[ORAL ARGUMENT NOT YET SCHEDULED]

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 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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September 19, 2012

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and Amici.

1. Petitioner is Noel Canning.

2. Respondent is the National Labor Relations Board.

3. Intervenor for Respondent is the International Brotherhood of Teamsters Local 760.

4. Movant-Intervenors for Petitioner are Chamber of Commerce of the United States of America and The Coalition for a Democratic Workplace.

5. The following entities are participating as *amicus curiae* in the Court of Appeals.

In support of Petitioner: Landmark Legal Foundation, Janette Fuentes, Tommy Fuentes, Connie Gray, Karen Medley.

In support of neither party: Senator Mitch McConnell and 46 Other Members of the Senate Republican Conference, and Speaker of the House of Representatives John A. Boehner.

B. Ruling Under Review.

The ruling under review was issued on February 8, 2012, by the National Labor Relations Board. The National Labor Relations Board ordered Noel Canning to cease and desist from its purported refusal to bargain, and from otherwise interfering with employee rights under Section 7 of the National Labor Relations Act, and further

ordered Noel Canning to execute a collective bargaining agreement that was allegedly agreed upon orally on December 8, 2010. In issuing this ruling, the Board necessarily decided that it had a proper quorum to act under 29 U.S.C. § 153(b).

C. Related Cases.

Several other petitions for review are pending in other circuits wherein the Petitioners have questioned the validity of the January 4, 2012, "recess" appointments and thus have, in turn, questioned the Board's quorum to issue Orders. *See, e.g.*, *N.L.R.B. v. Enterprise Leasing Company-Southeast, LLC*, Case No. 12-1514 (4th Cir.); *Nestle Dreyer Ice Cream Company v. N.L.R.B.*, Case Nos. 12-1684, 12-1783 (4th Cir.); *Richards, et al. v. N.L.R.B.*, Case No. 12-1973 (7th Cir.). So far as Petitioner and Movant-Intervenors know, there have not yet been any rulings on the issue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner and Movant-Intervenors make the following disclosures:

1. Petitioner Noel Canning is a division of The Noel Corporation. Noel Canning has no other parent corporations, and no other publicly held company has a 10% or greater ownership interest in Noel Canning. Noel Canning is engaged in the bottling and distribution of soft drinks in Central and Eastern Washington and Northern Oregon.

2. Movant-Intervenor Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. The Chamber's membership includes businesses that are covered by the NLRA and engage in collective bargaining, and that thus appear before the Board, giving them a direct interest in the rules and decisions issued by the Board. (Declaration of Randel K. Johnson at ¶ 5, Ex. A.) An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Whether the Board has a constitutional quorum is of extreme importance to the thousands of Chamber members who seek predictability and stability in federal labor regulation. The present uncertainty over the Board's

authority makes planning impossible, with negative consequences for employers and employees alike.

The Chamber has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in the Chamber.

3. Movant-Intervenor The Coalition for a Democratic Workplace ("CDW") consists of over 600 member organizations and employers, who in turn represent millions of additional employers, and gives its members a voice on a number of labor issues, including non-employee access, an employee's right to have access to organizing information from multiple sources, and unit determinations. The vast majority of CDW's members are covered by the NLRA or represent organizations covered by the NLRA. Thus, like the Chamber's membership, CDW's members have a strong interest in ascertaining whether the Board actually has a proper quorum.

CDW has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in CDW.

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JURISDICTIONAL STATEMENT

This is a Petition for Review from an Order of the National Labor Relations Board issued on February 8, 2012. This Court has jurisdiction to review that Order under 29 U.S.C. § 160(f).

STATEMENT OF ISSUES

The questions presented by Noel Canning's Petition are whether the National Labor Relations Board erred by:

1. Issuing a ruling against Noel Canning despite lacking a quorum of three properly appointed members;

2. Ordering enforcement of an alleged verbal contract; and

3. Ordering relief against Noel Canning absent substantial evidence.

STATUTES AND REGULATIONS

All applicable provisions are contained in the addendum to this Brief.

INTRODUCTION

On January 4, 2012, the President purported to make intrasession "recess" appointments of Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board (the "Board"). But the Senate was not in "recess" on January 4, 2012. The Senate had convened just the day before to commence the second session of the 112th Congress, and convened again two days later. Such short intrasession breaks are not recesses. Otherwise, every weekend, night, or lunch break would be a "recess" too. If accepted, that policy—effectively enabling Presidents to

make "recess" appointments at their convenience—would upend the appointments process by expanding the Recess Appointments Clause into the primary method of appointment, rather than the "auxiliary" method it was intended to be. It is thus clear that the Senate was not in "recess" on January 4, 2012, and the President did not have the power to make recess appointments.

