authority under the Recess Appointments Clause, in derogation of the Senate's confirmation power. The Court should restore certainty and legitimacy to the appointments process in general and to the NLRB in particular by declaring unconstitutional the purported recess appointments at issue here and holding void the decisions rendered by the Board while lacking a quorum of constitutionally-appointed members.

First, the Court should reject the suggestion that it reverse on justiciability grounds under the narrow "political question" doctrine. Certainly, the validity of recess appointments long has been a highly politicized issue. These political overtones have led partisan political actors to adopt shifting constitutional arguments favoring a more or less expansive interpretation of the Recess Appointments Clause depending on which political party has controlled the Presidency. Notably, the ILWU's support for Respondent Noel Canning cuts against the grain of such predictably politicized positions. Thus, it is fitting for the ILWU to respond to the assertion that the interpretive questions presently before the Court are non-justiciable. That argument ignores the distinction between the large class of

politically- and ideologically-charged cases routinely decided by this Court and the narrow class of cases raising genuinely "political questions" textually committed to one of the political branches and not resolvable by judicial standards. Despite the political posturing that typically has surrounded recess appointments, this case plainly does not fall into that exceptional latter category. Rather, this case is a dispute about the proper roles of the Executive and the Legislature in an appointments process that plainly is not textually committed to either branch acting alone. *See* U.S. Const. art. II, §2, cl. 2-3; *see also Freytag v. Comm'r*, 501 U.S. 868, 880 (1991) ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."). The arguments on both sides of the issues involve the proper interpretation of the text and structure of the Constitution. The present case therefore is indistinguishable from the numerous weighty separation-of-powers decisions handed down by this Court, including in cases concerning the appointments process.

Second, the Court should reject the notion that the Founders intended the Recess Appointments Clause to serve as a political check on the Senate's confirmation power. Under the reimagining of the appointments process advanced by the Board and its supporters, the purported recess appointments at issue were valid responses to the Senate's exercise of its unquestionable authority to reject presidential nominations. This position ignores the narrowly circumscribed role that the Recess Appointments

Clause was intended to play as an alternative means of filling vacancies arising in the Senate's extended absence during the once-lengthy intersession Recess. As scholars have recognized, historical change has rendered this intended purpose less relevant. However, the Executive branch has purported to reengineer the Recess Appointments Clause as a potent political tool never intended by the Framers. The broad interpretation of the Recess Appointments Clause favored by the Board would make the recess appointment power a presidential trump card during inter-branch appointment disputes. From the Executive's perspective, this legally suspect device has served as a convenient response to Senate filibuster procedures that until recently required a supermajority to secure contentious confirmations. On November 21, 2013, however, the Senate voted "to eliminate the use of the filibuster against most presidential nominees."[2] This change demonstrates that there the political branches already possess sufficient *constitutional* means to address concerns regarding the appointments process, without resorting to unconstitutional manipulation of the Recess Appointments Clause.

The outsized view of the recess appointment power upon which the Executive based the Board

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[2] Jeremy W. Peters, Landmark Senate Vote Limits Filibuster, N.Y. Times (Nov. 21, 2013), http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html. "The filibuster changes[] . . . do not affect Supreme Court nominees. They would also not affect legislation, which would still be subject to a 60-vote threshold if filibustered." *Id.*

appointments at issue here impermissibly interferes with the Senate's clearly prescribed "full power to reject newly proposed appointees." *See Myers v. United States*, 272 U.S. 52, 121 (1926); *see also* Federalist No. 76 (Alexander Hamilton) ("[T]he necessity of [the Senate's] cooperation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of [the President]."). Mere political expediency cannot legitimize exercises of presidential authority that conflict with the governmental structures and processes delineated in the Constitution. *See INS v. Chadha*, 462 U.S. 919, 945 (1983) ("[A]rguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers[] . . . and sets out just how those powers are to be exercised.").

