ORAL ARGUMENT SCHEDULED FOR DECEMBER 5, 2012

NOS. 12-1115, 12-1153

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

JOINT REPLY BRIEF FOR PETITIONER NOEL CANNING AND MOVANT-INTERVENORS CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE COALITION FOR A DEMOCRATIC WORKPLACE

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. It has long been established that if the Senate does not "adjourn for more than three days" under the Adjournment Clause, it cannot be in intrasession "recess" under the Recess Appointments Clause. Here, the Senate convened in pro forma sessions every three days, including on January 3 and 6, 2012. It was therefore not in recess on January 4, and the President's "recess" appointments of Ms. Block and Messrs. Flynn and Griffin to the National Labor Relations Board (the "Board") were invalid.

a. The Government asks the Court to ignore the Adjournment Clause, the Pocket Veto Clause, the Twentieth Amendment, and the Rules of Proceedings Clause, and conclude that the Senate's pro forma sessions were nullities because the adjournment order governing from December 17, 2011, to January 23, 2012, made the Senate incapable of conducting business. But this is manifestly false: The Senate *actually did* conduct business during this period—both passing major legislation and "assembling" to satisfy the Twentieth Amendment. The Government's true objection, therefore, is that the "Senate was not capable of doing business . . . *absent unanimous consent*." (Resp.Br.39-40 (emphasis added).) But the Senate conducts most of its business through unanimous consent. The Senate's self-limitation to this bedrock procedure cannot possibly convert "sessions" into "recesses."

b. The absence of any "recess" here is confirmed by the amorphous test the Government adopts, which deems the Senate in "recess" during every "break

from the Senate's usual business." (Resp.Br.12.) Invoking the "plain meaning" of "recess," the Government argues that the Senate is in "recess" during every "remission or suspension of business or procedure." (Resp.Br.28 (quoting II N. Webster, *An American Dictionary of the English Language* 51 (1828)).) But that definition would put the Senate into "recess" whenever a Senator (or Senators) are blocking some (or all) business through various procedures—basically all the time. It would also deem the Senate in "recess" during every weekend and lunch break, as both are "remission[s] or suspension[s] of business or procedure" during which the Senate cannot do business at all, not even by unanimous consent. That cannot possibly be correct, which is likely why the Government's test has no support in history or precedent.

c. Finally, the original meaning of the Recess Appointments Clause refutes the Government's position. The Government does not seriously contest this, instead noting that successive Presidents have abandoned the original meaning. Yet that simply underscores the need to hold the current line—under which the Adjournment Clause delineates the lower bound for a constitutional "recess." Removing this final constraint would transform recess appointments from an "auxiliary" method of filling posts into standard operating procedure, making Senatorial advice-and-consent a fading memory.

2. The Government's attempt to defend the merits of the Board's decision is likewise erroneous. The Board's Order was not supported by substantial evidence,

and the record contains evidence showing that Noel Canning never assented to any supposed "agreement." That is particularly problematic here, as Washington law does not enforce verbal contracts. The Board's enforcement of this "agreement" is thus contrary to the parties' reasonable expectations.

3. Finally, Movant-Intervenors have Article III standing. The Government claims that because Noel Canning "is essential to this action," Movant-Intervenors do not satisfy the third prong of *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343-44 (1977). (Resp.Br.16.) That prong, however, is prudential (not constitutional) and it is not at issue here, since the requirements of Fed. R. App. P. 15(b)—which this Court has held Movant-Intervenors satisfy—discharge its prudential function. And even if *Hunt* factor three did apply, it is satisfied. It precludes associational standing only where a necessary party is absent and, even there, only where the claims require individualized proof. Here, Petitioner Noel Canning is present and resolution of the recess-appointments issue requires no individualized proof.

Further, Movant-Intervenors have other members who have been and will continue to be harmed by quorumless Board proceedings, Circuit Court enforcement proceedings, quorumless Board adjudications, and the Board's oral contracts rule. The Government claims these harms are "speculative," but there is nothing speculative about whether the Board will issue quorumless decisions in cases involving Movant-Intervenors' members. The Board has issued over 500 decisions

since January 4, has initiated numerous Circuit Court enforcement proceedings, and is certain to continue doing so.

For these reasons, this Court should grant Petitioner's petition and deny the Board's cross-petition.

ARGUMENT

I. THE SENATE WAS NOT IN RECESS ON JANUARY 4, 2012

The Executive Branch has long abided by a simple rule: The Recess Appointments Clause empowers the President to make intrasession recess appointments only if, at a minimum, the Senate "adjourn[s] for more than three days" under the Adjournment Clause. U.S. Const. art. I, § 5, cl. 4. The original exponent of this rule was Attorney General Daugherty, who, in the same 1921 opinion the Government repeatedly invokes, opined (for the first time) that recess appointments could be made during *intra*session recesses. In doing so, he recognized that abandoning the clear rule confining recess appointments to *inter*session recesses required a limiting principle to prevent the Clause from descending into absurdity wherein every break in Senate business becomes a constitutional "recess." He found that principle in the Adjournment Clause:

> Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term 'recess' must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.

Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 24-25 (1921). The Executive Branch has followed this rule ever since, with no prior President attempting an intrasession recess appointment absent the Senate's adjourning for more than three days under the Adjournment Clause. (Op.Br.29-35.)

This longstanding rule should be dispositive. Here (1) the House of Representatives did not consent to a Senate adjournment exceeding three days; (2) the Senate actually convened for sessions every three days, including on January 3 and January 6; and (3) the Executive Branch concedes the validity of the December 23 and January 3 sessions. The Senate was not, therefore, in "recess" on January 4 when the President purported to make "recess" appointments. The Government's various counterarguments are meritless and its alternative test would eviscerate the Senate's advice-and-consent power.

A. The Government's Criticisms Of This Established Rule Are Meritless.

As noted, ever since General Daugherty's opinion, the Executive Branch has refrained from attempting intrasession recess appointments when the Senate has not "adjourn[ed] for more than three days" under the Adjournment Clause. That "prolonged reticence 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 Government's brief does not even mention General Daugherty's establishment of this rule, instead making a series of mistaken arguments.

1. The Adjournment Clause Establishes The Constitutional Baseline For Intrasession Recesses.

The Government hardly addresses the argument that the Adjournment Clause establishes the constitutional floor for intrasession "recesses." And what little it does say is erroneous.

