Proof Brief **Oral argument has been scheduled for December 5, 2012**

Nos. 12-1115, 12-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 270

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

JILL A. GRIFFIN
Supervisory Attorney

ELIZABETH A. HEANEY
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1743

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760 Intervenor	Nos. 12-1115, 12-1153

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, and Amici: Noel Canning, a division of the Noel Corporation ("the Company") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The International Brotherhood of Teamsters, Local 760 ("the Union") was the charging party before the Board and is intervening in support of the Board. The Board's General Counsel was also a party before the Board. The Chamber of Commerce of the United States of America ("the Chamber") and the Coalition for a Democratic Workplace ("CDW")

(collectively, "Movants") have requested leave to intervene in support of the Company.

The following parties are participating as *amicus curiae* and have filed briefs in support of the Company: Landmark Legal Foundation and Connie Gray, Karen Medley, Janette Fuentes, and Tommy Fuentes; Speaker of the House of Representatives John A. Boehner; and Senator Mitch McConnell and 41 other Members of the Senate Republican Conference.

B. Rulings Under Review: This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on February 8, 2012 and reported at 358 NLRB No. 4.

C. Related Cases: The ruling under review has not previously been before this Court or any other court. However, in *Center for Social Change v. NLRB*, D.C. Cir. Case Nos. 12-1161, 12-1214, the parties have raised and fully briefed the recess appointments issue, and oral argument is set for December 5, 2012.

In the following cases filed in this Circuit, parties have raised the recess appointment issue in their preliminary issue statements, and the Court has set a briefing schedule:

Sands Bethworks Gaming, LLC v. NLRB, D.C. Circuit No. 12-1240,

Milum Textile Services Co. v. NLRB, D.C. Circuit Nos. 12-1235, 12-1275,

Independence Residences, Inc. v. NLRB, D.C. Circuit No. 12-1239,

Aerotek, Inc. v. NLRB, D.C. Circuit No. 12-1271, and

Kimberly Stewart v. NLRB, D. C. Circuit No. 12-1338.

Further, in the following cases, parties have raised the recess appointments issue in their preliminary issue statements, but this Court has not yet set a briefing schedule:

Meredith Corp. v. NLRB, D. C. Circuit No. 12-1287, and

Keck Hosp. of USC v. NLRB, D.C. Circuit No. 12-1413, consolidated with

Sodexo of Am., LLC v. NLRB, D.C. Circuit No. 12-1426.

In the following cases filed in other circuit courts, parties have raised and briefed the recess appointment issue:

NLRB v. New Vista Nursing, 3d Circuit No. 11-3440, 12-1027 & 12-1936,

NLRB v. Enterprise Leasing Co., SE, LLC, 4th Cir. No. 12-1514,

NLRB v. Nestle Dreyer's Ice Cream Co. v. NLRB, 4th Cir. No. 12-1684,

Huntington Ingalls, Inc. v. NLRB, 4th Cir. No. 12-2000, and

Richards, et al. v. NLRB, John Lugo, et al. v. NLRB, 7th Cir. Nos. 12-1973, 12-1984.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 26th day of October 2012

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

United States Constitution: **Page(s)**

Legislative Materials: **Page(s)**

Legislative Materials-Cont'd: **Page(s)**

Legislative Materials-Cont'd: **Page(s)**

State Legislative Materials

Opinion Attorney General: **Page(s)**

Office of Legal Counsel: **Page(s)**

Other Authorities: **Page(s)**

Other Authorities- Cont'd: **Page(s)**

Other Authorities- Cont'd: **Page(s)**

Other Authorities- Cont'd: **Page(s)**

GLOSSARY

"The Company"	Noel Canning
"Board"	The National Labor Relations Board
"The Union"	International Brotherhood of Teamsters, Local 270
"Movants"	The United States Chamber of Commerce and the Center for a Democratic Workplace
"Br."	The Company's opening brief to this Court
"Tr."	Transcript of unfair labor practice hearing
"GCX"	General Counsel Exhibits
"RCX"	Respondent Exhibits

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Noel Canning ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order finding that the Company violated the National Labor Relations Act ("the Act") by refusing to reduce to writing and execute a collective-bargaining agreement reached with the International Brotherhood of Teamsters, Local 760 ("the Union").

The Board had subject matter jurisdiction under Section 10(a) of the Act, as amended (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order issued on February 8, 2012, and is reported at 358 NLRB No. 4.[1] The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on February 24, 2012. The Board filed its cross-application

[1] Record references in this proof brief are to the original record, as follows: "D&O" references are to the Board's Decision and Order, and to the annexed administrative law judge's decision and recommended order. "Tr." references are to the administrative hearing transcript. "GCX" and "RX" refer to the hearing exhibits introduced by the Board's General Counsel, and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

for enforcement on March 21, 2012. Both were timely; the Act places no time limitations on such filings.

The Union, charging party below, has intervened in support of the Board. The Chamber of Commerce of the United States of America ("the Chamber") and the Coalition for a Democratic Workplace ("CDW") (collectively, "Movants") requested leave to intervene in support of the Company, which the Board opposed. The Court directed the parties to address this matter in their briefs. (Court's June 21, 2012 Order.)

ISSUE STATMENT

1. Whether Movants lack associational standing to intervene.

2. Whether the President's recess appointments of three Board Members during a 20-day period in which the Senate had declared by order that no business would be conducted occurred within a "Recess of the Senate" under the Constitution's Recess Appointments Clause.

3. Whether substantial evidence supports the Board's finding that the Company violated the Act by refusing to execute and enter into a collective-bargaining agreement to which it orally agreed.

RELEVANT STATUTORY PROVISIONS

The attached Addendum includes pertinent statutory provisions.

STATEMENT OF THE CASE

The Board's General Counsel issued a complaint alleging, inter alia, that the Company violated the Act by refusing to execute a written contract embodying the terms to which the parties had orally agreed during collective bargaining negotiations. (D&O4;GCX1(c).) Following a hearing, the administrative law judge found that the parties had reached a verbal agreement on all substantive issues of a collective-bargaining agreement, and that the Company's failure to abide by those terms violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O12.)

The Company filed exceptions with the Board. (Exceptions pp.1-4) The Board issued a Decision and Order, adopting the judge's findings. (D&O1-9.)

STATEMENT OF FACTS

I. THE BOARD'S FACTUAL FINDINGS

A. Negotiations Between the Company and the Union

The Company bottles and distributes Pepsi-Cola products. (D&O4;Tr.165.) The Company and the Union have enjoyed a long standing collective-bargaining relationship with successive agreements dating back to the 1940s. (D&O5.) On April 30, 2010, their most recent agreement expired, and after agreeing to an

extension, the parties commenced bargaining for a new contract. (D&O5;Tr.20,24,GCX2.)

The parties met for five bargaining sessions, starting June 26, 2010 and ending on December 8, 2010. (D&O5.) Although the parties resolved most issues, two points of contention emerged – wages and pension plans. (D&O5.)

At the first bargaining session on June 26, 2010, the Union presented its first written proposal. The Union proposed a 3-year contract with wage increases each year, and a $.35 an hour increase in employer contributions to the employees' pensions.

The parties met again on July 7, August 10, and October 26. During these sessions, the parties did not exchange any written proposals but discussed the Union's pension plan. The Company repeatedly raised concerns regarding the pension's funding and whether the Union's early retirement program benefitted employees. (Tr.22-23.) The Company expressed its preference for employee participation in the Company's pension plan, not the Union's. (Tr.32, 38-39,GCX5,6,7.) The parties eventually agreed to let the employees decide between the two plans, and by November, the employees decided to remain with the Union's plan and negotiations continued. (D&O13n.2;GCX7.)

At the November 15, 2010 session, the Company presented its first written proposal. (GCX8,9.) The Company proposed, among other things, a 2-year

contract with a $.33 per-hour wage increase for each year that allowed the employees to decide the breakdown of the increase between wages and pension. (Tr.43-44,GCX9.) The Union countered, seeking a 3-year contract with $.60 per-hour increase in pension and wages, but agreeing to allow employees to vote on the wages-pension allocation. (Tr.47-49,GCX10.)

On December 8, 2010, the parties met for the last time. Representing the Union were its business representative, Bob Koerner, and unit employees Matthew Urlacher and Mark Weber, who was attending for the first time as a last minute substitution. (D&O5;Tr.116.) Company President Rodger Noel, Plant Manager Sam Brackney, Chief Financial Officer Larry Estes, and Treasurer Cindi Zimmerman represented the Company. (D&O5.)

Several proposals, oral and written, were made at this meeting. The Company began by presenting its second written contract offer. (GCX12.) It asked for a 2-year contract, with retroactive pay to October 1, 2010, a $.55 increase in wages for the first year with $.12 pension contribution, and a $.33 wage increase for the second year with no pension contribution. Employees would also pay a portion of their medical care. (Tr.53,GCX12.)

The Union countered, proposing a 2-year agreement with a $.45 per-hour increase in each year, and to allow the employees to determine how much of the raise to divert to the Union's pension plan. (D&O5,11;Tr.55,GCX11.) Under the

proposal, the Company would continue to pay the employees' medical insurance, and the employees would receive a retroactive pay bonus. (Tr.55,GCX11.)

The Company responded with a $.40 per-hour increase for each year, and included the retroactive pay bonus and full medical insurance coverage. (D&O6;Tr.58,120,GCX11.) The Union was agreeable to this offer, which became known as the "40-40" proposal. (D&O8.)

However, the Company believed that the employees would be better off financially with a different Company proposal. (D&O6.) Alternatively, it put forth a 2-year contract, with employees receiving a $.78 per-hour wage increase and an additional $.12 per hour for pensions in the first year, and a $.33 per-hour wage increase with no additional amount for pensions in the second year. The employees would also pay a portion of their monthly health premium. (D&O6;Tr.58-59,121,GCX11,GCX21.)

Koerner suggested that the employees vote on the two proposals, the "40-40" plan and the Company's alternative. (D&O5-6;Tr.58-59,118-21.) Both were for a 2-year contract and included a retroactive pay bonus. Koerner stated that the Union would be neutral and not claim a preference for either proposal, and the parties would be bound by whatever proposal the employees chose. (GCX11,GCX21.)

After the Union reviewed the respective proposals' terms, the Company agreed to this approach. (D&O6,10;Tr.62,118-21,123.) President Noel, after confirming the starting date for the new contract, said "then let's do it." (D&O6,10;Tr.120.) Plant Manager Brackney nodded his agreement. (D&O6.) Estes, the Company's chief financial officer, instructed the parties to "write it up and get it sent over." (D&O6;Tr.123.) Treasurer Zimmerman agreed to email Koerner the two proposals. The Company gave the Union permission to use the Company's meeting room for the vote on the two proposals. (D&O6,7;Tr.61-63.) The meeting ended after all the parties shook hands. (D&O7;Tr.62.)

B. Post-Negotiation Events

The following day, December 9, 2010, Weber discussed the two proposals with his co-workers, who expressed a strong preference for the "40-40" proposal. (D&O7;Tr.123.) Weber also spoke to Brackney, expressing his relief that the negotiations were "all over." (D&O7,10;Tr.124.) Brackney agreed and told Weber that both parties got a "good deal." (*Id*.) Later that afternoon, Weber and Brackney discussed the "check pool" game (an office pool generally played with paychecks) that the employees would be playing with the retroactive bonus checks. (D&O7;Tr.125.) Brackney "complained" that, because he was management and would not be getting the bonus, he could not participate. (D&O7;Tr.125-26.)

At 4:00 p.m. that same day, Zimmerman emailed Koerner a document titled "Proposal," which outlined two alternative proposals. (D&O7;GCX13.) While the Company's proposal remained relatively unchanged, the Company significantly altered the "40-40" proposal, denying employees the right to determine their wage-pension allocation and setting the pension contribution "not to exceed $.10 of the $.40." (D&O7;GCX 13.)