Accordingly, the ILWU urges the Court to fulfill its duty to interpret and enforce the Constitution's textual requirements so as to maintain the system of checks and balances carefully woven into that document by the Framers. In order to do so, the Court first should reach the merits of the justiciable constitutional questions presented. The Court then should resolve those questions by disapproving firmly the Executive's expansive interpretation of the Recess Appointments Clause and reaffirming the import of the Senate's confirmation power as a considerable restraint and check on the President's appointment authority.

ARGUMENT

I. THE CONSTITUTIONALITY OF RECESS APPOINTMENTS IS A JUSTICIABLE QUESTION NOTWITHSTANDING THE POLITICIZED, PARTISAN DISCOURSE SURROUNDING SUCH APPOINTMENTS

In an *amicus curiae* brief filed in support of Petitioner, Prof. Victor Williams argues that the Court should reverse the court below because this case presents non-justiciable political questions. Respectfully, the Court should reject that invitation to expand the political question doctrine to reach this case, which presents issues requiring "interpretation of the Constitution[]" that squarely "fall[] within the traditional role accorded courts to interpret the law." *See Powell v. McCormack*, 395 U.S. 486, 548 (1969). In predictably cyclical fashion, political actors over the years have adopted first one side and then the other side of the legal arguments regarding the proper scope and meaning of the Recess Appointments Clause, depending only on which party controlled the White House. In this case, however, the Court finally can and should lay to rest these persistent debates by ensuring that NLRB appointees and other powerful executive officers receive their commissions in a manner consistent with the text and structure of the Constitution. As this Court stressed in a case presenting interpretive issues similar to those raised here, "the presence of significant political overtones does not automatically invoke the political question

doctrine." *INS v. Chadha*, 462 U.S. 919, 942-43 (1983). Rather, the history of partisan reversals on the legal issues merely underscores that this Court must fulfill its obligation to interpret the law and enforce the constitutional scheme of checks and balances embodied in the Senate's confirmation power.

As one respected commentator has observed, "[a] given interpretation [of the Recess Appointments Clause] may be good for your team at one point in history and bad at another." Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 443 (2005). As Prof. Herz has noted more recently, the "ideologically tinged" "battle over the four January 2012 appointments is highly politicized."[3] Republican senators publicly have labeled President Obama's purported recess appointments as a "blatant attempt to circumvent the Senate and the Constitution"[4] and "surely not what the framers had in mind when they required the President to seek the advice and consent of the Senate in making appointments."[5] For years, however, "members of

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[3] Michael Herz, The challengingly uncategorizable Recess Appointments Clause, SCOTUSblog (Jul. 15, 2013). http://www.scotusblog.com/2013/07/167445/.

[4] Senate Minority Leader Mitch McConnell (R-Ky.), *quoted in* A Constitutional Conflict in the Opening Days of the New Congressional Session, NAW News (Jan. 2012), http://www.naw.org/nawnews/news_article.php?articleid=646.

[5] Sen. Chuck Grassley (R-Iowa), *quoted in* Lachlan Markay, *Grassley Not Buying DOJ's Non-Recess Appointment Apologia*, The Foundry (Jan. 12, 2012),

Congress from both parties have accused the President of abusing his power by using the Recess Appointments Clause, despite its considerable use by both Democratic and Republican Presidents." Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 236-37 (2008). Thus, in many ways, "the current battle is a rehash of fights during the George W. Bush administration, just with the party affiliations flipped."[6] Indeed, Democratic Senators raised similar complaints regarding President Bush's recess appointments. Late Democratic Senator Edward Kennedy labeled the former President's 2005 recess appointment of John R. Bolton as United Nations Ambassador an "abuse [of] the recess appointment power" and "a devious maneuver that evades the constitutional requirement of Senate consent."[7] Notably, Senator Kennedy also filed *amicus* briefs with this Court and the Eleventh Circuit in litigation challenging the recess appointment of Judge William Pryor. The Senator raised essentially the same interpretive arguments now advanced by Noel Canning and

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http://blog.heritage.org/2012/01/12/grassley-not-buying-dojs-non-recess-appointment-apologia/#.UoZ5hqjTlaQ.