First, the Government summarily asserts that "[t]o the extent the government [has drawn] upon the Adjournment Clause to impart meaning to the Recess Appointments Clause," it has only been "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." (Resp.Br.49 n.29.) Not so. As explained above, General Daugherty recognized the need for a constitutional limit on intrasession "recesses," and embraced the *entire* Adjournment Clause to establish one. *See supra* at 4. The Government has consistently followed General Daugherty's opinion, including by urging the Eleventh Circuit, "in constructing any *de minimis* exception from otherwise applicable constitutional rules for 'recess,' to apply the three-day rule explicitly set forth in the Adjournment Clause." Reply Brief for Intervenor United States at 20-21, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424), 2004 WL 3589822 ("*Evans* Reply"). The Government's advocacy for "the three-day rule explicitly set forth in the

Adjournment Clause" illustrates its longstanding commitment to using the *entire* Adjournment Clause.[1]

Moreover, the Government's new position makes no sense. The Government now claims that the Adjournment Clause establishes the temporal floor for a "recess," while the Clause's definition of what it means to "adjourn for more than three days" is irrelevant. The Government offers no rationale for this take-what-is-helpful approach, which is tantamount to plucking a content-less three-day rule from thin air. Such vague standards are anathema to constitutional construction, particularly in the separation of powers context: "In its major features . . . , [the separation of powers] is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U.S. at 239.

Second, the Government argues, alternatively, that "the Senate *did* adjourn for more than three days within the meaning of the Adjournment Clause." (Resp.Br.50.) But this too is wrong, as the Senate indisputably gaveled into session every three days. Indeed, the Senate could not "adjourn for more than three days" absent consent from the House of Representatives, which it never received. That lack of consent—and the

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[1] *See also, e.g.*, Letter from Senator Grassley to Attorney General Holder, at 1-2 (Jan. 6, 2012) (collecting numerous additional executive opinions on this point), *available at* http://www.grassley.senate.gov/judiciary/upload/Recess-Appointments-01-06-12-SJC-members-letter-on-OJC-input-on-recess-appointments-signed-letter.pdf.

attendant obligation to maintain constitutional availability—is why the Senate convened in pro forma sessions every three days, just as it has frequently done throughout the last century. *See* Op.Br.42-43 (citing dozens of such instances).

The Government erroneously suggests it is unclear whether the House consented to a lengthy Senate adjournment. (Resp.Br.51-52.) But the House does not consent to lengthy adjournments through mental telepathy. It does so by passing a resolution providing consent. Here, no such resolution was passed. Indeed, the Speaker of the House has filed an amicus brief, wherein he clearly explains that the House did not consent. (*See generally* Doc. 1396556.) Moreover, even if the House had consented, it would be irrelevant, since the Senate actually did convene every three days.

2. The Adjournment Order Governing The January 3 and January 6 Sessions Did Not Render The Senate Incapable Of Acting On Nominations.

The Government argues that there was a "recess" regardless of the Senate's sessions because those sessions were constitutional nullities. This argument is premised on the Government's claim that the adjournment order governing from December 17, 2011, to January 23, 2012, rendered the Senate incapable of "provid[ing] advice and consent, or conduct[ing] business of any other sort, within the meaning of the Recess Appointments Clause." (Resp.Br.40.) But that is demonstrably wrong. *See* Op.Br.41-50.

It is undisputed that the Senate passed legislation under the same adjournment order that was in place throughout the supposed "recess." At the Senate's December 23 pro forma session, it passed—and the President signed—the Temporary Payroll Tax Cut Continuation Act of 2011.[2] *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). Similarly, at the Senate's August 5 pro forma session—subject to an indistinguishable adjournment order—the Senate passed the Airport and Airway Extension Act of 2011, which the President also signed. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Indeed, the Senate has long done all manner of Senate business during pro forma sessions. *See* Op.Br.41-50.

Nor is the Senate alone. The House of Representatives has likewise done extensive business at pro forma sessions with the President's endorsement. For example, just a few months ago, in a brief pro forma session on September 28, the House passed three bills, two of which (S. 3624 and S. 3625) the President has signed. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). Indeed, the passage of S. 3625 is particularly noteworthy because the Administration supported the bill's quick

[2] The Senate did other business too, agreeing (1) to conference with the House on another matter; (2) to authorize the Presiding Officer to appoint conferees; (3) to establish the specific ratio of conferees between the political parties; and (4) the Acting President Pro Tempore signed an enrolled measure.

enactment to address a pressing national-security issue.[3] The House's use of a pro forma session to address that exigency illustrates why these sessions count: They maintain Congress's ability to do business if it chooses.

Finally, the Government attempts to support its claim that pro forma sessions are constitutionally meaningless by comparing them to lengthy recesses wherein "the leadership of the House and Senate [may] reconvene either or both Houses before the end . . . if the public interest warrants it." (Resp.Br.41.) But the difference between the two is obvious. When the Senate is in recess subject to being called back, it is in recess. When the Senate is meeting pro forma, by contrast, it is in session. No external "public interest" trigger—or hypothetical "reconvening"—is necessary to do business. Rather, the Senate is already convening and able to do business at each session; just as it did on August 11, December 23, and January 3, and just as it could have done on January 6.

3. The Senate's Order Requiring Unanimous Consent Did Not Convert "Sessions" Into "Recesses."

The Government's actual objection, therefore, is not to the Senate's inability to conduct business at its January 3 and 6 pro forma sessions, but to the procedure by which the Senate could conduct business. The Government repeatedly complains that during these sessions the "Senate was not capable of doing business . . . *absent*

[3] *See, e.g.*, *The Hill*, "House Delays Requirement for Feds to Make their Financial Forms Public," Sept. 28, 2012.

unanimous consent." (Resp.Br.39-40 (emphasis added).) But the fact that the Senate limited itself to this procedural device—a common method of doing Senate business—cannot possibly convert "sessions" into "recesses."

a. The Senate Is Fully Capable Of Conducting Business Through Unanimous Consent

In the OLC Memorandum authorizing the President's "recess" appointments, the Government noted that a "recess" can exist only if the Senate is "unable" to do business. *E.g.*, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __ (2012) ("OLC Memo") at 10 ("[T]he recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments."). But the Senate is entirely "able" to conduct business by unanimous consent at pro forma sessions, as it has repeatedly demonstrated. "The Senate is fundamentally a 'unanimous consent' institution." Walter J. Oleszek, Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate* 1 (2008). "Party leaders and other Senators propound unanimous consent requests every day the Senate is in session," *id.*, such that "[u]nanimous consent agreements are fundamental to the operation of the Senate." Walter J. Oleszek, Cong. Research Serv., RL 33939, *The Rise of Senate Unanimous Consent Agreements*, (2008); *see also id.* at 6 (explaining that such agreements "are essential to the processing of the Senate's workload . . . .").