The next morning, December 10, 2010, Koerner sent Zimmerman an email detailing the terms that the parties had agreed to on December 8, which included the Union's understanding that "the wage pension diversion for each year was proposed as $.40 per hour with the employees diverting whatever portion to pension which would be voted by the group." (D&O7;GCX14.) That same morning, Koerner posted a notice at the Company's premises announcing a vote for the contract on Wednesday, December 15, 2010 in the Company's meeting room. (D&O7-8;Tr.70,GCX15.)

Koerner then informed Weber that the Company changed its mind on the agreement. (D&O7.) Afterwards, Weber asked Brackney why the Company reneged; Brackney responded that he did not know. (D&O7;Tr.126-29.)

Later that evening, during a telephone conversation, Koerner informed President Noel that Zimmerman's December 9 email did not reflect the parties' December 8 agreement. (D&O8;Tr.67-68.) Noel responded that the agreement

had not been in writing, and that he had the right to make decisions for the Company. (D&O8;Tr.67-69.) Koerner informed Noel that the Union was going to vote on what the parties had agreed to at the bargaining table. (D&O8;Tr.69.)

On December 15, the Union held the vote, and the employees overwhelmingly chose the "40-40" proposal by a vote of 37 to 2. (D&O8;Tr.70,GCX16.) The employees also voted to divert all $.40 of the wage increase into the pension trust. (D&O8;Tr.70.)

Koerner immediately presented the vote results to Noel, who made a rude comment. The next day, Noel sent Koerner two letters. (D&O8;Tr.75.) The first letter stated that "[it was] not appropriate to vote an offer that was not made by the employer," and that the parties were at an impasse. (D&O8;Tr.75-77,GCX17.) The second letter demanded Koerner refer all further communications to the Company's attorney. (Tr.76;GCX17.)

On January 13, 2011, the Union sent copies of the new collective-bargaining agreement to the Company. (D&O10;Tr.79-81,GCX18,19.) This agreement reflected the terms employees ratified on December 15. The Company has since refused to execute it. (D&O10;Tr.81-82.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hayes, Flynn, and Block) found, in agreement with the administrative law judge, that the Company violated

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to reduce to writing and to execute a collective-bargaining agreement reached with the Union. (D&O1-9.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010; apply the terms retroactively to October 1, 2010 and for the agreed upon 2-year duration; and to make the employees whole for any loss incurred as a result of the Company's unfair labor practice. Finally, the Order requires the Company to post a remedial notice and to distribute such a notice electronically. (D&O1-2.)

SUMMARY OF ARGUMENT

1. Movants lack standing to intervene on the basis of the Company's standing. The Company, as the aggrieved party, is necessary to this appeal. Allowing Movants to intervene, solely because one member has exclusive standing to challenge the Board order, would undermine standing requirements. Further, Movants' other members lack standing because their claimed injury—possible "quorumless adjudications"—is speculative. Movants can promote their interests by participating as an amicus.

2. The Company challenges the Board's authority to issue its February 8, 2012 order, contending that the Board lacked a quorum because the President made invalid recess appointments of three of the five Board Members acting at the time of that order. That claim is mistaken.

The President made these recess appointments on January 4, 2012, during a 20-day period from January 3 to 23, 2012, in which the Senate had declared itself closed for business and ceased all usual business. During that period, no legislation was passed, no votes were held, and no nominations were considered. Senators made no speeches and no debates occurred; indeed, nearly all Senators had departed the capital for their yearly winter break. This period was a "Recess of the Senate" under the Recess Appointments Clause. The term "Recess of the Senate" has a well-understood meaning long employed by both the Legislative and

Executive Branches: it refers to a break from the Senate's usual business. That established construction readily encompasses the 20-day break at issue here, during which the Senate was closed for business.

The Company incorrectly asserts that the Senate opined that it was not in recess during this 20-day period within the meaning of that Clause. In fact, the Senate said just the opposite. The Senate adopted, by unanimous consent, an order that it would not engage in any business whatsoever during the 20-day January break. That unanimous consent order had binding effect: the Senate could vacate the order only by unanimous consent, and thus a single Senator could have blocked the conduct of *any* business—even a speech. The Senate also issued orders declaring the January break to be a "recess," and structuring their affairs based on that understanding.

The Company is likewise mistaken in its claim that the Senate transformed its 20-day recess into a series of shorter breaks that were not recesses—and thereby unilaterally eliminated the President's constitutional appointment authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designated "*pro forma* sessions only, with no business conducted." If adopted, that view would frustrate the constitutional design that ensures a mechanism for filling offices at all times. That mechanism was of particular importance here, where the President used his authority to make recess

appointment of a limited duration to fill positions that, if left unfilled, would have substantially impaired the functioning of an Executive Branch agency and undermined the President's responsibility to "take Care that the Laws be faithfully executed."

The Company's view would also upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments. Under the constitutional design, either the Senators remain in session to conduct business, thereby precluding the President's use of his recess appointment power, or they suspend business (presumably to leave the capital), thereby allowing the President to make recess appointments of limited duration. But the Company's position disrupts the balance by allowing the Senate to unilaterally nullify this latter, constitutionally authorized avenue for appointment and escape the consequences of its decision to go in recess. By contrast, accepting the President's recess appointment power would not, as the Company urges, create a "limitless recess appointment power" permitting recess appointments during "lunch breaks," but would leave the Senate's proper role in the appointment process wholly intact.

3. Substantial evidence supports the Board's finding that the Company violated the Act when it refused to execute a written contract incorporating the terms of the parties' oral agreement. As amply demonstrated by the credited

evidence, the parties' bargaining history and the circumstances surrounding their negotiations establish that they agreed that employees would vote on two proposals and the parties would be bound by that vote. While the Company faults the Board for failing to adhere to state law that allegedly prohibits oral agreements, the Company failed to raise this issue before the Board, rendering this Court without jurisdiction to decide the matter. In any event, Federal law controls the validity of collective-bargaining agreements, and the Act does not require an agreement to be in writing in order to be valid.

ARGUMENT

I. MOVANTS LACK ASSOCIATIONAL STANDING TO INTERVENE

Previously, this Court referred Movants' intervention motion to the merits panel and directed briefing on "the question of [M]ovants' standing to intervene." Movants' argument relies on Noel Canning's standing, and on the alleged standing of their members. But neither provide Movants with the Article III standing necessary for intervention. Rather, Movants' interest here is that of amici curiae, a status that fully allows the Movants to present their legal arguments on behalf of their members.

To meet the "irreducible constitutional minimum of standing," the plaintiff must show (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical," (2) a "causal connection between

the injury and the conduct complained of" that is fairly traceable to the defendant's action, and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

No *per se* rule grants an association standing to sue for any member's injury. Rather, an association may sue on its members' behalf only if it can show that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). *Accord Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006). Movants cannot satisfy these well-settled standards.

A. The Company's Standing Does Not Give Movants Associational Standing

Movants contend that they have standing because the Company, a member of both Movants, has standing. Contrary to Movants' claim (Br. 23-24), their standing does not follow from a "straightforward application of *Hunt*." Here, because "the claim asserted [and] the relief requested requires the [Company's] participation," Movants cannot satisfy *Hunt*'s critical prudential third prong. *Hunt*,

432 U.S. at 342-43; *see also United Food & Commercial Workers Union, Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996) [2].

The Company, of course, has standing. In fact, the appeal could not proceed in the Company's absence because only a "person aggrieved" can petition for review of the Board's order. 29 U.S.C. § 160(f). The Company—and only the Company—meets that requirement. *See Oil, Chem. & Atomic Workers v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) (to be "aggrieved" under Section 10(f), a party must demonstrate a loss or injury in fact from Board order). The Company's presence, therefore, is essential to this action. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (Easterbrook, J.) (where association could not have initiated suit, "it seems to follow that [the association] may not intervene"). [3]

---

[2] Movants erroneously assert (Br. 21 n.16) that the Board has not challenged this *Hunt* requirement. The Board's response to the Movants' intervention motion argued that the Board's order affected only the Company's interests, and that those interests did not require the Movants' intervention. *See* Opposition, pp. 6 & 15.

[3] Whether the Company unlawfully refused to bargain requires a fact-intensive examination of the bargaining history between the Company and the Union, and the circumstances surrounding their negotiations. Such a fact-intensive inquiry weighs against finding associational standing. *See Air Transp. Ass'n of Am. v. Reno*, 80 F.3d 477, 484 (D.C. Cir. 1996) (association lacked standing because members' damage claims required individualized proof); *Kansas Health Care Ass'n Inc. v. Kansas Dep't of Social & Rehab. Serv.*, 958 F.2d 1018, 1021-22 (10th Cir. 1992)((denying associational standing because claim asserted required evidence particular to individual members).

Further, the action on appeal is not in the nature of "a declaration, injunction, or some form of prospective relief." *See Hunt*, 432 U.S. at 343 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("'in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been'" some form of prospective relief)). Rather, the Company's review petition specifically seeks "to set aside the Decision and Order," relief addressing only the Company's peculiar injury. (Br. 76, requesting similar relief). If the Court grants the Company's petition, relief would flow only to the Company. The Court lacks jurisdiction to redress any other "injury" claimed by Movants; thus it cannot, for example, review other Board orders or prospectively enjoin the Board from regulating Movants' members altogether. No member of either Movant would benefit beyond receiving the "psychic satisfaction" of favorable precedent. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). In short, because the Board's remedy affects the Company alone, Movants have no cognizable legal interest in this Order and should not be given party status, with attendant rights to control the litigation. *See O'Hair v. White*, 675 F.2d 680, 691 (5th Cir. 1982) (association lacks standing to raise a member's individual due process and equal protection claims; those claims affect only the member, who is the "best representative of her personal interests"). *See generally Warth*, 422 U.S.

at 515 (associational standing "depends in substantial measure on the nature of the relief sought").

Allowing Movants to intervene, solely because one member has exclusive standing to seek relief from a Board Order directed only to it, would not serve the purposes underlying standing requirements. Standing doctrine, in both its constitutional and prudential dimensions, "is founded in concern about the proper—and properly limited—role of the courts." *Warth*, 422 U.S at 498. Embracing Movants' overly simplistic view of standing, where any association may intervene in a Board enforcement or review proceeding when one of its members is a party, would open the floodgates to intervenors and eradicate any prudential limitation on associational standing. *See Bethune*, 863 F.2d at 532-33 (allowing association to intervene based on their interest in the legal rule at issue "would turn the court into a forum for competing interest groups"). This is particularly true where, as here, the association's concern is purely legal and can effectively reach the Court as amicus.

Although Movants claim (Br. 23) that "courts routinely find associational standing when the member supplying standing is also a party," in none of their cases did the claim at issue and the relief sought require the individual member's presence and affect only that member. Rather, in each the association sought declaratory or injunctive relief that would benefit all its members. *See Interfaith*

Cmty. Org v. Honeywell Int'l, Inc., 399 F.3d 248, 258 (3rd Cir. 2005) (injunction sought requiring site owner to clean up contaminated area); *Doe v. Porter*, 370 F.3d 558, 562 (6th Cir. 2004) (injunction sought to prevent Board of Education from providing religious instruction during the school day); *Fair Housing in Huntington Comm. v. Town of Huntington, N.Y.*, 316 F.3d 357, 363 (2d Cir. 2003) (injunctive action challenging racially-discriminatory disparate impact in proposed housing development). Here, the Company's petition does not seek, and this Court cannot grant, injunctive or declaratory relief. Instead, Congress limited the Court's authority to entering "a decree enforcing, modifying . . . , or setting aside in whole or in part the order of the Board," which, here, can impact only the Company. 29 U.S.C. § 160(f). Accordingly, the Company's standing does not give Movants standing to intervene where both the claim and the relief affect only the Company. *See Hunt*, 432 U.S. at 343

B. No Other Members Suffer a Redressable Injury-in-Fact from the Board's Order

In the alternative, Movants argue that the Board's Order purportedly causes other members (apart from the Company) two additional potential injuries—a threat of "quorumless adjudications" and of precedent holding verbal agreements binding despite contrary state law. Those claims lack merit.