[6] Herz, *supra* note 3.

[7] Sen. Edward Kennedy (D-Mass.), *quoted in* Bush Appoints Bolton to U.N. Job, FoxNews.com (Aug. 1, 2005), http://www.foxnews.com/story/2005/08/01/bush-appoints-bolton-to-un-job/.

amici Republican Senators.[8] In this same tradition, Republican Senators previously had argued that recess appointments made by President Clinton constituted "treat[ing] the Senate confirmation process as little more than a nuisance which [the President] can circumvent whenever he wants" contrary to "the intent of [the] Constitution"; and an "outrageously inappropriate . . . effort to bypass the Senate." Hein, *In Defense of Broad Recess Appointment Power*, 96 Cal. L. Rev. at 237.

Because *amicus* ILWU is an intensely principled labor union, the ILWU's position – advanced not only here but consistently in other litigation before the Ninth Circuit and the NLRB – represents a marked departure from the predictable pattern of expedient party- and ideology-driven approaches to the issues presented in this case. As explained above, *amicus* is affected profoundly by the instability and illegitimacy that arises when this or any President makes constitutionally infirm recess appointments to the NLRB. The ILWU currently faces the prospect of entering into collective bargaining negotiations with a deep lack of confidence in the legitimacy of numerous Board rulings. This crisis of legitimacy is particularly acute at present in light of the Executive's reliance on an unprecedented legal position to justify the President's recess appointments despite the Senate's maintenance of pro forma sessions during the period in question. *See*

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[8] *See, e.g.*, Brief of Amicus Curiae Edward M. Kennedy in Support of Petitioner, Franklin v. United States, No. 04-5858, *cert. denied*, 125 S. Ct. 1636 (Mar. 21, 2005).

Memorandum Opinion for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6. 2012) ("conclud[ing] that . . . Congress [cannot] prevent the President from making any recess appointments . . . by conducting pro forma sessions" but acknowledging that "[t]he question is a novel one, [with] substantial arguments on each side");[9] *cf.* *Wright v. United States*, 302 U.S. 583, 597-98 (1938) ("[T]he precedents of executive action which have been cited are not persuasive. The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional interpretation."). The predictably partisan manner in which political actors heretofore have endorsed different interpretations of the Recess Appointments Clause simply underscores the need for this Court to finally and authoritatively settle the matter. That these recurring interpretive debates inevitably carry political overtones does not support a determination that the fundamental interpretive questions are non-justiciable under the political question doctrine. To the contrary, application of the political question doctrine here would contravene the consistent teachings of this Court's precedents.

The Court recently reaffirmed that the political question doctrine is but "a narrow exception to th[e]

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[9] *Available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

rule" that "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia,* 19 U.S. 264, 404 (1821)). Moreover, the Court repeatedly has distinguished between the mine run of justiciable controversies that involve contentious "political" dimensions and the comparatively narrow class of claims that must be held non-justiciable under the political question doctrine. The Court spelled out this distinction in *Chadha*, in which the Court was asked to consider "the important question of the constitutionality of the one-House veto," 462 U.S. at 929, and rejected a political question argument similar to that advanced here:

> It is correct that this controversy may, in a sense, be termed "political." But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . . *Marbury v. Madison* was also a "political" case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But "courts cannot reject as 'no law suit' a bona fide controversy as to whether

> some action denominated 'political' exceeds constitutional authority."

Id. at 942-43 (citations omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Likewise, the *Baker* Court explained that "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217. While this case perhaps may be described fairly as a "political" one, a review of this Court's precedents demonstrates that it does not present non-justiciable political questions.