The centrality of unanimous consent in Senate practice is confirmed by the fact that the Senate does most of its business by unanimous consent rather than through actual roll call votes. For instance, "[i]n the last ten Congresses, 110th-101st, an average of 93 percent of approved measures did not receive roll call votes and in the 111th Congress through February 1, 2010, 94 percent of approved measures were approved without a roll call vote." 156 Cong. Rec. S7137-38 (daily ed. Sept. 15, 2010); *Riddick's Senate Procedure: Senate Precedents and Statistics*, at 1311 (1992) ("[m]uch of the routine activity on the Senate floor occurs as a result of simple unanimous consent agreements"). The widespread use of unanimous consent extends to nominations, most of which "are brought up by unanimous consent and approved without objection." Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, at 10 (2011).

Further illustrating the point, it is "unusual for as many as 51 Senators to be present on the floor at the same time,"[4] which means that the Senate rarely has a proper quorum. The Senate is nonetheless able to operate because its rules presume a quorum in the absence of a quorum call. *See Riddick's* at 1038 ("[T]he Senate operates on the absolute assumption that a quorum is always present until a point of no

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[4] Betsy Palmer, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2010), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2D4QLO9%0A.

quorum is made."). The effect of this presumption is that whenever the Senate lacks a quorum (i.e., most of the time), a single Senator can "prevent[] the Senate from conducting any business" (Resp.Br.41) by simply enforcing the quorum requirement—which effectively means that the Senate can only do business with unanimous consent. *See Riddick's* at 1038.[5]

It is thus clear that if the Government were correct—and the Senate were in recess whenever it could do business only by unanimous consent—the Senate would be in recess almost all the time. After all, the Government's position is not (and could not be) that the Senate is incapable of doing business during pro forma sessions. It is, rather, that the Senate is "not capable of doing business during [pro forma sessions] *absent unanimous consent*." (Resp.Br.39-40 (emphasis added).) The Government's position thus puts the Senate almost perpetually in recess, giving the President nearly constant recess appointment authority. That cannot be correct.[6]

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[5] This rebuts the Union's claim that Senators have different attendance obligations at pro forma sessions and regular sessions. (Union.Br.16-17.) Senators are only obliged to attend during quorum calls. *Id.* If the Senate were in "recess" whenever Senators are not obligated to be on the floor, then the Senate would almost always be in recess.

[6] The Government asserts in a footnote that during the August 11 and December 23 pro forma sessions, the Senate "overrode" the adjournment orders through "a unanimous consent agreement to pass legislation . . . and [brought] about a substantive working session of the Senate." (Resp.Br.45 n.26.) But that is wrong because the Senate never "overrode the order for a pro forma session" at either session. Instead, it simply met in the pro forma sessions, where the presiding Senator

b. The Government's Position Demonstrates How Deeply The Executive Branch Seeks To Intrude Into Senate Rules Of Procedure.

Further, the Government's argument intrudes upon the Senate's authority to determine its own procedures. As Amici Senators persuasively show, the Rules of Proceedings Clause, U.S. Const., art. I, § 5, cl. 2, "commits to the Senate the power to make its own rules." *United States v. Smith*, 286 U.S. 6, 48 (1932); *see* Sen.Am.Br.13-16. Consequently, over a century ago, the Supreme Court held that this Clause empowers each House of Congress to "prescribe a method for . . . establishing the fact that the house is in a condition *to transact business*." *United States v. Ballin*, 144 U.S. 1, 6 (1892) (emphasis added). It is therefore within the Senate's authority to determine the rules by which it "transacts business," including a rule requiring unanimous consent. The

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(continued…)

requested and received unanimous consent that "the bill be considered read three times and passed." 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011); 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (same). This is the same thing that happens whenever the Senate acts by unanimous consent. *See, e.g.*, Oleszek, *Unanimous Consent*, at 1 ("[T]he rules and precedents of the Senate are set aside regularly by the unanimous consent of the membership."). The Senate's ability to utilize this standard procedure demonstrates that it was not in recess.

The Union's claim that the Senate "returned" to "the previous order" after it passed legislation on December 23 (Union.Br.17) is irrelevant. The Senate always returns to its prior state when a unanimous consent agreement expires. The purpose of unanimous consent is to temporarily suspend rules or prior agreements in order to do business expeditiously. *See, e.g.*, Oleszek, *Unanimous Consent*, at 1 ("The way the Senate conducts its business hour after hour, day after day, week after week, year after year, is Senators voluntarily waive the rights which they possess under the rules.").

Government's argument depends on its assertion that this rule is impermissible. But as *Ballin* explains, that is not a decision the Constitution permits the President to make.

The Government argues that the Rules of Proceedings Clause does not require deference if the Senate's rules affect other entities. But virtually all of the Senate's procedures have effects beyond the walls of the Senate Chamber, including on the President. Nowhere is this clearer than in the Senate's rules for passing legislation—including the rule authorizing the Senate to act by unanimous consent with a presumed quorum. Such rules directly impact the President, triggering his obligation to sign or veto legislation, and, if he signs it, to faithfully execute it. But the fact that these procedural rules affect the President does not empower him to disregard them.

That is, indeed, what this Court held in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). There, the Senate adopted a procedural rule by which it could receive a returned bill from the President through its appointed agent. The President nevertheless attempted to exercise his Pocket Veto power, arguing that the Senate's procedure was deficient. This Court, however, sided with the Senate, deploying analysis that applies here. The Court began by noting that the Pocket Veto Clause (like the Recess Appointments Clause) is "an exception to the general rule" because the Constitution excludes "an absolute presidential veto." *Id.* at 437. Since the "pocket veto power is a departure from the central scheme of the Constitution," it is "limited by the specific purpose it is intended to serve." *Id.* There, the Senate had established a procedure for receiving bills returned by the President in the Senate's

absence. *Id.* at 438-39. This Court held that the Senate's preferred procedure controlled, notwithstanding the fact that it constrained the President's Pocket Veto power. *Id.* at 439-40.[7]

In sum, the President has unfettered power to decide whether to make recess appointments and select whom to appoint. But the Senate alone has the power to determine the procedures by which it conducts legislative business. And that is precisely what it did here.[8] The President does not have the authority to override or disregard that determination.[9] *See also, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his

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[7] It is irrelevant that the Government believes *Kennedy* was wrongly decided, since *Kennedy* remains law of the circuit. (Resp.Br.55-56.)