To establish standing, the asserted injury must be distinct and palpable, not merely abstract, and the alleged harm must be actual or imminent, not conjectural

or hypothetical. *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Supreme Court has stated that standing is "substantially more difficult to establish" where, as here, the parties invoking federal jurisdiction are not "the object of the government action or inaction" they challenge. *Lujan*, 504 U.S. at 562. A petitioner alleging only "future injuries" confronts a "significantly more rigorous burden to establish standing." *Chamber of Commerce v. EPA*, 642 F.3d 192, 202 (D.C. Cir. 2011).

Movants' first claim—that the Board's Order "directly subjected [their] members to the imminent harm of quorumless adjudications" (Br. 25-26)—claims only a hypothetical future injury. Movants' hypothesize (Br. 25) that their "multiple" members who are "undergoing Board proceedings or awaiting a decision from the Board" risk having their pending cases adjudicated without an allegedly valid quorum. But the claimed injury from the threat of future Board orders issued by the recess-appointed Board members is speculative at this point and not sufficiently concrete to confer standing here on Movants or any of their members. *See J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996) ("It is not enough for the Foundation to assert that it might suffer an injury in the future, or even that it is likely to suffer an injury at some unknown future time. Such 'someday' injuries are insufficient."). If and when one of

Movants' members is aggrieved by a final Board order, that member can seek review of that order under Section 10(f) of the Act, and "until the Board's order has been affirmed by the appropriate . . . Court of Appeals, no penalty accrues for disobeying it." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938). But at present, Movants and their members lack a cognizable injury-in-fact.[4]

Furthermore, even if these members could demonstrate a cognizable injury, it is not redressable here. As noted, the only relief that has been sought, and that this Court can grant, is an order impacting the Company; non-parties will not be affected by the Court's judgment. And while this Court's opinion may have persuasive or precedential effect, that is insufficient for Article III purposes. *See Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (future effect of D.C. Circuit opinion held irrelevant for redressability purposes); *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.").

Nor is there merit to Movants' second basis for standing (Br. 28)—that precedent enforcing verbal agreements notwithstanding state law "imposes

---

[4] Adjudication by a "quorumless" Board is not a certainty in any pending case, since the Senate could confirm the pending nominations or the Board's membership could change with the departure and replacement of current members.

concrete injury" on their members. First, because the Company did not raise that issue to the Board, the Court lacks jurisdiction to consider it; therefore, even if this could constitute imminent harm, this Court has no power to remedy it. *See infra* pp.78-79. In any event, other than a conclusory statement that unidentified members "regularly engage in collective bargaining," Movants have failed to show a direct, concrete harm to any member. Movants' alleged injury flows from the Board's legal rationale applied in a case involving only the Company, and "[m]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998).

Finally, Movants misplace their reliance (Br. 25-26) on *Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1998) and *Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010). In both cases, this Court found petitioners' alleged injuries to be demonstrably imminent and unavoidable. In *International Brotherhood*, the agency's assertion of jurisdiction to review arbitration awards meant that the union—prevailing party on the merits before the agency, losing party on the agency's jurisdiction to review the arbitration—was facing numerous future arbitrations that could be appealed. Therefore, according to the Court, the union possessed "a personal stake" against "being forced to litigate future arbitration awards." 862 F.2d at 334. Likewise, in *Teva*, the Food

and Drug Administration's prior adjudication stripped Teva's exclusive right to sell a generic drug for 6 months, making the alleged economic injury "inescapable" and "imminent." 595 F.3d at 1312. Unlike those cases, here, "the prospect of harm" from the potential issuance of a decision and application of undesirable precedent is not "effectively certain," as this Court requires. *Teva*, 595 F.3d at 1314. Moreover, neither case involved an association. As noted, p.20 *supra*, standing is "substantially more difficult to establish" when the plaintiff is not the object of challenged government action. *See Lujan*, 504 U.S. at 562 *(internal quotations omitted)*.

II. Members Block, Griffin, And Flynn Held Valid Recess Appointments When The Board Issued Its February 8th Order

Starting on January 3, 2012, the first day of the Senate's current annual Session, the Senate remained closed for business for nearly three weeks, until January 23. Under the terms of the Senate's own adjournment order, which it had adopted by unanimous consent, it could not provide advice or consent on Presidential nominations during that 20-day period. Messages from the President were neither laid before the Senate nor considered. The Senate considered no bills, held no votes, and passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in its conduct of business with periodic *pro forma* sessions that involved a single Senator and lasted for

literally seconds, it provided by order that "no business" would be conducted even during those moments.

By the start of this lengthy period of Senate absence, the membership of the National Labor Relations Board had fallen below the statutorily mandated quorum with the end of an earlier recess appointment term at noon on January 3, leaving the Board unable to carry out significant portions of its statutorily mandated mission of overseeing implementation of the National Labor Relations Act. *See New Process Steel*, 130 S. Ct. at 2645. Accordingly, the President exercised his constitutional power to fill vacancies that exist "during the Recess of the Senate," U.S. Const. art. II, § 2, cl. 3, by appointing three members to the NLRB, ensuring that the Board's work could continue without substantial interruption.

These recess appointments were valid because, at the time they were made, the Senate was plainly in "Recess" as that term has long been understood, and, indeed, under any reasonable understanding of the term. The Company's argument to the contrary is rooted in a misunderstanding of the meaning and purpose of the Recess Appointments Clause that—if adopted by this Court—would substantially alter the longstanding balance of constitutional powers between the President and the Senate.

A. Under the Well-Established Understanding Of The Recess Appointments Clause, The Senate Was In Recess Between January 3 and January 23

1. The Recess Appointments Clause confers on the President the "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. This Clause reflects the Constitution's careful balancing of powers that defines and sustains our democracy. The Constitution confers on the President the power to make appointments and, with respect to principal officers, ordinarily conditions such an appointment on the advice and consent of the Senate. *Id.* art. II, § 2, cl. 2. But the Framers also recognized the practical reality that the Senate could not (and should not) be "oblig[ated] . . . to be continually in session for the appointment of officers." *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton). The Framers thus balanced their desire to allow Senators leave the capital, [5] with the need to keep offices filled and the government running,[6] by authorizing the President to make appointments that are not

---

[5] *See also* 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot's Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

[6] 1 Op. Att'y Gen. 631, 632 (1823) ("The substantial purpose [of the Recess Appointments Clause] was to keep these offices filled. . . . The office may be an important one; the vacancy may paralyze a whole line of action in some essential

conditioned on the Senate's advice and consent but are of limited duration when the Senate is in recess. The provision for presidential recess appointments frees Senators to return to their constituents (and families) instead of maintaining "continual residence . . . at the seat of government," as might otherwise have been required to ensure appointments could be made to keep the government functioning.[7] The recess appointment power was vested in the President because, under the constitutional design, the President alone is "perpetually acting for the public," even in Congress's absence, and at all times to "take Care that the Laws be faithfully executed."[8]

The importance of presidential recess appointments to our system of government is demonstrated by the frequency with which they have been made. Since the founding of the Republic, Presidents have made hundreds of recess appointments in a wide variety of circumstances: during intersession and intrasession recesses of the Senate, during long recesses and comparatively short

---

branch of our internal police the public interests may imperiously demand that it shall be immediately filled.").

[7] 3 Elliot's Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining undesirability of requiring the Senate to "be perpetually in session, in order to provide for the appointment of officers").

[8] 4 Elliot's Debates 135-36 (Archibald Maclaine) (explaining that the power "to make temporary appointments . . . can be vested nowhere but in the executive"); U.S. Const. art II, § 3.

ones, at the beginning of recesses and in the final days (and hours) of recesses, and to fill vacancies that arose during the recesses and those that arose before the recesses.[9] Even as Senate recesses have become comparatively short, Presidents have continued to invoke the Recess Appointments Clause with regularity, thus confirming the Clause as a critical part of the allocation of powers under the Constitution and its assurance of a means for the effective conduct of government.[10]

Consistent with the firm foundation of recess appointments in historical practice, courts regularly interpret the President's recess appointment power broadly. *See, e.g.*, *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (holding that the recess appointment power applies to an intrasession recess

---

[9] *See generally* Henry B. Hogue, Cong. Research Serv., *Intrasession Recess Appointments* 3-4 (2004) (identifying 285 intrasession recess appointments made during lengthy and comparatively short recesses); Herman Marcuse, Office of Legal Counsel, *Memorandum for the Files Re: Recess Appointments to the Export Import Bank* (Jan. 28, 1985), *available at* http://www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments5.pdf (describing recess appointments made by President Reagan on January 21, 1985, two-and-a-half hours before the Senate reconvened after its recess); 10 Op. Att'y Gen. 356, 356 (1862) (noting the "continued practice of [the President's] predecessors" to use the Recess Appointments Clause to fill vacancies that existed while the Senate was in session).

[10] *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (quotations and alterations omitted); *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions[.]").

of eleven days, to vacancies that arose before the recess, and to Article III appointments); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (holding that the power applies to vacancies that arose before the recess and to Article III appointments); *United States v. Allocco*, 305 F.2d 704, 705-706 (2d Cir. 1962) (same).

2. The Company's argument that the Senate was not in recess on January 4 rests on a misconception of the meaning of the term "Recess." The Supreme Court has repeatedly stressed that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (explaining that the Framers "must be understood to have employed words in their natural sense, and to have intended what they have said"). Accordingly, the meaning of a constitutional term necessarily "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the time of the founding, like today, the term "recess" was used in common parlance to mean a "[r]emission or suspension of business or procedure," II N. Webster, *An American Dictionary of the English Language* 51 (1828), or a

"period of cessation from usual work." Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706); *see also Evans*, 387 F.3d at 1222 (citing 1755 dictionary "defining 'recess' as 'retirement; retreat; withdrawing; secession" or "remission and suspension of any procedure"). The plain meaning of the term "Recess" in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as periods in which the Framers anticipated that Senators would return to their respective States.

The settled understandings of the Executive Branch and the Senate are consistent with the plain meaning of the term. The Executive Branch has long maintained the view that the Clause authorizes presidential recess appointments when the Senate is not open to conduct business and thus not in a position to provide its advice and consent on Presidential nominations. In 1921, Attorney General Daugherty described the inquiry as a functional one:

> [T]he essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

33 Op. Att'y Gen. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test). The application of this functional inquiry is straightforward here, as the Senate expressly declared itself closed for business between January 3 and 23, 2012.

The Legislative Branch has long maintained a similar view of the President's recess appointment power. In a seminal report issued more than a century ago, the Senate Judiciary Committee in 1905 expressed an understanding of the term "Recess" that, like the Executive Branch's understanding, looks to whether the Senate is open for its usual business:

> The word 'recess' is one of ordinary, not technical, signification and it is evidently used in the constitutional provision in its common sense . . . It was evidently intended by the framers of the Constitution that it should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. . . . Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). Indeed, Attorney General Daugherty relied on this 1905 Senate definition in his 1921 opinion, 33 Op. Att'y Gen. at 24, and the Senate's parliamentary precedents continue to cite this report as an authoritative source "on what constitutes a 'Recess of the Senate.'" *See* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28 ("Riddick's Senate Procedure"), at 947 & n.46 (1992).

3. The Senate's January 2012 break was not a brief intermission in business for a weekend, an evening, or lunch, as the Company would have the Court believe. Br. 57. Instead, the Senate's 20-day break between January 3 and January 23, 2012 fits squarely within the well-established understanding of the term "Recess" described above. By its own order, the Senate provided that it would not conduct business during this entire period. The relevant text of the Senate order provided as follows:

> Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).[11]

Orders like this one, adopted by unanimous consent, "are the equivalent of 'binding contracts' that can only be changed or modified by unanimous consent."