This Court "ha[s] explained that a controversy 'involves a political question . . . where there is a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 132 S. Ct. at 1427. Unless these factors are "inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217. Neither of these critical factors applies here. Nor would the Court's resolution of the questions presented "express[] lack of the respect due coordinate branches of government." *See id.*

First, resolution of the interpretive issues presented in this case is not textually committed to either political branch. The questions here presented concern the interplay of several related constitutional provisions relevant to the appointment process, implicating powers committed to the Senate as well as the President. This Court has explained that the "[t]he structural principles

embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). Rather, the Court has described "[t]he [Appointments] Clause [as] a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States,* 515 U.S. 177, 182 (1995) (quoting *Freytag,* 501 U.S. at 878)). As with these other cases raising constitutional issues involving the appointment process, this case will require the Court to interpret the Constitution's text and structure so as to articulate the separation of powers between the Executive and the Legislature. Although always a serious task, refereeing these constitutional boundaries falls within the core competency and obligation of the Judiciary. *See, e.g.*, *Freytag*, 501 U.S. at 870, 873 ("In this litigation, we must decide whether the authority that Congress has granted the Chief Judge of the United States Tax Court to appoint special trial judges transgresses our structure of separated powers. . . . We granted certiorari to resolve the important questions the litigation raises about the Constitution's structural separation of powers.")

Second, and relatedly,[10] there are familiar, "judicially . . . manageable standards," *see Baker*,

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[10] "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it[] . . . ." *Nixon v. United States*, 506 U.S. 224, 228 (1993).

369 U.S. at 217, for interpretation of the Constitution's text and structure. Just last year, this Court declared that a case will not be held to "turn on standards that defy judicial application" where the arguments advanced "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 132 S. Ct. at 1430. When "[r]esolution of [a] claim demands" nothing more than "careful examination of the textual, structural, and historical [arguments] put forward by the parties," the "claim presents issues the Judiciary is competent to resolve." *Id.* This is in part because "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Chadha*, 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)). "The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers[] . . . ." *Id.* As one scholar has explained: "While the recess appointments power can obviously be partisan in the short run, in the long run it concerns nonpartisan matters about the allocation of constitutional authority and checks and balances."[11] Such cases present justiciable controversies – even if ultimately "reaching a decision . . . is [not] simple."

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[11] Michael B. Rapapport, The originalist and non-originalist cases for following the original meaning of the Recess Appointments Clause, SCOTUSblog (July 15, 2013), http://www.scotusblog.com/2013/07/symposium-the-originalist-and-non-originalist-cases-for-following-the-original-meaning-of-the-recess-appointments-clause/.

See Zivotofsky, 132 S. Ct. at 1430; *see also United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) ("Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances."). As the *Zivotofsky* Court aptly stated, addressing and resolving such closely contested disputes "*is what courts do*." 132 S. Ct. at 1430 (emphasis added).

Moreover, the Court specifically has emphasized the justiciability of challenges raised by individual parties affected by the decisions of constitutionally suspect appointees. *See Ryder*, 515 U.S. at 177-78 ("[O]ne 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. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments.") (internal citation omitted); *see also Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances. . . . If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object. ").

Finally, as the Court explained in *Powell v. McCormack*, "an interpretation of the Constitution" such as that called for here "falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government.'" 395 U.S. at 548 (alterations in original). "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 549.

For these reasons, the Court should refuse to extend the appropriately narrow political question doctrine so as to avoid deciding the important and recurring issues squarely presented by this case. Indeed, it is incumbent upon the Court to reach the merits and – finally – to set forth an authoritative interpretation of the Recess Appointments Clause, in accordance with the "duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As explained in the second section of this brief, the Court should resolve the questions presented so as to reaffirm the Senate's considerable role as a check on the President in the appointment process.

II. THE RECESS APPOINTMENTS CLAUSE DOES NOT PERMIT THE PRESIDENT TO TRUMP THE SENATE'S POWERFUL ROLE IN THE APPOINTMENT PROCESS

This Court has long recognized that "the greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). As articulated by James Madison, this system was designed to "giv[e] to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Federalist No. 51 (James Madison). Thus, the system of checks and balances that the Constitution places on each branch of government serves as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122.