[8] The Government claims that the Senate "viewed its January 2012 recess as equivalent" to actual recesses (Resp.Br.34), citing two prefatory statements made by Senator Reid on the day of the Senate's adjournment order, wherein he requested unanimous consent to *something else*; statements for which he neither sought nor received unanimous consent. In fact, the Senate's adjournment order never described the upcoming series of three-day breaks as a Senate "recess." And unlike orders commencing lengthy recesses, the December 17, 2011, Order scheduled Senate sessions every three days. Contemporaneous statements confirm that the purpose of scheduling those sessions was to prevent a recess and instead remain in session. *See* USA Today, "Senate Politics Shut Down Some Federal Agencies", Dec. 27, 2011 (Sen. McConnell: "We are not going to let the president put another unelected czar in place.").

[9] The Union suggests that unless the Government prevails, the Senate could declare itself in session without holding sessions at all. (Union.Br.at 20.) Incorrect. Here, the Senate was actually meeting every three days and was thus actually capable of providing advice and consent. That is plainly different from a Senate that never meets but nonetheless claims to be in session.

own house precludes him from imposing his control in the house of another who is master there.").

4. The Government Itself Concedes That Pro Forma Sessions Are Valid Where They Increase Executive Power.

The Government's disparagement of pro forma sessions is, moreover, fatally undermined by the fact that the Government agrees *some* pro forma sessions are constitutionally meaningful—even for purposes of the Recess Appointments Clause. In particular, in the OLC Memorandum underlying the "recess" appointments, the Government asserted that the "recess" here began "on January 3, 2012, [when] the Senate convened one such pro forma session *to begin* the second session of the 112th Congress." *OLC Memo* at 1 (citing 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012)) (emphasis added); *see also* Op.Br.54-55. By taking this position, the Government endeavors to increase the terms for each "recess" appointee by a year. (Op.Br.54-55.) It cannot be, however, that pro forma sessions count only when they *increase* executive power.

Recognizing the problem with OLC's pretzeled logic—wherein the January 3 session counts, but the January 6 session does not—the Government now seeks to abandon it, at least in part. It now claims that the January 3 session did *not* trigger the Second Session of the 112th Congress. Instead, the Government relies on the supposedly self-executing nature of the Twentieth Amendment, which it claims triggers each new Session of Congress *automatically*. (Resp.Br.53-54.) The

Government's theory thus appears to be that one "recess" began when the Senate adjourned on December 17, continued unbroken through a string of pro forma sessions (with a possible exception for the December 23 session wherein the Senate was *actively passing legislation*), until the Senate's pro forma session on January 3, when the first "recess" briefly ended, but only by operation of the Twentieth Amendment, which automatically commenced a new Session of Congress regardless of whether the Senate actually met, after which the Senate began a second "recess" that persisted unbroken through another string of pro forma sessions until January 23, 2012.

To articulate this dizzying position is to refute it. The text of the Twentieth Amendment says nothing about the "start date of the annual Session" of Congress. (Resp.Br.54.) Instead, it says: "The Congress *shall assemble* at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. Am. XX (emphasis added). Consequently, a new Session of Congress commenced on January 3 only if Congress "assemble[d]" on that day. Congress did "assemble"—in a pro forma session—and that is why the Second Session of the 112th Congress began on January 3. The Government's contention that the "recess" began on January 3 thus absolutely depends on the Senate's pro forma session having constitutional significance.

The Government cannot have it both ways. Pro forma sessions do not count solely when they increase Executive power. The January 6, 2012, pro forma session was just as valid as the January 3, 2012, pro forma session, and both were just as valid

as the pro forma sessions held on August 11 and December 23, 2011. The Government offers no plausible reason for treating these sessions differently.

5. Parallel Constitutional Provisions Further Confirm That Pro Forma Sessions Are Actual Senate Sessions.

Finally, parallel clauses of the Constitution—including the Adjournment Clause, the Twentieth Amendment, and the Pocket Veto Clause—further refute the Government's argument. Under each of these clauses, pro forma sessions are actual, constitutional sessions. (Op.Br.41-50.) It necessarily follows that they are valid under the Recess Appointments Clause too.

The Government argues that these other provisions should be ignored because they serve different purposes. (Resp.Br.49.) All four provisions, however, turn on the same basic thing—congressional availability. The Adjournment Clause, for example, ensures that one House of Congress does not render itself unavailable to conduct business for extended periods of time without the consent of the other. (Op.Br.37-43.) The Twentieth Amendment similarly ensures that Congress is available to conduct the Nation's business by requiring it to "assemble" every January 3. (*Id.* at 43-45.) Conversely, the Recess Appointments Clause and Pocket Veto Clause give the President special powers when Congress is unavailable to do business—whether that business is acting on the President's nominees or receiving a returned bill. (*Id.* at 38-41.)

Pro forma sessions are constitutionally meaningful sessions for each of these provisions. (*Id.* at 42-50.) For example, the Senate and House of Representatives have, for decades and without objection from the President or anyone else, maintained constitutional availability under the Adjournment Clause by convening pro forma. (*Id.* at 42-43.) Likewise, the Senate and House regularly satisfy the Twentieth Amendment by "assembling" in a pro forma session—a practice that the Government has conceded is valid, *see supra* at 17; Op.Br.43-45.

The Pocket Veto Clause is particularly instructive. (Op.Br.at 38-40.) That Clause, like the Recess Appointments Clause, creates a unilateral executive power contingent on Congress being unavailable. It is thus significant that the Pocket Veto Clause likewise enlists the Adjournment Clause to distinguish between constitutional availability and unavailability. As the Supreme Court held in *Wright v. United States*, the President cannot pocket veto legislation unless the originating House of Congress has "adjourn[ed] for more than three days" under the Adjournment Clause, 302 U.S. 583, 589-90 (1938); Op.Br.38-39—which the Senate can avoid by convening in pro forma sessions. Given the "functional affinity between the pocket veto and recess appointment powers," 3 Op. O.L.C. 314, 316 (1979), it makes eminent sense to use the same test here.

The Constitution should be construed sensibly. Just as pro forma sessions keep the Senate available to do business under the Adjournment Clause, Twentieth Amendment, and Pocket Veto Clause, they keep the Senate available to act on

nominations under the Recess Appointments Clause. Otherwise, the Senate could simultaneously be in "session" under the Adjournment Clause, Twentieth Amendment, and Pocket Veto Clauses, but in "recess" under the Recess Appointments Clause. The Government offers no reason for such incoherence.

B. The Government's Alternative Test Has No Limiting Principle And Would Be Impossible To Administer.

For the foregoing reasons, the Government's criticism of the established rule—under which the Adjournment Clause establishes a minimum baseline for a constitutional "recess"—is erroneous. Any lingering doubt is dispelled by considering the Government's amorphous alternative, wherein the Senate is in recess during every "break from the Senate's usual business." (Resp.Br.12.) This sweeping test has no limiting principle or historical support, and would render the Senate's advice-and-consent power a dead letter.