---

[11] This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the balance of the First Session of the 112th Congress. *Ibid.* On January 3, 2012, the First Session of the 112th Congress ended and the Second Session began, as required by the Twentieth Amendment. *See infra* at pp.52-54. We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of the transition on January 3, 2012, from the First Session to the Second Session, 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). In all events, it is clear that the Senate was no longer functionally conducting business well before January 3, 2012.

Walter Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, *in* SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008); *see also* Riddick's Senate Procedure at 1311 ("A unanimous consent agreement changes all Senate rules and precedents that are contrary to the terms of the agreement, and creates a situation on the Senate floor very different from that which exists in the absence of such agreement."). Thus, the Senate could have conducted business during its January 2012 break only if it reached subsequent agreement to do so by unanimous consent. Moreover, even if a majority of Senators had wanted to conduct business during the January break, a single Senator could have prevented the Senate from doing so by objecting. *See* United States Senate, *Senate Legislative Process*, *at* http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm ("A single objection ('I object') blocks a unanimous consent request.").[12] This was a crucial feature of the Senate's order because it thereby gave Senators firm assurance that they could

[12] In practice, a Senator need not even be on the floor of the Senate to register an objection. Before a bill, resolution, or nomination is presented on the Senate floor for unanimous consent, the Senate Majority Leader contacts each Senator's office through "a special alert line called 'the hotline' that provides information on [the measure] the leader is seeking to pass through unanimous consent." Sen. Tom Coburn, *Holding Spending*, at http://www.coburn.senate.gov/public/index.cfm/holdingspending. If a Senator objects, he can impose a "hold" to block consideration of the measure. *Ibid.*; *see also* Walter J. Oleszek, Cong. Res. Serv., *Proposals to Reform "Holds" in the Senate* 1-3 (2011); Alexandra Arney, *The Secret Holds Elimination Act*, 48 Harv. J. on Legis. 271, 274 (2011); 2 U.S.C. § 30b (specifying particular procedures for holds).

leave the capital without concern that any business—including debates or votes—would be conducted by the Senate without their consent.[13]

Indeed, the Senate itself specifically and repeatedly referred to the January break as a "recess or adjournment," and arranged its affairs based on that understanding. For example, at the same time as it adopted the order described above, the Senate made special arrangements for certain appointments during the January "recess or adjournment":

> [N]otwithstanding *the upcoming recess or adjournment of the Senate*, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards, conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate.

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (emphasis added); see also *ibid.* (providing that "*notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters" (emphasis added)).[14] The Senate has taken similar steps before long recesses that are not punctuated by *pro forma*

---

[13] *Cf.* 95 Cong. Rec. 12,598 (1949) (explaining that the Senate Parliamentarian had concluded "that the phase 'without the transaction of any business' includes unanimous-consent requests, speeches, or anything of that nature").

[14] The Company's assertion that the Senate never recessed or adjourned for more than three days is thus belied by the terms of these orders, which refer to a single "recess or adjournment," with no indication that their arrangements were intended to last only until the first *pro forma* session.

sessions,[15] which indicates that the Senate viewed its January 2012 recess as equivalent to such recesses.

That the Senate was in recess during this extended period in January is further underscored by the fact that messages from the President and the House of Representatives were not laid before the Senate nor entered into the Congressional Record until January 23, 2012, when the Senate resumed business. *See* 158 Cong. Rec. S37 (daily ed. Jan. 23, 2012) (message from the President "received during adjournment of the Senate on January 12, 2012"); *id.* at S11 (daily ed. Jan. 20, 2012) (record of *pro forma* session with no mention of receipt of presidential message). The Senate also specifically identified January 23 as the next date it would vote on a pending nomination. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

In short, the Senate provided by binding order that no business would be conducted during its 20-day January break, in fact conducted no business during that break, and referred to its January break as a "recess." The President was fully entitled to rely on these unequivocal indications from the Senate in determining that there was a "Recess of the Senate." *Cf. United States v. Smith*, 286 U.S. 6, 35-36 (1932) (observing that "[i]t is essential to the orderly conduct of public business

[15] *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010) (providing for appointment authority before an intrasession recess expected to last for thirty-nine days); 153 Cong. Rec. S10991 (daily ed. Aug. 3, 2007) (same, recess of thirty-two days).

. . . that each branch be able to rely upon definite and formal notice of action by another" and warning against the "uncertainly and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of a Senate communication).

B. The Senate's Use Of *Pro Forma* Sessions, At Which No Business Was To Be Conducted, Did Not Eliminate The President's Recess Appointment Power

1. The Company does not claim that the Senate was conducting regular business at any point during the January break. Nor does it suggest that a 20-day break in business is too short to constitute a recess for the President to exercise his recess appointment power. Instead, it asks this Court to ignore the Senate's extended absence, the deliberate steps taken by the Senate to provide that no business would take place during that absence, and the Executive Branch and the Senate's longstanding construction of the Recess Appointments Clause. Its position rests entirely on the claim that holding intermittent and fleeting *pro forma* sessions at which, by Senate order, no business could be conducted, precluded the President from treating the relevant 20-day period as a "Recess of the Senate." Br. 32-33, 43.

The Company's argument fails because the *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was not done, *i.e.*, that "no business" would be conducted under the Senate's own

prescription. The *pro forma* session on January 6 was typical. A virtually empty Senate Chamber was gaveled into *pro forma* session by Senator Jim Webb of Virginia. No prayer was said and the Pledge of Allegiance was not recited, as typically occurs during regular daily Senate sessions.[16] Instead, an assistant bill clerk read a two-sentence letter directing Senator Webb to "perform the duties of the Chair," and Senator Webb immediately adjourned the Senate until January 10, 2012. The day's "session" lasted 29 seconds. As far as the video reveals, no other Senator was present. *See* 158 Cong. Rec. S3 (daily ed. Jan. 6, 2012); *Senate Session 2012-01-06*, http://www.youtube.com/watch?v=teEtsd1wd4c.[17] These sessions allowed the Senate to assume compliance with the constitutional requirement that it not adjourn for more than three days without concurrence of the House;[18] we explain below why that argument is irrelevant for the Recess Appointments Clause analysis.

As the record of January 6 reveals, the *pro forma* sessions were mere

---

[16] *Compare* 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) *with* 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); *see also id.* at S8783-84 (daily ed. Dec. 17, 2011) (making clear that "the prayer and pledge" would be required only during the January 23, 2012, session).

[17] *See also* 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (29-second *pro forma* session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

[18] U.S. Const., art. I, § 5, cl. 4.

technical formalities whose principal function was to allow the Senate to cease business between January 3 to 23. Historically, when the Senate wanted to take a break from regular business over an extended period of time—that is, to be in recess—it followed a process in which the two Houses of Congress pass a concurrent resolution of adjournment, which authorizes the Senate to cease business over that period of time. Since 2007, however, the Senate has, instead, frequently used *pro forma* sessions to suspend its business and create recesses during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.[19] Indeed, since August 2008, the Senate has, on five different occasions, used *pro forma* sessions to permit breaks in business in excess of thirty days. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (describing breaks of 31, 34, 43, 46 and 47 days punctuated by *pro forma* sessions). The fact that *pro forma* sessions occurred during the January break does not alter the fact that the Senate broke from business for a continuous 20-day period; the *pro forma* sessions were merely the mechanism used to facilitate that

[19] The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when it was unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (2002). The Senate's *regular* use of *pro forma* sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued frequently since. *See generally* Official Congressional Directory 2011-2012: 112th Congress ("Congressional Directory") 536-38 (2011).

break.[20]

This procedural innovation to facilitate recesses, however, does not alter application of the Recess Appointments Clause. The orders providing for *pro forma* sessions are functionally indistinguishable from concurrent adjournment resolutions for the purposes of the Recess Appointments Clause: both allow the Senate to cease doing business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. The only difference is that one Senator is at the Capitol to gavel in and out the *pro forma* sessions. As with other recesses, no other Senator need attend and "no business [may be] conducted." That single difference is immaterial for purposes of the Recess Appointments Clause and does not affect whether the Senate is in "Recess" as the term has long been understood. The inquiry for purposes of that Clause is whether "the members of the Senate owe . . . [a] duty of attendance? Is its Chamber empty? Is the Senate absent so that it

[20] Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, 2012, that three-day break would support the President's recess appointments in the circumstances of this case. That break was not akin to a long-weekend recess, or an evening or lunch-time adjournment, between regular working sessions of the Senate; the President does not claim the authority to make appointments during such routine intermissions in Senate business. Rather, the three-day break here was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity.

can not receive communications from the President or participate as a body in making appointments?" 33 Op. Att'y Gen. at 21-22, 25 (emphasis in original); *accord* S. Rep. No. 58-4389, at 2.

There is no question that under this well-established standard the Senate was in recess from January 3 to January 23, 2012, notwithstanding the periodic *pro forma* sessions. The *pro forma* sessions were part and parcel of the Senate's 20-day recess—its ongoing "suspension" of the Senate's usual "business or procedure," II Webster, *supra* at 51—not an interruption of that recess. To conclude otherwise would "give the word 'recess' a technical and not a practical construction," would "disregard substance for form," 33 Op. Att'y Gen. at 22, and would flout the Supreme Court's admonition to exclude "secret or technical meanings that would not have been known to ordinary citizens in the founding generation" when interpreting constitutional terms. *Heller*, 554 U.S. at 577.

2. The Company disputes the Executive Branch's assessment of the *pro forma* sessions, urging that "there is no meaningful factual difference between *pro forma* sessions and other sessions." Br. 42. Although it acknowledges that "*availability* to work is the key to assessing whether the Senate is in recess," Br. 4, the Company nevertheless urges that the Senate *was* "fully capable of doing business at its pro forma sessions." Br. 42; *see also* Br. 41-50. That assertion is incorrect: as we next explain, the Senate was not capable of doing business during

this period absent unanimous consent and the conversion of the *pro forma* session to a working session. The Company has provided no support for its assertion that the Senate was available to provide advice and consent, or conduct business of any other sort, within the meaning of the Recess Appointments Clause.

a. The Company points to the fact (Br. 46-47) that the Senate has previously passed legislation during sessions that had originally been ordered to be *pro forma* sessions with no business conducted. *See, e.g.*, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend temporarily the payroll tax cut). The Company also urges that "the Senate is fully capable of providing advice and consent to nominations" at sessions that were scheduled to be *pro forma*. Br. 48-49.

This argument, however, ignores the fact that the Senate could have passed legislation or confirmed nominees only by overriding its previous unanimous consent order that no business be conducted during the January break. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Company attempts to minimize the force of that order by describing it as merely a "prediction" that the Senate "would not conduct business at its pro forma sessions." Br. 49. But it is far more than that. As explained above (see *supra* pp.31-32), a unanimous consent agreement is a binding order of the Senate that can be overridden only through a new unanimous consent agreement. *See, e.g.*, 149 Cong. Rec. S1845 (daily ed. Feb. 3, 2003)

(noting that before the Senate could conduct business related to the Shuttle Columbia disaster, it had to agree by "unanimous consent that the order for a *pro forma* session be vitiated"). As a result, a single objecting Senator could have prevented the Senate from conducting any business during the January break. Thus, the *pro forma* sessions held during that break were entirely different in kind from regular Senate working sessions. *See* Riddick's Senate Procedure at 1311 ("A unanimous consent agreement . . . creates a situation on the Senate floor very different from that which exists in the absence of such agreement.").