Madison explained that the division of power among the branches provides "security [that] arises to the rights of the people." Federalist No. 51. Thus, separation of powers does not serve only to protect each branch of government from the others. *See Bond*, 131 S. Ct. at 2365 ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern."). Rather, "[t]he structural principles secured by the

separation of powers protect the individual as well." *Id.*; *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" (quoting *Morrison v. Olson*, 462 U.S. 654, 694 (1988))).

The Constitution's appointment provisions form an important part of this carefully constructed system of checks and balances. These provisions divide the appointment power between the President and the Senate. *See* U.S. Const. art. II, § 2, cl. 2-3. This Court has explained that the "structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," such that "[n]either Congress nor the Executive can agree to waive this structural protection." *Freytag*, 501 U.S. at 880 (1991). This case addresses specifically the role of the Recess Appointments Clause within this structural framework. As one legal scholar has observed, "the recess appointments power . . . concerns . . . the allocation of constitutional authority and checks and balances."[12]

This Court is obligated to enforce the checks and balances set in place by the Framers and to prevent the President from circumventing the Senate's structural role in the appointment process. As explained by Justice Kennedy:

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[12] Rappaport, *supra* note 11.

> [A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring).

The Founders carefully and deliberately designed the appointment provisions to avoid the aggrandizement of the Executive's authority over appointments by giving the Senate "full power to reject newly proposed appointees." *Myers*, 272 U.S. at 121. Alexander Hamilton made clear that the Senate's role of providing ultimate approval was critical to the appointment process:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Federalist No. 76. According to Hamilton, "the necessity of [the Senate's] cooperation, in the business of appointments, w[ould] be a considerable and salutary restraint upon the conduct of [the President]." *Id.* Specifically, "the power of appointment by the executive is restricted in its exercise by the provision that the Senate, a part of

the legislative branch of the government, may check the action of the executive by rejecting the officers he selects." *Myers*, 272 U.S. at 119. Indeed, because the Appointments Clause grants the Senate this considerable check over appointments and thereby "articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests." *Freytag*, 501 U.S. at 880; *see also Weiss v. United States*, 510 U.S. 163, 185-86 (1994) (Souter, J., concurring) ("[B]ecause exclusive Presidential appointment power 'may be abused,' the Appointments Clause provides the 'salutary check' of Senate confirmation, and '[t]he consciousness of this check will make the president more circumspect, and deliberate in his nominations for office.'" (second alteration in original) (quoting 3 J. Story, Commentaries on the Constitution of the United States 374-377 (1833))).

As this Court has stated, "[t]he 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag*, 501 U.S. at 883 (quoting G. Wood, The Creation of The American Republic 1776–1787, at 79, 143 (1969)). As Justice Souter previously observed, several Founders, including Benjamin Franklin, "expressed concern over the threat of expanding Presidential power[] . . . specifically in the context of appointments." *Weiss*, 510 U.S. at 187 n.2 (Souter, J., concurring); *see also id.* at 185 n.1 ("Gouvernor Morris, who was among

those initially favoring vesting exclusive appointment power in the President, ultimately defended the assignment of shared authority for appointment on the ground that 'as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.'"). "Indeed, the 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 officers." *Id.* at 187 n.2. "Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Freytag*, 501 U.S. at 884. It is therefore clear that the prospect of executive usurpation of legislative authority in the appointment process was a serious concern that the Framers sought to address when drafting the appointment provisions. *See id.* ("Even with respect to 'inferior Officers,' the [Appointments] Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.").