1. The Government's Test Sweeps In Every Lunch Break.

The Government's attempt to anchor its amorphous test to the plain meaning of the term "recess" demonstrates how limitless its construction is. According to the Government, the term "recess" reaches every "remission or suspension of business or procedure," Resp.Br.28 (quoting II N. Webster, *An American Dictionary of the English Language* 51 (1828)), every "period of cessation from usual work," *id.* at 28-29 (citing Oxford English Dictionary 322-23 (2d ed. 1989)), and every "'retirement; retreat; withdrawing; secession," *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (en

banc) (citing a 1755 dictionary). By this standard, every suspension in Senate action—no matter how brief—would be a constitutional "recess." That would include every weekend, lunch break, ten-minute adjournment, and even every "recess subject to the call of the Chair" (a common practice), *Riddick's* at 1089. It would quickly lead to the "auxiliary" recess appointment power subsuming the "general" mode of appointment. *The Federalist No. 67* (Alexander Hamilton) ("*Federalist 67*").

The linchpin of the Government's argument illustrates the limitlessness of its proposal. The Government's core argument is that the Senate's pro forma sessions were meaningless because the Senate could do business only by unanimous consent. *See supra* at 8-13. But that is true almost all the time. *Id.* If the need for unanimous consent effects a "recess," then weekends and lunch breaks must too, as those are periods when the Senate cannot do business at all—not *even* by unanimous consent.

Further, a test wherein the Senate is in recess whenever a single Senator can "prevent[] the Senate from conducting any business" (Resp.Br.41) could sweep in even those sessions where the Senate is actively doing business but a single Senator is thwarting final action. For example, the well-known "hold" procedure "permit[s] a single Senator or any number of Senators to stop—sometimes temporarily, sometimes permanently—floor consideration of measures or matters that are available to be scheduled by the Senate." Walter J. Oleszek, Cong. Research Serv., 98-712, *"Holds" in*

the Senate, Summary (2008). Because "holds are often used to stall action on legislation or nominations,"[10] they effectively operate as one-Senator blocking devices. It would be extraordinary if the Senate were in recess whenever a single Senator is preventing the body from confirming nominees.

Indeed, the facts of this case demonstrate the breadth of the Government's position. The Government asserts that the supposed recess here began on January 3. The President made the "recess" appointments the very next day, even though he could not have known what the Senate would do on January 5 or 6. The Government's position, therefore, is necessarily that the President can make a recess appointment after a mere *one*-day break. The President should at least be required to wait three days before making recess appointments.

Nor can the Government minimize the implications of its sweeping standard by claiming that recess appointments are of "limited duration." (Resp.Br.13.) Under the Government's view—wherein the January 3 pro forma session triggered the Second Session of the 112th Congress—each "recess" appointee will have a full two-year term. That is as long as most Senate-confirmed appointees actually serve. *See, e.g.*, GAO Report, *Political Appointees: Turnover Rates in Executive Schedule Positions*

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[10] Walter Oleszek, Cong. Research Serv., RL 31685, *Proposals to Reform "Holds" in the Senate* 2 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL31685.pdf.

Requiring Senate Confirmation, at 3 (1994).[11] Moreover, the Executive Branch maintains that serial recess appointments are permitted, *see, e.g.*, 11 Op. Att'y Gen. 179, 180 (1865), which means the President can repeatedly recess appoint the same person to the same position. The Government's test would thus enable the President to staff the entire Executive Branch with recess appointees for the full duration of his tenure. The President need only await brief pauses in the Senate's "usual business."

The Government's position would also eliminate the President's incentive to compromise. The Government attempts to invoke past compromises in its favor, *see* Resp.Br.47, 61-62, but each of those compromises was premised on the assumption that the Senate had the power to block recess appointments by refusing to adjourn.[12] The Government's position, in contrast, eliminates that Senate leverage. In the Government's view, all the President need do is await a short break and then appoint whomever he chooses.

Two centuries of Presidents have refrained from attempting recess appointments during mere "break[s] from the Senate's usual business." (Resp.Br.12.) Until now, no President had attempted an intrasession recess appointment absent a

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[11] *Available at* http://www.gao.gov/assets/90/89690.pdf.

[12] The Government's attempt to distinguish the compromise between President Reagan and Senator Byrd is a non-sequitur. (Resp.Br. 47.) The fact that their political deal had multiple components does not prove that the threat to stay in session by convening pro forma was irrelevant.

Senate adjournment under the Adjournment Clause. That "prolonged reticence would be amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230. It plainly is.

2. There Is No Historical Or Legal Support For The Government's Test.

Needless to say, the Government's proposed standard has no basis in history or precedent. In attempting to argue otherwise, the Government distorts the historical record.

First, General Daugherty's opinion, which was the first to opine that intrasession recess appointments are permissible, rejects the Government's "usual business" standard. As noted, General Daugherty recognized that if intrasession recess appointments are permitted, there needs to be a clear limiting principle: "[D]oes it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no." 33 Op. Att'y Gen. at 24-25. He relied on the Adjournment Clause for that principle, not a free-floating "usual business" test.

Second, the Government invokes a 1905 report from the Senate Judiciary Committee which, it claims, "looks to whether the Senate is open for its usual business." (Resp.Br.30.) The 1905 Senate report, however, was issued to *protest* recess appointments that President Theodore Roosevelt made during a recess between

sessions that lasted less than a second. As the Congressional Research Service has explained:

> [T]he 1905 Senate Committee on the Judiciary Report . . . was prompted by what undoubtedly was the briefest recess ever relied on by a President in order to make recess appointments. In the 58th Congress, the first session ended at noon—December 7, 1903—and the second session immediately began thereafter. During the moment between the two sessions, President Theodore Roosevelt announced the recess appointment of over 160 officers . . . . The 1905 Senate Committee on the Judiciary Report was issued 14 months afterward and *emphatically rejected Roosevelt's actions*.

Vivian S. Chu., Cong. Research Serv., RL33009, *Recess Appointments: A Legal Overview*, at 8 (Jan. 6, 2012) (emphasis added), *available at* http://www.lieberman.senate.gov/assets/pdf/RecessAppOverview.pdf. The Report's description of Senate recesses as "something real, not something imaginary," S. Rep. No. 58-4389, at 2 (1905), was therefore in response to President Roosevelt making recess appointments during a so-called "constructive recess." The Report says nothing about the Senate's "usual" business, or about recess appointments during three-day intrasession breaks. *See also, e.g.*, Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1555 n.209 (2005).