Even more fundamentally, the Company's argument provides no basis for distinguishing the January 2012 recess from many other recesses that even it would concede constitute recesses for purposes of the Recess Appointments Clause. Indeed, petitioner's logic would place virtually *all* recesses outside the scope of the Clause. Concurrent resolutions of adjournment typically allow the leadership of the House and Senate to reconvene either or both Houses before the end of a recess if the public interest warrants it.[21] In this setting, the mere possibility that Senate

[21] *See* e.g., H. Con. Res. 307, 111th Cong. (passed Aug. 5, 2010) (giving the Senate majority leader the power to reassemble the Senate); *see generally* John V. Sullivan, Parliamentarian, *Constitution, Jefferson's Manual & Rules of the House of Representatives*, 112th Congress, H. Doc. No. 111-157 ("House Manual"), at 38-39 (2011) ("A concurrent resolution adjourning both Houses for more than three days, or sine die, normally includes joint leadership authority to reassemble the Members whenever the public interest shall warrant it. . . . On occasion an adjournment resolution has provided for one-House recall.").

leadership might recall the Senate to conduct business during a recess does not mean that the Senate is "available to conduct business" or render the President unable to make recess appointments. By the same token, that the Senate *could* have superseded its adjournment order by unanimous consent and conducted business during the January 2012 recess does not change the fact that the Senate was in recess, and likewise did not prevent the President from making recess appointments. In fact, overriding a unanimous consent agreement may be *more* difficult than a simple recall—the latter can be done at the instigation of Senate leadership, while the former can be blocked by a single Senator.

Indeed, before the recess appointment at issue in *Evans v. Stephens*, 387 F.3d 1220, the Senate had adjourned pursuant to a resolution that expressly provided for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that recess appointment. *Evans*, 387 F.3d at 1222.[22] Similarly, in August 2005, President Bush made a number of recess appointments during the Senate's recess

[22] The *en banc* court further rejected the argument that "this specific recess appointment circumvented and showed an improper lack of deference to the Senate's advice-and-consent role," because arguments over "how much Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him" move "beyond interpretation of the text of the Constitution." 387 F.3d at 1227. This Court should similarly decline to entertain *amici* Senators' arguments regarding the President's motivations behind these appointments. *See* Amicus Br. of Sen. McConnell, *et al.*, at 28.

(including John Bolton to be the United States' representative to the United Nations and Peter Schaumber to the NLRB); the validity of these appointments was undisputed even though Congress subsequently exercised its authority to return early from its scheduled recess to respond to Hurricane Katrina.[23] And in August 2010, President Obama made four recess appointments after the Senate had temporarily interrupted an ongoing recess to pass emergency legislation pursuant to recall authority in a concurrent resolution.[24]

b. The Company also claims that the "Senate regularly uses pro forma sessions for a variety of other parliamentary purposes." Br. 45. But the fact that the Senate may use *pro forma* sessions for purely internal purposes, such as allowing a cloture vote to ripen (Br.45) or to calculate statutory deadlines for congressional action (Amicus Br. of Sen. McConnell *et al.* at 24), does not control

---

[23] H. Con. Res. 225, 109th Cong. (July 28, 2005) (providing for adjournment between July 29 and September 6, 2005, but allowing for early recall); Henry B. Hogue & Maureen Bearden, Cong. Research Serv., *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008* at 13-14 (2008) (noting recess appointments of Bolton on August 1, and Schaumber on August 31); 151 Cong. Rec. S9593 (daily ed. Sept. 1, 2005) (reconvening early from intrasession recess).

[24] 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010) (passing concurrent resolution giving Senate majority leader the power to reassemble the Senate); *id.* at S6995, S6996-7 (daily ed. Aug. 12, 2010) (Majority Leader exercising his recall authority to permit the Senate to pass an emergency border security appropriation); *id.* at S7001 (adjourning again until September 13 pursuant to concurrent resolution); The White House, Office of the Press Secretary, *President Obama Announces Recess Appointments to Key Administration Posts* (Aug. 19, 2010) (announcing four recess appointments).

the question of whether such sessions vitiate the President's recess appointment power. As explained above, the Senate made clear that it would not be available to conduct business from January 3 to 23, 2012: it adopted a binding order that no business be conducted during its January break and referred to its upcoming break as a "recess."

In any event, the examples of the use of *pro forma* sessions on which the Company relies are wrong or inapposite. For example, the Company claims that the Senate employs *pro forma* sessions "specifically in order to permit committee meetings." Br. 45. That is incorrect; standing Senate committees are authorized by Senate Rule to meet during Senate recesses.[25] Regardless, the relevant inquiry for Recess Appointments Clause purposes is not whether committees may meet; it is whether the Senate as a body is available to conduct its regular business, including providing advice and consent on Presidential nominees. *See* 33 Op. Att'y Gen. at 25 ("Is the Senate absent so that it can not * * * participate *as a body* in making appointments?" (emphasis added)). The fact that Senate committees can

[25] *See* Senate Rule XXVI, paragraph 1; Stanley Bach and Betsey Palmer, Cong. Res. Serv., *Senate Rules Affecting Committees* 2 (2003); *see also* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2242 n.209 (1994) (collecting examples). The Company relies on a quote from Senator Reid (Br. 45), but in light of the foregoing, it is possible that Senator Reid had in mind a different rule, Senate Rule XXXVI, para. 5(a), which prohibits committee meetings during floor sessions, but notably does not apply when the Senate is holding *pro forma* sessions. *See* 98 Cong. Rec. 3955 (1952).

meet during a recess, or for that matter, that Senators can review materials related to nominations while in recess, is entirely irrelevant to this inquiry.

The Company's reliance on other examples of supposed uses of *pro forma* sessions is similarly flawed. The Company asserts that the Senate has previously "[c]onvened pro forma for the purpose of hearing a presidential address." Br. 46. But the floor statement it cites refers to sessions being "pro forma *or* solely for the purpose of hearing the Presidents Day address on Wednesday morning," 139 Cong. Rec. 3039 (1993) (emphasis added). The floor statement thus distinguishes between a *pro forma* session and one convened to hear an address (one by a Senator, not the President). Indeed, by Senate order, the session held to hear the Presidents' Day address was a regular working session of the Senate. 139 Cong. Rec. 3196, 3419 (1993). The Company is also mistaken in pointing to *pro forma* sessions during which the Senate engaged in internal management like rescheduling future sessions or delegating authority to sign enrolled bills. Br. 46. In both such instances petitioner cites, the Senate adopted these housekeeping measures only after agreement by unanimous consent. *See* 109 Cong. Rec. 22,941 (1964); 127 Cong. Rec. 263 (1981).[26]

---

[26] In the case of the *pro forma* session on December 23, 2011, messages were not read into the record until a unanimous consent agreement to pass legislation overrode the order for a *pro forma* session and brought about a substantive working session of the Senate. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (message from the House received "on December 19, 2011, during the

3. The Company's contention that the Executive Branch has conceded that *pro forma* sessions can interrupt a Senate recess misses the mark. The passing reference by the Solicitor General in the course of a letter principally addressed to other subjects (Br. 51-52) was in no way aimed at definitively resolving the issue in this case. The Department of Justice has since conducted a thorough examination of the legal implications of the Senate's practice of providing for mere *pro forma* sessions at which no business is to be conducted. That analysis concludes that such *pro forma* sessions do not interrupt a Senate recess for purposes of the President's recess appointment power. *See* Department of Justice, Office of Legal Counsel, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645 (Jan. 6, 2012). The Department's position in this case is entirely consistent with that analysis.[27]

---

adjournment of the Senate"); *id.* at S8787 (daily ed. Dec. 20, 2012) (record of *pro forma* session with no mention of receipt of message). As explained above, messages from the President and the House received are not laid before the Senate and entered into the Congressional Record during *pro forma* sessions, but are instead saved until the next working session of Congress.

[27] The January 2012 recess appointments are also consistent with prior advice from the Department of Justice in the most closely analogous situation. In 1992, the Department addressed the propriety of making recess appointments during a recess that occurred from January 3 to 21, 1992. 16 Op. O.L.C. 15 (1992). The Department noted that, aside from a "brief formal session on January 3" at which the body conducted no business, the Senate had been in recess since November 27, 1991. *Id.* at 15 n.1. The Department considered the recess in question to be 18

Nor is the Company's effort advanced by its claim that President Reagan agreed to provide the Senate with advance notice of recess appointments because Senator Byrd had threatened to use *pro forma* sessions to block the President's recess appointment power. Br. 53. The Company's contention that, by agreeing to give advance notice, President Reagan had conceded that "the Senate *could have* prevented him from making any recess appointments by convening pro forma," Br. 53, is baseless. In fact, the Congressional Research Service has identified a different reason for President Reagan's compromise: because "Byrd and Senate Democrats [had] held up action on seventy presidential nominations 'touching virtually every area of the executive branch,' including executive officials and federal judges," the President compromised to ensure that the Senate would vote on his nominees after the recess. Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 254-54 (2008) (quoting CRS report).[28]

---

days long, *id.* at 16, but it also observed that "[f]or practical purposes with respect to nominations, this recess closely resembles one of substantially greater length." *Id.*

[28] Senator Inhofe, whose floor statement The Company cites, himself identified the blanket hold as a reason for Reagan's compromise, *see* 145 Cong. Rec. 29,915-16, and obtained a similar agreement from President Clinton by putting a blanket hold on Clinton's nominations. Hein, *supra* at 254.

C. The Company's Reliance On Constitutional Provisions Other Than The Recess Appointments Clause Is Misplaced.

Instead of focusing its attention on the text, history, and established understanding of the Recess Appointments Clause, *see supra* at pp.25-35, the Company spends the bulk of its brief attempting to draw support from other provisions of the Constitution. But whatever effect *pro forma* sessions may have vis-à-vis other parts of the Constitution, under the established meaning of the Recess Appointments Clause, there was a "Recess of the Senate" here: the Senate had provided by binding order that it would conduct no business during its January break; it in fact conducted no business during that break; and it referred to its January break as a "recess." In all events, The Company's arguments are mistaken even on their own terms.

1. The Adjournment Clause

The Company asserts that the Senate and House of Representatives regard *pro forma* sessions as complying with the command of the Adjournment Clause that "[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days," U.S. Const. art. I, § 5, cl. 4, and that this legislative determination cabins the President's powers under the Recess Appointments Clause. *See generally* Br. 35-36. The Company and the amici Senators further urge that because "the Senate never adjourned for more than three days under the Adjournment Clause" pursuant to a concurrent resolution, there

could not have been a "Recess of the Senate" within the meaning of the Recess Appointments Clause. Br. 35; Amicus Br. of Sen. McConnell, *et al*., at 15.

This argument is flawed at several levels. As an initial matter, this Court need not address the question of whether the Senate's *pro forma* sessions were sufficient to prevent it from having "adjourn[ed] for more than three days" within the meaning of the Adjournment Clause. Contrary to petitioner's suggestion (Br.4, 40), by making the recess appointments here, the President did not opine on the implications of *pro forma* sessions for the Adjournment Clause. Rather, the requirements of each Clause must be interpreted primarily based on its own text, history, and purpose.[29] The Adjournment Clause relates to internal operations and obligations of the Legislative Branch. With respect to such purely internal matters, the respective Houses presumably would act in accordance with their understandings of the Clause, and each House has the ability to respond to (or to

---

[29] The Company misses the mark in relying on the government's statement in the court of appeals briefing in *Evans v. Stevens*, 387 F.3d 1220, referring to "extensive evidence suggesting that 'adjournment' and 'recess' are constitutionally equivalent." (Br. 31-32). To the extent the government was drawing upon the Adjournment Clause to impart meaning to the Recess Appointments Clause, it was only to make the point, not at issue in this case, that a three-day break between ordinary working sessions of the Senate is generally not regarded as a sufficient break in business to be considered a recess. The break during which no Senate business was conducted here, however, lasted for 20 days. Further, the government's briefing in *Evans* was not in any respect addressing the question of whether *pro forma* sessions disrupt such a recess for the purposes of the Recess Appointments Clause.

overlook) any potential violation of that Clause.[30] That would ordinarily not be an issue for the other Branches. In contrast, the Recess Appointments Clause defines the scope of an exclusively Presidential power, and that Clause's interpretation has ramifications far beyond the Legislative Branch. The Senate's *pro forma* sessions could not eliminate the President's recess appointment power, whatever their effect with respect to the Adjournment Clause.