It follows that the Court should not interpret the Recess Appointments Clause so as to undermine the Senate's legitimate structural power to impose "considerable . . . restraint" on the President's appointment preferences, absent some basis in the Constitution itself. *See* Federalist No. 76. Instead, the relevant authorities confirm that the Framers intended the Recess Appointments Clause as a narrow, pragmatic exception to the general Advice and Consent requirement. Thus, Hamilton

explained that the Recess Appointments Clause is "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method [is] inadequate." Federalist No. 67 (Alexander Hamilton). Hamilton continued:

> The ordinary power of appointment is confined to the president and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments "during the recess of the Senate," by granting commissions which shall expire at the end of their next session.

Id. Hamilton's characterization of the joint appointment procedure as the "*ordinary* power of appointment" demonstrates that this joint procedure was intended to be the general rule, while the unilateral recess appointment procedure would be an exception to that rule. Moreover, Hamilton clearly contemplated that this exception was to be invoked in very specific circumstances, i.e., when a vacancy happens while the Senate is in its recess.

In an *amicus curiae* brief filed in support of the Petitioner, however, the Brennan Center for Justice ("Brennan Center") argues that the recess appointment power has evolved to serve a politically useful function as a "check on partisan obstructionism" committed by the Senate when it "prevent[s] the President from appointing officers of his choosing."[13] However, neither the text of the Constitution, founding era authorities, nor this Court's precedents support the theory that the Recess Appointments Clause was intended as some sort of counter-check to the Senate's "full power to reject newly proposed appointees." *See Myers*, 272 U.S. at 121. To the contrary, as Hamilton made clear in Federalist No. 67, the Clause was intended as a mere auxiliary measure to be employed to fill vacancies arising during the Senate's absence.

Thus, proponents of an expansive reading of the Recess Appointments Clause seek to have the Clause serve a function far broader than the narrow

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[13] *See* Brief of Amicus Brennan Center 19. The Brennan Center's brief states that the organization's ultimate concern is with Senate filibuster rules and the use of the filibuster to frustrate executive branch nominations. *See, e.g.*, *id.* at 1 (explaining the Brennan Center's interest in the case as stemming from the organization's "role in . . . seeking to curb abuses of the filibuster rule"); *id.* at 26 (stating that "this case relates to dysfunction created by filibusters affecting executive officers"). As the Senate's recent decision to revise its procedures to eliminate filibustering of most nominations demonstrates, political and policy arguments regarding Senate rules properly are addressed to that body. The wisdom of such filibuster reforms is not at issue here.

purpose for which it originally was intended. Under a faithful interpretation, however, the role of the Clause should be waning in the modern era, rather than waxing under aggressive theories of Executive power. Scholars have recognized that the main factor bearing on the originally intended role of the Recess Appointments Clause has been that "modern transportation and the change in the frequency with which the Senate meets render the clause an anachronism." Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 454. The Clause was designed to provide a mechanism by which the President could make temporary appointments while the Senate was out of town during long annual recesses.[14] However, the Senate now holds between seven and twelve recesses per year, with most recesses lasting less than two weeks. The Senate is no longer unavailable to perform its appointment functions due to extended recesses: "[it] is simply never out of session long enough for a vacancy[] . . . truly to need filling before its return." Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 454. Rather, as Prof. Herz aptly observed, "[i]t is simply impossible to justify modern uses of the Recess Appointments Clause in terms of its original purpose"; indeed, "no one could suggest with a straight face that [such] recent recess

[14] "In the early years under the Constitution, intersession recesses typically lasted between six and nine months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long periods." Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1491 (2005).

appointments . . . [are] in any way related to the clause's underlying purposes." *Id.* at 454-55. Indeed, "if any urgency exist[s], it [is] created not by the Senate's *absence* but by its imminent *return*; a physical inability to act [is] hardly the problem." *Id.* While *amicus* is not insensitive to the political challenges of divided government, the Senate's exercise of its express constitutional authority to restrain the President's appointment preferences cannot justify the President's unconstitutional abuse of the recess appointment power. The Recess Appointments Clause simply was not designed to serve as a presidential trump card to overcome this type of political gridlock.