Indeed, the Report directly refutes the Government's position by reaffirming the basic proposition that the Senate is not in recess when it is capable of acting on nominations:

> It can not by any possibility be deemed within the intent of the Constitution that when the Senate is in position to receive a nomination by the President, and, therefore, to exercise its function of advice and

> consent, the President can issue, without such advice and consent, commissions which will be lawful warrant for the assumption of the duties of a Federal office.

S. Rep. No. 58-4389 at 3. Here, the Senate was fully "in position to . . . exercise its function of advice and consent" during the pro forma sessions, and thus was not in recess. *See supra* at 11-12.

Finally, the Government seeks to fortify its position by conjuring a binary choice that the Constitution allegedly foists upon the Senate: (1) "remaining continuously in session to conduct business" (presumably with a quorum) or (2) "ceasing to conduct business (and potentially leaving the capital)." (Resp.Br.64.) The Government offers no authority for this choice. None exists. The Senate's rules allow it to conduct business at regular pro forma sessions. If that is not "remaining continuously in session," then the Senate is likewise not "continuously in session" whenever the Senate floor lacks a quorum, or whenever the Senate takes brief "breaks" from its "usual business."

C. The Original Understanding Of The Recess Appointments Clause Rebuts The Government's Position.

The Government does not seriously dispute that the Framers believed the Recess Appointments Clause empowered the President to: (1) make recess appointments only to positions that became vacant during the recess; and (2) make recess appointments only during *inter*session recesses. *See, e.g.*, Rappaport, 52 UCLA L. Rev. 1487 (explaining in great detail the original understanding of the Recess

Appointments Clause). Instead, the Government simply points out that successive Presidents have ignored these limits. But past presidents' assertions of broad executive power "cannot create or destroy executive power." *Kennedy*, 511 F.3d at 441.[13]

More importantly, the fact that past presidents have abandoned two of the original limits on recess appointments simply underscores the need to maintain the third. The Government does not merely seek affirmation of presidential power to make recess appointments (1) where the vacancy arose during a Senate session, and (2) during an intrasession break. Rather, it seeks (3) the *additional* presidential power to make recess appointments when the Senate has not adjourned for more than three days under the Adjournment Clause and even during any "remission or suspension" in Senate proceedings, however short. Thus, the Government seeks to eliminate one of the last remaining checks on the Recess Appointments Clause and seize an absolute

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[13] The Government also exaggerates the actions of past presidents. It claims, for example, that Presidents made 285 intrasession recess appointments "between 1867 and 2004," Resp.Br.69-70. In fact, "[t]here were no intrasession recess appointments for the first seventy-five years under the Constitution. Then, until after World War I, only a limited number of these appointments were made during the troubled presidency of Andrew Johnson." Rappaport, 52 UCLA L. Rev. at 1572; Op.Br.71-72. This relatively modern convention provides no support for the Government's even broader assertions here. *See also Kennedy*, 511 F.2d at 441-42 (rejecting reliance on "a relatively modern phenomenon" where "only . . . 78% [of the precedents] have occurred since the inauguration of President Franklin Roosevelt" and "[n]one occurred prior to 1867").

appointment power—something that the Constitution clearly withholds and that no prior President has ever claimed.

Finally, the Government's assertion that the Constitution is "design[ed] to ensure a mechanism for filling offices at all times," (Resp.Br.60), is plainly wrong. The Constitution creates a "joint[]" appointment power that the President and the Senate share, which is supplemented by an "auxiliary" recess appointments power for a narrow range of exigent circumstances. *Federalist 67*. It is, therefore, undisputed that the Senate has the absolute power to prevent offices from being filled while it is in session by simply withholding consent. Moreover, since senatorial advice-and-consent is the "general" mode of appointment, *id.*—and recess appointments the exception—it is equally clear that the Senate generally has, and was intended to have, the power to prevent offices from being filled. It is, thus, the Government—not Petitioner and Movant-Intervenors—that seeks to "frustrate the Constitution's design." (Resp.Br.60.)

This Court should hold the constitutional line where it has long stood: The President may not make a recess appointment unless, at a minimum, the Senate adjourns under the Adjournment Clause. The Senate did not do so here, instead convening in pro forma sessions every three days at which it was fully capable of conducting legislative business.

II. THE BOARD'S DECISION ERRS ON THE MERITS

A. The Board's Decision Was Not Supported By Substantial Evidence.

"To meet the requirement of 'substantial evidence,' the Board must produce 'more than a mere scintilla' of evidence." *Pacific Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000). As explained at Op.Br.74-76, the testimony before the Administrative Law Judge ("ALJ") does not support the Board's finding of an agreement.

Remarkably, the Board was able to find union representative Koerner "highly credible" only by discrediting Koerner's testimony. (D&O at 1 n.2.) Koerner testified on direct that a tentative agreement ("T.A.") was reached during the December 8th negotiations wherein an "either/or" proposal would be voted. (TR 69:10-11; 70:14-16) On cross, Koerner was shown the affidavit he provided to the Regional Office of the NLRB during the investigation of the charge (TR 102:11), wherein he discussed a December 9 telephone conversation with the company president: "I told Rodger that I was voting the contract on Wednesday and that I would vote what we TA'd during the December 8th meeting—*noting different than T.A.*" (TR 103:14-25 (emphasis added).) Koerner was thus clear that the employees voted on something *different* from any supposed tentative agreement. On redirect, the General Counsel asked Koerner if he believed the affidavit contained "an error" (TR 112:9-10) or if anything was "incorrect" (TR 112:14-16). Koerner then denied

any error: "Q: Having read that provision or those provisions do you think there is anything incorrect regarding that portion of your statement? A: No, I do not." (TR 112:14-17.)

The ALJ dismissed this testimony in favor of conjecture: "I believe it is more likely that the quoted language confused Koerner, and that the affidavit simply contained a spelling error." (D&O at 5 n.8.) The record does not support this determination. Despite the General Counsel's questions suggesting "an error" or something being "incorrect" (TR 112:9-10; 112:14-16), Koerner consistently affirmed the affidavit's accuracy (TR 112:15-17). The ALJ relied on Koerner's "contemporaneous notes" (D&O at 7), but those sparse notes contain only a sliver of the three-hour negotiations, *see* GC Ex. 11; TR 98:3-15,[14] and there was substantial conflict about when the notes were taken. Koerner testified he took the notes after asking employer representative Zimmerman to read the proposal (TR 59:10-21; 60:1-14; 62:4-8), while two employer witnesses denied that Zimmerman ever read the proposal (TR 144:17-19; 170:24-171:6). Indeed, union committee member Urlacher sat next to Koerner during the session and testified both that Koerner never asked Zimmerman to read the proposal (TR 166:8-11), and that Koerner did not take notes (*id.*). Koerner himself even stated that he *checked* his notes, not that he *took* notes. (TR 101:10-19.)