Even if this Court were forced to squarely confront the Adjournment Clause issue—which, again, it need not do—it would have to determine whether the Senate "adjourn[ed] for more than three days" within the meaning of that clause, and, if the Senate did so adjourn, whether it was "without the Consent of the other," *i.e.*, the House of Representatives. U.S. Const. art. I, § 5, cl. 4. Accepting *arguendo* the Company's blanket contention that Adjournment Clause, the better view is that the Senate *did* adjourn for more than three days within the meaning of the Adjournment Clause. As the Company acknowledges (Br. 37), the basic purpose of the Adjournment Clause is to furnish each House of Congress with the ability to ensure the simultaneous presence of both Houses of Congress so that they can conduct legislative business, by forcing each House to get the consent of the

---

[30] *See* Riddick's Senate Procedure at 15 (noting that "in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it").

other before departing. *See* Thomas Jefferson, *Constitutionality of Residence Bill of 1790*, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (explaining the Adjournment Clause was "necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will."). For the reasons explained above (*supra* at pp.39-43), the Senate had rendered itself *unavailable* to do business between January 3 to 23, 2012, giving Senators the ability to leave town without concern that business could be conducted in their absence.

Assuming the Senate thus had "adjourn[ed]" within the meaning of the Adjournment Clause, the question whether there was a violation of the Clause then would depend on whether the House of Representatives "Consent[ed]" to the Senate order providing for its January recess; any such consent by the House would mean that there was no violation of the Adjournment Clause by the Senate.[31] That, however, would be an issue for resolution by the House of Representatives or between the two Houses, not for this Court (or any court). Here, as the Company points out (Br. 8-9), the House was aware that the Senate had adopted an order to not conduct business during the January break. Rather

[31] While a concurrent resolution is the typical method by which each House has expressed its consent to an adjournment of more than three days, contrary to the amici Senators' assertion, the Constitution does not mandate the use of a concurrent resolution or any other particular method of expressing consent. *See* Amicus Br. of Sen. McConnell, *et al.*, at 16.

than objecting to that order, the House adopted its own corresponding resolution permitting the Speaker to "dispense with organizational and legislative business" over roughly that same period of time (January 3 to January 17). *See* H. Res. 493, 112th Cong. (2011).[32] Whatever the implications of that course of events for purposes of the relationship between the two Houses under the Adjournment Clause, the Senate's declared and actual break in business between January 3rd and 23rd was a "Recess of the Senate" for purposes of the President's authority under the Recess Appointments Clause.

2. The Twentieth Amendment

The Company also mistakenly invokes Section 2 of the Twentieth Amendment (Br. 9, 43-45), which provides that "[t]he Congress shall assemble at least once in every year," and that "such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const., amend. XX, § 2. Like the Adjournment Clause, the Twentieth Amendment relates primarily to the intra-Branch operations and obligations of the Legislative Branch. A congressional determination about the effects of the *pro forma* session for that

[32] The Adjournment Clause does not obligate the two houses of Congress to adjourn for identical periods. Indeed, "[i]n the modern practice it is common for a concurrent resolution to provide for a one-House adjournment or to provide for each House to adjourn for different time periods." House Manual at 38. Thus, on various occasions, the Senate and House have agreed to adjourn for different lengths of time. *See, e.g., ibid.* (citing examples).

purpose do not render such a session significant for purposes of the Recess Appointments Clause, where the powers of a coordinate Branch are concerned.

The Twentieth Amendment has two aspects. First, the "assembl[y]" requirement—which was part of the original Constitution, U.S. Const. art. I, § 4—ensures that Congress convenes for legislative business at least annually.[33] Second, the requirement that the "meeting shall begin" at noon on January 3 or the "different day" provided by law, sets the time for the start of the annual session of Congress (*e.g.*, the Second Session of the 112th Congress).[34]

The Senate held a *pro forma* session on January 3 in an effort to fulfill these requirements; but contrary to the Company's claim (Br. 54-55), the government has not conceded that this effort was successful.[35] In any event, the relevant recess here began after the start of the Second Session of 112th Congress on January 3

---

[33] James Madison, *Notes of Debates in the Federal Convention of 1787* at 399 (W.W. Norton & Co. 1966) (George Mason) ("[A]n annual meeting ought to be required as essential to the preservation of the Constitution. The extent of the Country will supply business; and if it should not, the Legislature, besides *legislative*, is to have *inquisitorial* powers, which cannot safely be long kept in a state of suspension").

[34] House Manual at 307–308; *Ashley v. Keith Oil Corp.*, 7 F.R.D. 589, 590 (1947); *see also* 75 Cong. Rec. 1373 (Jan. 6, 1932) (floor colloquy between Senators Norris and Walsh during debates regarding the Twentieth Amendment).

[35] The Office of Legal Counsel opinion cited by the Company expressly reserved judgment on the effect of *pro forma* sessions for other constitutional purposes, including the assembly requirement of the Twentieth Amendment. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, *15.

and continued until January 23—a 20-day break in business that is more than sufficient to qualify as a "Recess of the Senate."

The government is indeed of the view that the Second Session of the 112th Congress began at noon on January 3, 2012. But that position does not depend on the fact that a *pro forma* session was held at that time. Absent a law appointing a different date, the congressional Session begins at noon on January 3 whether or not Congress in fact "assemble[s]" on this date. To hold otherwise would vitiate the Twentieth Amendment's requirement that the start date of the annual Session may only be changed "by law," including the usual requirement of presentment to the President, rather than unilateral action of Congress or one of its Houses.[36] Thus, whatever the significance of the *pro forma* session as an "assembly," the new Session began by operation of the Twentieth Amendment.

3. The Pocket Veto Clause

The Company relies on inapposite case law and congressional testimony addressing the scope of the Pocket Veto Clause, U.S. Const. art. I, § 7, cl. 2. *See* Br. 38-39 (citing *Wright v. United States*, 302 U.S. 583 (1938)). Legal precedent addressing the Pocket Veto Clause does not determine the meaning of the Recess Appointments Clause. *See Recess Appointment Issues*, 6 Op. O.L.C. 585, 589

[36] Congress sometimes has enacted legislation to vary the date of its first annual meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but it did not do so here.

(1982) (explaining that the Clauses' "language, effects, and purposes are by no means identical"). Petitioner's reliance on the Pocket Veto Clause in all events turns on its flawed assumption that the Senate merely went on a "brief recess" of three days in January 2012. Br. 38 (internal quotation marks and citation omitted). That assumption is unwarranted where, as here, the Senate had, by unanimous consent, provided that no business would be conducted over a 20-day period.

The Company also cites in passing a decision by this Court addressing the Pocket Veto Clause, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). *See* Br. 39. The government has taken the position (in briefing in *Burke v. Barnes*, 479 U.S. 361 (1987)) that that decision was incorrect. But even if correct and relevant, it is consistent with our position here. *Sampson* held that a brief intrasession adjournment of Congress did not "prevent [the] Return" from the President of a disapproved bill, and thus did not trigger the Pocket Veto Clause, because the originating House took affirmative steps to enable the President to return the bill during the adjournment. *See Sampson*, 511 F.2d at 437-40 & n.26. Here, in contrast, the Senate ordered that no business be conducted from January 3 to 23, thus preventing the President from making appointments with the Senate's advice and consent during that period.

4. The Rules of Proceedings Clause

The Company urges that the Senate itself has "determined that it was in session during the period in question" because it engaged in *pro forma* sessions. Br. 58-59. Based on that view of the Senate's actions, the Company asserts (Br. 59-63) that under the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, the President and this Court lack the power to second-guess the Senate's determination.

The Rules of Proceedings Clause does not aid the Company here. As an initial matter, the Senate's decision to engage in *pro forma* sessions does not constitute a Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no rule or resolution setting forth the conclusion that the Senate was not in recess for purposes of the Clause. Individual Senators' statements that *pro forma* sessions preclude recess appointments do not constitute a Senate determination on that score.[37] Even less relevant are the views of individual members of the *House*, *see*

[37] *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those "authorized to represent their respective Houses of Congress"); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate's interest in litigation as amicus curiae only upon a resolution adopted by the Senate). The Company fails to cite a valid source for its claim that the Senate's "explicit purpose" was to block the President's recess appointment power. *See* Vivian S. Chu, Cong. Res. Serv., *Recess Appointments: A Legal Overview* at 19 (2011) (citing only the views of individual senators) (cited at Br. 59).

Br. 8, who have no role in the appointment process. Indeed, the only formal statements from the Senate as a body were the order that there would be "no business conducted" during its *pro forma* sessions, and its various orders referring to the January break as a "recess." And, as explained, the recess appointments here are entirely consistent with the Senate's own longstanding interpretation of the Recess Appointments Clause.

Apart from the Company's failure to point to a "Rule" defining the January break not to be a recess, the Rules of Proceedings Clause in any event provides the Senate with authority only to establish rules governing the Senate's *internal* processes and "only empowers Congress to bind itself." *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983). The Senate cannot, through exercise of that circumscribed authority, unilaterally control the interpretation of the Recess Appointments Clause or determine the *consequences* of Senate action for the authority of a coordinate Branch, as the Company suggests (Br. 22-23). The Supreme Court has made clear that Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892).[38] Thus, although Congress may generally

[38] *See United States v. Smith*, 286 U.S. 6, 33 (1932) ("As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity."). In any event, the question here is not the "meaning" of the Senate's order of adjournment. Its meaning was clear—all sessions were to be only *pro forma* and no business was

"determine the Rules of its Proceedings," that constitutional provision does not control here, because this case does not solely involve matters internal to the Legislative Branch—it concerns the President's Article II appointment powers.

Indeed, the Company's reliance on the Rules of Proceedings Clause is particularly inapt because the recess appointments here were an exercise of President's authority under Article II, not Legislative power under Article I. Thus, the President's determination that the predicate for the exercise of his authority (that the Senate was in "Recess") had occurred warrants deference. *See Evans*, 387 F.3d at 1222 (en banc) (noting that "when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional"); *Allocco*, 305 F.2d at 713 (before making a recess appointment, "the President must in the first instance decide whether he acts in accordance with his constitutional powers").

Indeed, in 1980, the Comptroller General—an officer of the Legislative Branch—affirmed the President's authority to make appointments to a newly created federal agency during an intrasession recess, relying on the Attorney General's opinion that "the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which

---

to be conducted. The question here concerns the significance under the Constitution of the Senate's unambiguous act for events occurring *outside* the Senate.

makes it impossible for him to receive the advice and consent of the Senate." *See In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att'y Gen. 20 (1921)).[39]

The Company's reliance (Br. 60) on *United States v. Ballin* is misplaced. In *Ballin*, the question before the Court—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by a formal quorum call that had been entered into the House journal. 144 U.S. at 2-3. In that context, the Court stated the Rules of Proceedings Clause allows each House to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." *Id.* at 4. In contrast, as noted, the Senate as a body issued no formal rule or resolution indicating that it regarded itself as not in recess under the Recess

[39] This view has long historical roots in the Senate. In 1814, Senators from opposing political parties agreed that President Madison was owed deference in his exercise of the recess appointment power. *See* 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (observing that the Recess Appointments Clause "delegates to the President *exclusively* the power to fill up *all* vacancies which happen during the recess of the Senate" and that "where a discretionary power is granted to do a particular act, in the happening of certain events, that the party to whom the power is delegated is necessarily constituted the judge whether the events have happened, and whether it is proper to exercise the authority with which he is clothed"); 26 Annals of Cong. 707-08 (April 1, 1814) (Sen. Horsey) ("[S]o far as respects the exercise of the qualified power of appointment, lodged by the Constitution with the Executive, . . . the Senate have no right to meddle with it."). These Senators' view prevailed against a movement to censure the President's use of his recess appointment authority. *See* Irving Brant, JAMES MADISON: COMMANDER IN CHIEF 1812-1836, at 242-43 (1961) (explaining that the effort to censure the President "collapsed when [Horsey] cited seventeen diplomatic offices created and filled by former Executives while the Senate was in recess").