Here, the President's actions well exceeded the scope of executive authority under the Recess Appointments Clause. Admittedly, other Presidents also have invoked broad interpretations of the Clause in recent years, although none had gone so far as the current Administration. Indeed, "[e]very modern recess appointment has occurred at most a couple of weeks, and in some cases a couple of days, before the Senate's return – and usually after the nomination had been stalled for months."[15] However, as in other circumstances in which this Court has declined to find such "precedents of executive action . . . persuasive," "[t]he question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional

[15] Herz, *supra* note 3.

interpretation." *See Wright*, 302 U.S. at 597-98. Indeed, the increasingly aggressive use of recess appointments in recent years makes this Court's intervention all the more critical. *See Chadha*, 462 U.S. at 944 ("[O]ur inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies."). Allowing the President to employ the Recess Appointments Clause to strategically circumvent the Senate's confirmation power in this manner defeats the structural benefits that the appointments provisions were designed to provide. The Court must decisively end the practice.

Proponents of a more expansive interpretation of the Recess Appointments Clause attempt to minimize their position's fundamental constitutional defects by asserting that the President's use of the recess appointment power outside of its original context ensures that vacancies may be filled during recesses. However, this view "ignores that the Recess Appointments Clause was designed both to allow vacancies to be filled *and to restrain Presidents from circumventing the Senate*." Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1542 (2005) (emphasis added). Under the interpretation advanced by Petitioner, the President can fill any existing vacancy regardless of when it arose by waiting deliberately until a recess occurs. By contrast, an interpretation that limits the recess appointment power to vacancies that arise during the recess in question "would have allowed the

President historically to fill virtually all significant vacancies that could not have been addressed by the Senate, without eviscerating the requirement of senatorial consent in other cases."[16] The Recess Appointments Clause should be interpreted in a manner that does not undermine structural interests served by a joint appointment process.

A decision reaffirming the intended, narrow scope of the Recess Appointments Clause simply requires the Senate and the President to sort out their differences regarding executive appointments through constitutional means within the political process. Under the appointments scheme created by the Framers, the political branches have at their disposal sufficient *constitutional* means for resolving such disputes, as well as powerful political incentives for doing so. *See Freytag*, 501 U.S. at 884 ("The Framers understood[] . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) ("The Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" (alteration in original) (quoting Federalist No. 51)). The Senate's recent decision to eliminate filibustering of most presidential nominations demonstrates the capacity of the political branches to wield their *constitutional* powers to address policy concerns regarding purported dysfunction in the

[16] Rappaport, *supra* note 11.

appointments process. There simply is no need to resort to unconstitutional methods, as the President did here.

Moreover, even otherwise compelling appeals to political utility and efficiency could not legitimize the President's unconstitutional appointments. As this Court previously has explained, "[c]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government." *Chadha*, 462 U.S. at 944. Accordingly, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.*; *cf. New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010) (holding that legislation "provid[ing] for a Board quorum of three[] must be given practical effect rather than swept aside in the face of admittedly difficult circumstances," such as "the costs that delay imposes on . . . litigants"). *Amicus* Brennan Center asks the Court to embrace its view that the President may invoke the Recess Appointment as a "structural check on Senate obstruction,"[17] despite the lack of any constitutional foundation for this position. However, a policy preference for a less combative appointment process and speculative gains in "eliminat[ing] government dysfunction and gridlock,"[18] cannot trump the plain text and purposes of the Constitution. *See Chadha*, 462 U.S.

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[17] Amicus Brief of Brennan Center 19.

[18] *Id.* at 1.

at 945 ("[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution."); Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 457-58 ("If purposive interpretation differs from mere consideration of policy, it is because of the lawmaking authority of the original enactors. Once we exchange *their* purposes for ours, we are invoking policy alone." (footnote omitted)). The Court should decline the invitation from the Board and its supporters to breathe artificial life into the Recess Appointments Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* ILWU urges the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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