[14] Koerner's notes of other meetings were "lost." (TR 99:6-9.)

Employee Weber's testimony—the other basis for the Board's ruling—was similarly problematic insofar as Weber clearly misunderstood the negotiations. Weber testified that employer representative Zimmerman confirmed his understanding that the parties had reached a binding agreement as being "correct." (TR 118:20.) But Zimmerman *actually* confirmed only that they were talking about a *potential* agreement, explaining "that's what we have been talking about" (TR 142:19-23), as others corroborated (TR 171:8-23). The December 8th meeting was Weber's only involvement and he sat some thirty feet distant from the negotiating table. (TR 129:18-130:1; 115:22-29; 107:22.) Weber, an employee with no negotiating training and limited involvement, thus misunderstood *confirmation of subject matter* ("we have been discussing that") with *agreement*.

Nor do Weber's handwritten notes (GC Ex. 21) add support. For instance, those notes provide "485.00" as the gross amount employees would receive. (TR 130:19.) But no other witness mentioned a $485 figure. Weber also testified that Rodger Noel's statement to the effect of "let's do it" meant an agreement had been reached. (TR 123:9-10.) But Weber was the only one who thought that. The other participants testified that everyone was tired and that the employer agreed to send a proposal later. (TR 144:2, 171:12.) "I'm really getting tired, we need to end . . . [Koerner] asked [Noel] [to] present a proposal in writing." (TR 171.) Thus, Weber's testimony—like Koerner's—does not support the Board's finding of an agreement.

The Board has therefore failed to show that its decision was supported by substantial evidence.

B. Washington Law Confirms The Absence Of An Agreement.

The Board improperly seeks to enforce an "agreement" that was unenforceable under Washington law. (Op.Br.73-74.) The Government's assertion that Noel Canning waived this issue, (Resp.Br.78-79) is incorrect. This Court has made clear that "the ground for the exception" need not "be stated explicitly in the written exceptions filed with the Board." *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) (quotation omitted). Rather, it need only "be evident by the context in which the exception is raised." *Id.* Here, Noel Canning argued to the Board that there was "no meeting of the minds as to the terms of the contract" because "the union presented a contract and the employer *declined to sign it*." (Mem.Supp.Exceptions at 8 (emphasis added).) That was sufficient to present the argument that there was no enforceable agreement, due to the parties' expectations under Washington law. The fact that the "agreement" was invalid under Washington law shows that the parties did not reasonably believe themselves to be entering an agreement, precluding enforcement here. *See, e.g.*, *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

III. MOVANT-INTERVENORS HAVE STANDING[15]

A. Noel Canning's Standing Confers Standing On Movant-Intervenors.

The Government admits that Noel Canning has standing and is a member of both Movant-Intervenors. It nevertheless claims that Movant-Intervenors do not have standing because they cannot satisfy the third associational-standing factor in *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 343-44 (1977). The Government is mistaken.

First, Movant-Intervenors have Article III standing, which suffices for Rule 15(d) intervention. The third *Hunt* factor does not pertain to the "elements of a case or controversy within the meaning of the Constitution," but focuses instead on "matters of administrative convenience and efficiency." *United Food & Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996). "[O]nce an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more." *Id.* at 556.

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[15] Determining whether Movant-Intervenors have standing is not necessary to decide this case, since Noel Canning "of course, has standing." Resp.Br.16; *see also, e.g.*, *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (per curiam) ("[I]f one party has standing in an action, a court need not reach the issue of standing of other parties when it makes no difference to the merits of the case.").

Although Rule 15(d) intervenors "must [ ] satisfy the requirements of Article III standing," *Alabama Municipal Distrib. Grp. v. F.E.R.C.*, 300 F.3d 877, 879 n.2 (per curiam) (D.C. Cir. 2002), this Court has never held that they must also satisfy the prudential third *Hunt* factor. And for good reason. Such intervenors do not seek to create a new lawsuit with new claims. Instead, they seek to intervene in an existing lawsuit to protect their interests in the resolution of existing claims. Indeed, Rule 15(d) Intervenors are prohibited from bringing claims that the petitioner is not itself already advancing. *See, e.g.*, *Illinois Bell Tel. Co. v. F.C.C.*, 911 F.2d 776, 785-86 (D.C. Cir. 1990). The prudential concerns associated with this endeavor are thus different from those associated with parties who seek to initiate new litigation. Here, the Rule 15(d) requirements—which Movant-Intervenors satisfy—discharge the prudential need to ensure that only appropriate entities become parties. *See, e.g.*, *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-72 (7th Cir. 2009) (analogizing the intervention requirements to the requirements of prudential standing). That practical reality is, no doubt, why most circuits do not require that intervenors have standing at all.[16]

Second, even if the third *Hunt* factor did apply, it would not matter, since the

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[16] "[T]he predominant view is that intervention does not require that the intervenor have an interest sufficient under Article III to entitle him to sue, since the court's jurisdiction is adequately supported by the fact that the original parties must have standing." *Korczak v. Sedeman*, 427 F.3d 419, 421 (7th Cir. 2005); *see also, e.g.*, *San Juan Cnty. v. United States*, 420 F.3d 1197, 1204-05 (10th Cir. 2005) (Second, Fifth, Sixth, Ninth and Eleventh Circuits do not require standing for intervention).

third factor precludes standing only where the essential party is *absent*. The purpose of this prudential requirement is to prevent adjudication of claims that cannot be resolved without the absent member. As the Supreme Court has explained, this factor addresses whether associations can "rebut the background presumption . . . that litigants may not assert the rights of absent third parties." *United Food Workers*, 517 U.S. at 557. Because Noel Canning is not an "absent" third party, these practical concerns disappear.[17]

Finally, even if *Hunt*'s third factor applied and even if Noel Canning's presence did not satisfy it, Movant-Intervenors would still clear this hurdle. "[A] suit which raises a pure question of law and which seeks relief that is not dependent on the individualized facts of individual cases meets the third prong of the *Hunt* test." *Public Citizen v. FTC*, 869 F.2d 1541, 1545 n.5 (D.C. Cir. 1989) (citation omitted). That is because this factor precludes associations from bringing suits that "require[] individualized proof" and cannot be "properly resolved in a group context." *Hunt*,

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[17] The Government is incorrect that associations lack standing to intervene if they are not authorized by statute to initiate the suit. (Resp.Br. 16.) That argument is foreclosed by *Alabama Municipal Distributors' Group*, 300 F.3d at 879, which allowed an association to intervene in a petition for review proceeding even though it could not have initiated the suit, rejecting the argument that "the statutory prerequisites for obtaining judicial review apply to intervenors and petitioners alike." The Government's sole authority for its broad rule is a line of dicta in a pre-*Lujan*, out-of-circuit case, where an association sought to intervene in the suit of a *non-member* that had divergent interests. (Resp.Br. 16 (quoting *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988)).)