Appointments Clause. To the contrary, as explained, the orders adopted by the Senate as a body *reinforce* the conclusion that the Senate was in recess and not in a condition to conduct business. And, in any event, the Senate's own view would not control the interpretation of the Recess Appointments Clause's vesting of authority in the President.

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), and related cases are irrelevant because this case does not involve a challenge to legislation passed by Congress and signed by the President. *See* Br. 61-62. As this Court has explained, *Marshall Field* requires that the judiciary "treat the attestations of 'the two houses, through their presiding officer' as 'conclusive evidence that [a bill] was passed by Congress.'" *See Public Citizen v. U.S. Dist. Ct. for Dist. of Columbia*, 486 F.3d 1342, 1343 (D.C. Cir. 2007). That principle is entirely inapposite here.

D. The Company's Position Would Frustrate The Constitutional Design And Upend The Longstanding Balance Of Powers With Respect To Recess Appointments.

Allowing a *pro forma* session to disable the President from acting under the Recess Appointments Clause would frustrate the Constitution's design to ensure a mechanism for filling offices at all times, and would upend a longstanding balance of powers between the Senate and President. The Supreme Court has repeatedly condemned congressional action that "disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its

constitutionally assigned functions." *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Yet accepting the Company's position would do just that, by allowing the Senate to effectively eliminate the President's power to make temporary appointments when the Senate makes itself unavailable to advise and consent.

The constitutional structure gives the Senate a choice: either the Senate can remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to perform its function of advice and consent; or the Senate can "suspen[d] . . . business," II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business, during which time the President can make temporary appointments to vacant positions. The understanding that the Senate is confined to one or the other of these options is evidenced by past compromises between the President and the Senate over recess appointments.[40] For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May

[40] *See generally* Hein, *In Defense of Broad Recess Appointment Power*, *supra* at 253-55 (describing various political confrontations over recess appointments culminating in negotiated agreements between the Senate and the President).

19, 2004. These political accommodations allowed both Branches to protect their respective institutional prerogatives: they gave the President assurance that the Senate would act on his nominations, while freeing the Senators to cease business and return to their respective States without losing the opportunity to provide "advice and consent."

Under the Company's view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate had always possessed the authority to unilaterally divest the President of his recess appointment power even when the Senators depart the capital and order that no business be conducted over any period of time, so long as they follow the simple expedient of having a single Member gavel in fleeting *pro forma* sessions during that period. Under the Company's logic, early Presidents could not have made recess appointments during the Senators' months-long absences from Washington if the Senate had merely provided for such action by one Member every few days.

History provides no support for that view of the Constitution. To the contrary, prior to 2007 (when the Senate began providing for *pro forma* sessions during absences that it historically would have taken per a concurrent resolution of adjournment), the Senate never before had even arguably purported to exercise the power to be simultaneously in session for Recess Appointments Clause purposes and yet physically absent and officially not conducting any business for an

extended period of time. That historical record "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, "prolonged reticence" of the Senate to assert that the President's recess appointment power could be so easily nullified "would be amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

The Company's position raises significant separation-of-powers concerns that are vividly illustrated by this case. If, as the Company urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, the Board would have been unable to carry out significant portions of its statutory mission during the Senate's entire January recess, thus preventing the execution of a duly passed Act of Congress and the performance of the functions of an office "established by Law," U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional structure and balance of powers, which ensure that all Branches can carry out their duties, including the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

In contrast, giving effect to the President's recess appointments here leaves in place the established constitutional framework and balance between the political Branches. The President's recess appointments are only temporary; recess

commissions granted by the President "expire at the End of [the Senate's] next Session." U.S. Const. art. II, § 2, cl. 3. The Senate retains authority to vote on the Board nominations, which remain pending before it. More broadly, the Senate retains the choice it has always had: remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President's recess appointment power, or ceasing to conduct business (and potentially leaving the capital) knowing that the President may make temporary appointments during that period.

Indeed, since the recess appointments at issue here, the President and Senate have resumed the traditional means of using the political process to reach inter-Branch accommodation regarding appointments. In April 2012, the Senate agreed "to approve a slate of nominees," while the President "promis[ed] not to use his recess powers." Stephen Dinan, The Washington Times, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of compromise that the political Branches have often reached, and reflects a longstanding inter-Branch balance of power. This Court should not upset that balance.

Contrary to the Company's claim (Br. 66), the government's position would not create "a limitless recess appointment power." The government is not asserting that the President possesses "virtually unreviewable discretion to make 'recess' appointments whenever he deemed the Senate to be 'unavailable.'" Br. 57.

Likewise, the Company's claim that the government's position would allow the President to make recess appointments during "weekends or evenings or even lunch breaks" is hyperbole. *Ibid.* The President's recess appointment authority is constrained by the well-established functional standard described above, and is subject to judicial review in appropriate cases. *See, e.g.*, *Evans*, 387 F.3d 1220. Under that standard, a routine adjournment for an evening, a weekend, or a lunch break occurring during regular working sessions of the Senate does not constitute a "Recess of the Senate" under the Recess Appointments Clause.

E. The President May Fill Vacancies That Happen To Exist During Intrasession And Intersession Recesses.

The Company attempts to buttress its argument by pointing to two supposed limits on the President's power under the Recess Appointments Clause that it claims "have, over time, been ignored by successive Presidents." Br. 69. First, it urges that the President may make recess appointments "only to positions that *became* vacant *during* the Senate recess." Br. 70 (first emphasis added). Second, it contends that the Recess Appointments Clause permits recess appointments only during *inter*session recesses—*i.e.*, those occurring after the formal end of an annual congressional Session—and not during *intra*session recesses. Br. 71-72. The Company disclaims any challenge to the January 4 Board appointments on either of these grounds, Br. 72-73, and so these points are not relevant to the issue

before this Court. In any event, the Company's contentions are wholly without merit.

1. The Recess Appointments Clause gives the president the authority to fill "all Vacancies that *may happen during* the Recess." U.S. Const. art. II, § 2, cl. 3 (emphasis added). As explained almost two hundred years ago, the term "happen" does not undisputedly mean, as the Company suggests, "happen to occur"; it "may mean, also . . .'happen to exist.'" 1 Op. Att'y Gen. 631, 632 (1823). When "determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning," courts look to "[l]ong settled and established practice" as a "consideration of great weight in a proper interpretation" of the Constitution's text. *The Pocket Veto Case*, 279 U.S. at 688-90 (internal quotation marks omitted).

In this context, long-established practice—as well as the purpose of the Clause—precludes the Company's interpretation. In 1823, Attorney General Wirt concluded that "happen" should not be interpreted as "originate," explaining that the Clause should be interpreted to permit the President to use his recess appointment powers to fill vacancies that predated the recess in question, or else the purpose of the Clause—and the President's ability to execute the law—would be seriously impeded. *See* 1 Op. Att'y Gen. at 632-33. Properly construed, "all vacancies which . . . *happen to exist* at a time when the Senate cannot be consulted

as to filling them, may be temporarily filled by the President." *Id.* at 633 (emphasis added). For over 150 years, the Executive Branch has followed and acted in reliance upon this opinion, and has done so against a backdrop of longstanding congressional acquiescence. *See Allocco*, 305 F.2d at 713 (offering citations to the "long and continuous line of [Attorney General] opinions" on this point, and noting that "Congress has implicitly recognized the President's power to fill vacancies which arise when the Senate is in session by authorizing payment of salaries to most persons so appointed under the recess power").

In light of this lengthy history and the purposes of the Recess Appointments Clause, it is unsurprising that the Company's crabbed interpretation of "happen" has been squarely rejected by all three courts of appeals to consider the argument. *See Evans*, 387 F.3d at 1226-27 (explaining that interpreting "happen" as happen to arise would "contradict[] . . . the purpose of the Recess Appointments Clause"); *Woodley*, 751 F.2d at 1012-13 (en banc) (same); *Allocco*, 305 F.2d at 709-15 (concluding that such an interpretation of happen was "inconceivable" in light of Framers' intent and pointing to longstanding Executive precedent). The Company offers no valid reason to disregard the purposes of the Recess Appointments Clause, to ignore almost two centuries of Executive Branch practice, and to create a split with the three courts of appeals that have addressed this question.

2. The Company's argument that the Recess Appointments Clause permits recess appointments only during *inter*session recesses is also incorrect. The Recess Appointments Clause provides that the President may make recess appointments "during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The Eleventh Circuit has explained that "the text of the Constitution does not differentiate expressly between inter- and intrasession recesses for the Recess Appointments Clause." *Evans*, 387 F.3d at 1224. And "the Framers' use of the term 'the' [does not] unambiguously point[] to the single recess that comes at the end of a Session." *Ibid*.

As used elsewhere in the Constitution, the phrase "during the Recess" refers to recesses generally, whether during or after the end of an annual session. At the time the Constitution was being drafted, some state legislatures regularly took extended breaks, *i.e.*, intrasession recesses, during their own annual sessions. *See, e.g.*, N.J. Legis. Council Journal, 10th Sess., 1st Sitting 31 (1785). Nevertheless, when the Framers vested state governors with the power to "make Temporary Appointments" of Senators "if Vacancies happen . . . during the Recess of the Legislature of any State," U.S. Const. art. I, § 3, cl. 3, they did not differentiate between intersession and intrasession recesses. Indeed, at least one Senator was appointed during an intrasession break, and the Senate accepted his commission without objection. *See* 8 Annals of Cong. 2197 (Dec. 19, 1798) (noting that

Franklin Davenport, "appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature . . . took his seat in the Senate"); N.J. Legis. Council Journal, 23rd Sess. 21-22 (1798-99) (documenting an intrasession recess between November 8, 1798 and January 16, 1799).

Thus, "'the Recess,' originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate's acts of recessing, that is, taking a break." *Evans*, 387 F.3d at 1224-25. It is therefore unsurprising that the courts to address this question have refused to confine the President's recess appointment power to intersession recesses. *See id.* at 1224-26; *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1375 n.13 (Ct. Int'l Trade 2002) (concluding that the power applies to intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (Ct. Cl. 1884) (same).

Moreover, the Executive Branch's longstanding interpretation of the Clause to permit intrasession recess appointments, in which Congress has acquiesced, is highly significant in judicial interpretations of the Constitution. *See Evans*, 387 F.3d at 1226; *Mistretta*, 488 U.S. at 401; *The Pocket Veto Case*, 279 U.S. at 688-90. Presidents have routinely made recess appointments during intrasession recesses. *See* Hogue, *Intrasession Recess Appointments*, *supra* at 3-4 (identifying

285 intrasession recess appointments made between 1867 and 2004).[41] This practice originated in the nineteenth century and has continued regularly since 1921, when Attorney General Daugherty—invoking the Senate Judiciary Committee's own interpretation of "recess" and the Clause's purpose of enabling Presidents to keep offices filled—concluded such appointments were within the President's authority. *See* 33 Op. Att'y Gen. 20. Subsequent Executive precedent follows, and legislative precedent acquiesces in, this conclusion. *See, e.g.*, 20 Op. O.L.C. 124, 161 (1996); *see also Appointments—Recess Appointments*, 28 Comp. Gen. 30, 34-36 (1948).

Indeed, were the Company's view to prevail, the President could be unable to make recess appointments during a majority of the time the Senate is in recess because that time is generally during annual sessions of Congress, not between them. For decades, the length of intrasession recesses has routinely exceeded the length of intersession recesses, often by a significant margin. *See* Congressional Directory, *supra* at 530-537; *see also Evans*, 387 F.3d at 1226 & n.10 (noting that "an intersession recess might be shorter than an intrasession recess," that the Senate has taken "zero-day intersession recesses" as well as "intrasession recesses

---

[41] Before the Civil War, intrasession recesses were relatively infrequent. *See* Congressional Directory, *supra* at 522-25. During Congress's first lengthy intrasession recess, in 1867, President Johnson made at least fourteen known recess appointments. *See* Hogue, *Intrasession Recess Appointments*, *supra* at 5.

lasting months:); 33 Op. Att'y Gen. at 23 (explaining that reading the Constitution to prohibit intrasession recess appointments could lead to "disastrous consequences," since "the painful and inevitable result will be measurably to prevent the exercise of governmental functions"). The Company identifies no rationale for truncating the scope of the recess appointment power in this arbitrary fashion.

III. THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH

Substantial evidence supports the Board's finding that the parties' December 8, 2010 meeting "concluded with a verbal agreement and a meeting of the minds on all substantive issues of a collective-bargaining agreement." (D&O11.) That evidence includes the parties' bargaining history, as recounted in the union representatives' credited testimony and mutually corroborative notes, and the circumstances surrounding the negotiations, including the parties' congratulatory behavior after the last bargaining session. The Company's failure to honor its agreement violates Section 8(a)(5) and (1) of the Act.

A. Applicable Principles and Standard of Review

An employer violates the Act by refusing to bargain collectively with the statutory representative of his employees. 29 U.S.C. § 158(a)(5). The statutory duty to bargain imposed on employers and unions encompasses the duty to execute "a written contract incorporating any agreement reached if requested by either

party." 29 U.S.C. § 158(d). It has been black letter law, for over 60 years, that "an employer's failure to reduce to writing an agreement reached with a union constitutes an unlawful refusal to bargain." *Young Women's Christian Ass'n*, 349 NLRB 762, 771 (2007) (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941)).

The Act does not require that the agreement must be written to be valid and enforceable. *NLRB v. Haberman Constr. Co.*, 651 F.2d 351, 355-56 (5th Cir. 1981) (parties' adoption of a labor contract "is not dependent on the reduction to writing of their intention to be bound"); *NLRB v. Scientific Nutrition Corp.*, 180 F.2d 447, 449 (9th Cir. 1950) (the Act does not require contracts to be in any specific form). Section 8(d) of the Act (29 U.S.C. § 158(d)) provides for a written agreement, only "if requested by either party." As the Second Circuit has recognized, that provision is "clear evidence that writing is not required as a matter of law." *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952). An unexecuted oral agreement is therefore valid and binding on all parties. *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996). Accordingly, an employer fails to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to sign a document embodying terms it has

agreed to in collective bargaining.[42] *See H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941).

This Court "accords a very high degree of deference to administrative adjudications by the [Board]." *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the findings of the Board unless they are "unsupported by substantial evidence in the record considered as a whole," or unless the Board "acted arbitrarily or otherwise erred in applying established law to fact." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). "Substantial evidence" consists of "such relevant evidence as a reasonable mind might accept to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). This Court "'does not reverse the Board's adoption of an [administrative law judge's] credibility determinations unless . . . those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.'" *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1092 (D.C. Cir. 2012) (quoting *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998)).

---

[42] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

B. Substantial Evidence Shows that the Parties Reached Agreement on Terms and Conditions of Employment

Under Board law, a contract is formed after a "meeting of the minds" on all substantive issues and material terms of the contract. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). Because adoption of an enforceable collective-bargaining agreement does not depend on reduction to writing , the Board looks to the surrounding circumstances and to "conduct manifesting an intention to abide by agreed-upon terms." *Bobbie Brooks Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987). *See also McKinzie Enter., Inc.*, 250 NLRB 29, 32 (1980) (parties' bargaining history and circumstances surrounding negotiations determine whether parties reached agreement).

Here, substantial evidence supports the Board's finding that the parties' conduct and bargaining history show a valid agreement. To begin, the contemporaneous bargaining notes of union negotiators Koerner and Weber—whom the judge deemed "highly credible witnesses"— mutually corroborate a completed agreement, the exact terms of that agreement, and how employees were to vote on it. (D&O6,10;Tr.58-61,118-121,GCX11,GCX21.) *See Sunrise Nursing Home*, 325 NLRB at 389(documentary evidence showing agreement defeats mere claim that no agreement existed). Moreover, testimony was undisputed that, at the conclusion of the meeting, Company Treasurer Zimmerman confirmed the parties'

shared understanding, Plant Manager Brackney nodded agreement, President Noel approvingly exclaimed, "Let's do it," CFO Estes agreed to "write something up and get it back to [the Union]," and the parties all shook hands. (D&O 6,10; Tr.62,121,199.) Such conduct is consistent with reaching consensus and is a "hallmark indication that a binding agreement has been reached." *Windward Teachers Ass'n*, 346 NLRB 1148, 1151 (2006). *See also Bobbie Brooks*, 835 F.2d at 1169 (congratulatory behavior shows agreement was reached); *NLRB v. Truck Drivers, Chauffeurs, & Helpers, Local 100*, 532 F.2d 569, 570 (6th Cir. 1976) (same).

Additionally, when the meeting ended, the Company granted Koerner's request to use the Company's meeting room for the ratification vote, and the parties discussed a time frame for negotiating the next agreement. (D&O6;Tr.62,131.) It defies common sense for the parties to discuss future actions such as ratifying the contract and commencing new negotiations if their concluded negotiations had not achieved consensus. *See Mack Trucks, Inc. v. Int'l Union, UAW*, 856 F.2d 579, 592 (3rd Cir. 1988) (discussing ratification plans signals parties had reached agreement).

The parties' post-bargaining session behavior was also consistent with a recently-forged consensus. On December 9, Weber shared the agreement's terms with employees. That same day, Weber told Plant Manager Brackney how happy

he was that "it was all over." (D&O7;Tr.124.) Brackney agreed, and said "you guys got a good deal." (D&O7;Tr.124.) Brackney also expressed remorse that he could not participate in the employees' retroactive check pool. (D&O7;Tr.125.) The Board properly concluded that Brackney made these statements because he and Weber shared "the common understanding that a new contract had in fact been reached." (D&O 10.)

In contrast to the abundant credited evidence establishing that the parties had agreed to the substantive terms of the collective-bargaining agreement, there is no contradictory evidence. The Company's testimony was "abbreviated, conclusionary, nonspecific, and unconvincing." (D&O 10.) Although Zimmerman took notes during the sessions, the members of the Company's bargaining committee produced no written notes or explained their absence, thereby reducing the credibility of their unsupported assertion that no agreement was reached. *See Graphic Commc'n Union, District Council No. 2, AFL-CIO*, 318 NLRB 983, 991 (1995) (lack of written confirmation reduces credibility of testimony).

The Company faults the Board for accepting the judge's detailed credibility determinations. However, the Company has failed to demonstrate that the judge's credibility determinations are "'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28

(D.C. Cir. 1998) (citations omitted). *See also Joy Silk Mills v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950) (credibility determination is for the Board not the court).

The Company focuses its argument on union negotiator Koerner's testimony, but presents no valid reason to question the judge's finding that Koerner was a "highly credible" witness. (D&O10.) Koerner's testimony about the December 8 agreement was corroborated by both his written notes and by his colleague Weber's "unrebutted" and "precise" testimony and notes. (D&O10.)

Rather than present evidence refuting this testimony, the Company points to alleged inconsistencies in Koerner's testimony that are largely irrelevant to the question of whether the parties reached an agreement. For example, the Company notes (Br. 74-75) differences between Koerner's testimony and his affidavit that purportedly show that Koerner intended to present employees with proposals different from the December 8 meeting. However, the judge reasonably attributed this inconsistency to nothing more than a "confus[ing] . . . spelling error" in Koerner's affidavit. (D&O13n.8.) Moreover, Koerner had employees actually vote on the agreed-to proposals from December 8, thereby undermining any interpretation that Koerner intended to present them with different ones. The Company's reliance (Br. 74) on such inconsequential matters as whether Koerner took notes or just checked them when the parties reviewed the last proposal, or whether he called President Noel or vice versa, are immaterial to whether the

parties reached an agreement on December 8. There is simply no support for the Company's claim (Br. 74) that Koerner was an "unreliable" witness.

The Company's challenge also conveniently ignores the fact that the judge specifically discredited the Company's testimony. (D&O10.) The Company's witnesses failed to provide notes or explain why notes were unavailable, and did not testify about any proposals made by either party at the last session. Likewise, the Company ignores the judge's finding that Plant Manager Brackney's "confusing" and "false" testimony attempting to undermine the credited report of his statements on December 9, underscoring that the parties had reached an agreement, "def[ied] credulity." (D&O10.)

Quite simply, contrary to the Company's weak argument, the credited and unrebutted testimony amply supports the Board's finding that the parties reached an oral agreement on December 8. The Board properly found that the Company's failure to embody that agreement in writing violated its duty to bargain.

C. The Court Lacks Jurisdiction To Decide Whether the Board Erred in Disregarding State Law

The Company claims (Br. 73) that the Board erroneously disregarded Washington state law when it determined that the parties were obligated to sign a written contract embodying their oral agreement upon request. The Company, however, failed to raise that challenge to the Board, either in its exceptions to the judge's decision or in a motion for reconsideration, rendering this Court without

jurisdiction to consider that argument. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). An employer that does not file exceptions with the Board to an administrative law judge's findings is jurisdictionally barred from obtaining appellate review of those findings. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Here, neither the Company's exceptions to the administrative law judge's decision nor its brief in support of those exceptions even mention, let alone challenge, the judge's conclusion that Federal law, not state law, determines the contract's validity. (*See* Company's Exceptions to the Judge's Decision and Brief filed in Support of those Exceptions.) The Company's failure to contest the judge's finding renders this Court "powerless" to consider any argument challenging that determination. *W&M Prop. Of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008). *See also Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006) (court is barred from considering argument never presented to the Board).

Even assuming arguendo that the Company had preserved this argument and that it is correct that Washington state law precludes legal enforcement of a verbal contract, the judge properly recognized that the duty to bargain "is not subject to

state law." (D&O11.) Rather, the duty to bargain arises under Section 8(d) of the Act, "and the Federal statute, not State law, controls the validity of contractual relations entered into in fulfillment of such statutory bargaining duty." *Painters, Local 823*, 161 NLRB 620, 623 (1966). *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (courts must look to federal labor relations law, not state contract law, in determining whether a collective-bargaining agreement exists). First, Section 8(d) explicitly states that labor contracts need not be written. Moreover, adherence to federal law, as opposed to various different state laws, when determining a labor agreement's validity promotes predictability and assists the Board in fashioning a uniform national labor policy. Requiring labor agreements to be in writing is contrary to the Act's purpose of maintaining industrial peace by encouraging collective bargaining. *See Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952) (requiring labor agreements to be reduced to writing "would force the give-and-take reality of labor relations into a strait-jacket of lawyers' technicalities"). Thus, contrary to the Company, the Act controls whether a collective-bargaining agreement has been reached, and under the Act, as discussed *supra* at p.72, the agreement does not need to be in writing to be valid.

CONCLUSION

The Board respectfully requests that this Court find that the Movants lack standing to intervene, deny the Company's petition for review, and enforce the Board's Order in full.

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Ave N.W.
Washington, DC 20530
202-514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

/s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
202-273-2949
202-273-1743

October 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION	)	
Petitioner/Cross-Respondent	)	Nos. 12-1115, 12-1153
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 19-CA-32872
and	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 270	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 19,736 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 26th day of October, 2012

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act as amended

(29 U.S.C.§§ 151 et. seq.):

Section 7 [Sec. 157]: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 (a)[Sec.158]: [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) Obligation to bargain collectively (29 U.S.C. §158(d))

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Section 10 of the Act (29 U.S.C. § 160):

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Relevant portions of the National Labor Relations Board's Rules and Regulations (29 C.F.R.):

Sec. 102.48 (29 C.F.R. 102.48) *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board, extraordinary postdecisional motions.*

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760 Intervenor	Nos. 12-1115, 12-1153

CERTIFICATE OF SERVICE

I hereby certify that October 26, 2012, I e-filed the foregoing with the CM/ECF system. I further certify that all persons who have filed appearances are e-filers and will receive service electronically.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 26th day of October 2012