432 U.S. at 344. The paradigmatic example is "when an organization seeks damages on behalf of its members." *United Food Workers*, 517 U.S. at 554; *see also Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 428 n.9 (D.C. Cir. 1989) (individual participation required "only when there are conflicts of interest within an organization, or when individual participation in a suit is needed in order to make damage determinations") (abrogated on other grounds).

Movant-Intervenors do not seek damages. Nor do they seek to litigate an issue requiring individualized proof. They simply seek to argue that the "recess" appointments are invalid, such that the Board lacks a quorum. This is a critical question of general interest to Movant-Intervenors' members.[18] Intervention is proper.

B. The Board Is Incorrect That The Harm Facing Movant-Intervenors' Members Is Too Speculative.

In any event, Movant-Intervenors have other members who likewise have standing to support intervention. *See* Op.Br. 24-27. The Government's counterarguments fail.

First, the Government articulates these members' injury as "the threat of future Board orders issued by the recess-appointed Board members." (Resp.Br.20.) But

[18] This is plainly not a situation where the asserted claims pertain only to a single member and thus "do not have any legal or practical significance for the rest of the [association's] membership." *O'Hair v. White*, 675 F.2d 680, 692 (5th Cir. 1982) (en banc).

their injuries are broader than that. They include both future unlawful Board Orders and the immediate harm of meaningless litigation before a quorumless Board. This Court has long held that a party has a sufficient injury for standing when it is forced to "incur the costs of resisting challenges" before an administrative body. *Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988). Proceedings before a quorumless Board impose a direct "wallet injury." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring).

Second, the Board claims that the future harm facing Movant-Intervenors is too speculative, asserting that "[a]djudication 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." (Resp.Br.21 n.4.) But speculation about purely hypothetical events cannot erase imminent harm. The Board has issued, and will continue to issue, quorumless rulings in Movant-Intervenors' members' cases. Those rulings violate the National Labor Relations Act, *New Process Steel, L.P., v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010), and impose a direct injury on those members. The Board determined to take this course when it adjudicated Noel Canning's dispute and Movant-Intervenors have standing to challenge that decision.

Any doubt about certainty is dispelled by the Board's adjudication of *over 500 cases* since the January 4, 2012, "recess" appointments, *see* NLRB Board Decisions, *available at* http://nlrb.gov/cases-decisions/board-decisions, including that of the

member named in Movant-Intervenors' Opening Brief, *see* NLRB Docket, *Goya Foods of Florida* (May 17, 2012 Board Decision), *available at* http://www.nlrb.gov/case/12-CA-019668. The Board is actively seeking enforcement of these Orders in the Circuit Courts. Thus, quorumless (and eventually appellate) adjudication of members' cases is certain. That suffices for standing: "[P]rovided the projected sequence of events is sufficiently certain, the prospective injury flows from what the agency is going to do." *Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010).

Finally, the Government claims that injuries facing Movant-Intervenors' members are not redressable because this Court's decision will have only a "precedential" effect. (Resp.Br.21.) That too is wrong. In the cases the Government invokes, any legal effect from the court's ruling would have been highly attenuated, affecting different entities in hypothetical circumstances. Here, by contrast, this Court's decision will directly bind the Board on the quorum issue. As this Court recently explained in a different Petition for Review proceeding from a different Board Order: "[A]s a three-judge panel, we are bound by" the Court's "prior decision" in an earlier Petition for Review proceeding from an earlier Board Order. *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012). Even the Board has admitted that this Court's decisions in the petition for review context are effectively binding nationwide. Pet. for Cert., *NLRB v. Laurel Baye Healthcare of Lake Lanier*, 130 S. Ct. 3498 (2010) (No. 09-377), 2009 WL 3122602. A favorable decision would thus

provide members with far more than the "'psychic satisfaction' of favorable precedent." (Resp.Br.17.)

C. The Board Wrongly Contends That The Board's Adjudicative Rule On Verbal Contracts Imposes No Redressable Injury

Finally, Movant-Intervenors' members have standing to challenge the Board's adjudicative rule on oral agreements. The Government does not dispute that the Board adopted such a rule, but instead claims that this rule does not confer standing "because the Company did not raise that issue to the Board." (Resp.Br.22.) The Government, however, incorrectly conflates standing with the ultimate resolution of the claim. Whether or not Noel Canning prevails, standing asks only whether "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This standing inquiry comes first, such that even if the court "ultimately determine[s] that petitioners have not established a right to relief, that does not mean that they have not alleged a cognizable injury." *Natural Resources Defense Council, Inc. v. E.P.A.*, 25 F.3d 1063, 1067 (D.C. Cir. 1994).

The Government also claims both that "Movants' alleged injury flows from the Board's legal rationale" and that "mere precedential" effect within the Board does not confer standing. (Resp.Br.22.) But these contentions ignore *Teva*, where this Court held that "the prospective injury flows from what the agency is going to do, not how it decided to do it." 595 F.3d at 1312. There is no question that the Board will continue enforcing the adjudicative rule that oral agreements are enforceable

regardless of state law. That plainly imposes imminent injury on Movant-Intervenors' members who engage in collective bargaining and who are forced to adhere to oral contracts regardless of contrary state law.

For all of these reasons, intervention should be granted. [19]

CONCLUSION

For the foregoing reasons, this Court should grant Noel Canning's Petition, deny the Board's Cross-Petition for Enforcement, and vacate the Board's Order.

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[19] The Government and the Union wisely refrain from adopting Amicus Prof. Williams' argument that this case presents a nonjusticiable political question. The question here is a legal one that the courts are well equipped to answer through "careful examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012). Thus, none of the cases addressing the validity of recess appointments has rejected such challenges as non-justiciable political questions. *See, e.g.*, *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 708 (2d Cir. 1962); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 (Ct. Int'l Trade 2002). Likewise, *Evans*, which Prof. Williams invokes, directly addressed the validity of a presidential recess appointment and held that "the President's appointment was not beyond his constitutional power." 387 F.3d at 1222. It addressed the separate "highly subjective" political question whether the President acted with sufficient "political wisdom" only *after* upholding the legality of the recess appointment. *Id.* at 1227.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the opening certificate, disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 9,989 words as determined by the word-counting feature of Microsoft Word.

Dated: November 20th, 2012

/s/ Noel Francisco
Noel J. Francisco

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2012, on behalf of Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of such filing to the following counsel:

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Respectfully submitted,

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