This conclusion flows directly from settled law and undisputed facts. The Government has long operated on the understanding—an understanding that no prior President has ever transgressed—that in order for the President to make intrasession recess appointments, the Senate must first, at the least, "adjourn for more than three days" under the Adjournment Clause, Art. I, § 5, cl. 4, which ensures that neither House of Congress becomes unavailable without the other's consent. Here, it is undisputed that the Senate never "adjourn[ed] for more than three days." Instead, it convened in brief sessions every three days in order to maintain its constitutional availability. These brief sessions are commonly referred to as "pro forma" sessions—a reference to their "short" duration, Henry B. Hogue, Congressional Research Service, RS 21308, *Recess Appointments: Frequently Asked Questions* at 4 (2012) (explaining that a pro forma session is a "short meeting[] of the Senate or the House for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House")—and are just as constitutionally consequential as longer sessions. During these sessions, the Senate was capable of conducting—and *actually did* conduct—significant legislative business. The Senate

therefore did not recess, and the President did not have the power to make recess appointments. That is sufficient to resolve this dispute.

The Government has deployed an assortment of rationales to avoid this straightforward conclusion, but all lack merit. It contends that even though the political branches have long agreed that the Adjournment Clause delineates the minimum break required for an intrasession "recess" under the Recess Appointments Clause, it makes no difference whether the Senate was *actually* adjourned for more than three days under the Adjournment Clause. But the entire point of relying on the Adjournment Clause to establish the minimum break for a "recess" under the Recess Appointments Clause is that the Adjournment Clause makes clear which breaks have constitutional significance ("more than three days"), and which do not (three days or less). It would make no sense for the Executive Branch to rely on the Adjournment Clause's three-day rule while ignoring the Clause's definition of what satisfies that rule. Indeed, if the meaning of "recess" in the Recess Appointments Clause is not tethered to the Adjournment Clause's three-day rule, the result is a jurisprudential netherworld in which the existence of a "recess" turns on an ad hoc assessment of whether the Senate is sufficiently "busy" to be in session. There would then be no logical reason why the President could not make a recess appointment during a lunch break or over the weekend. Such indeterminacy is anathema where the separation of powers is at stake. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

The Government also attempts to erect an artificial constitutional wall between pro forma sessions and all other sessions. But there is no support for this attempt, as no meaningful distinction exists. For decades, the Senate has used pro forma sessions to maintain constitutional availability and do legislative business. And *availability* to work is the key to assessing whether the Senate is in recess—not whether the Senate is actively working—because the recess exception to the general appointments process is specifically linked to the Senate's *inability* to provide advice and consent. That is likely why, until recently, the Executive Branch agreed that the Senate is not in "recess" when it is convening in pro forma sessions every three days. It is also no doubt why even today the Government agrees that some pro forma sessions *do* count under the Recess Appointments Clause. Namely, the Government believes that the Senate's January 3, 2012, pro forma session was valid even though it was no less pro forma than any of the others. The Government takes this position because by counting the January 3 session (but not the others), the terms of each putative recess appointee are increased by a year. But there is no basis for the Government's conclusion that pro forma sessions count only when they increase executive power.

In the end, the validity of the appointments at issue depends upon a claim of sweeping executive "discretion" to "determine" that the Senate is "unavailable" and therefore in "recess." But such sweeping "discretion" cannot possibly exist. If any branch has the power to decide whether the Senate is in session, it is the Senate and not the President. The governmental actor who obtains *additional* powers during a

Senate recess cannot also be the gatekeeper who decides whether those additional powers are triggered. Moreover, the Government's assertion of such discretion is premised on a presumption of executive authority to not only overrule the Senate's determination of its own availability to conduct business, but also overrule the House of Representatives' understanding of the Senate's availability to conduct business, and ignore the fact that the Senate *actually did* conduct substantial business at two separate pro forma sessions during and just before the supposed "recess" here. Such a power would enable the President to both unilaterally declare recesses and make unilateral recess appointments, eviscerating the Senate's constitutional role in the appointments process. That is plainly not what the Constitution permits.

Here, the Senate never adjourned for more than three days. It thus remained constitutionally available and fully capable of acting on pending nominations. The Senate chose not to act on those nominations, and the President may have disagreed with that choice. But a political disagreement is not a "recess." If it were, then the Founders' refusal to vest an "absolute power of appointment" in the Executive would be a dead letter. *The Federalist No. 76* (Alexander Hamilton) (*available at* http://constitution.org/fed/federa76.htm) ("*Federalist 76*").

This Court should therefore grant Noel Canning's Petition, deny the Board's Cross-Petition for Enforcement, and vacate the Board's Order on the ground that it was unlawfully entered by a quorumless Board.

STATEMENT OF FACTS

On January 4, 2012, the President purported to "recess" appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board. Even though the Senate was in session, the President attempted to make these appointments by invoking the recess appointments provision in U.S. Const. art. II, § 2, cl. 3. The Board then proceeded to issue a number of orders, including one against Petitioner Noel Canning, all of which presumed that Ms. Block and Messrs. Flynn and Griffin were lawfully appointed. Below is a summary of the facts leading to the present situation generally, as well as those underlying this particular case.

1. Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). While vacancies in the Board do "not impair the right of the remaining members to exercise all of the powers of the Board," *id.* § 153(b), "three members of the Board shall, at all times, constitute a quorum of the Board," *id.* Thus, the Supreme Court recently held that the Board cannot exercise its statutory authority during any period in which it has fewer than three members. *See New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, 130 S. Ct. 2635, 2644-45 (2010).

Prior to January 3, 2012, the Board operated with three lawfully appointed members[1] and therefore had a lawful quorum.[2] In particular, two of the Board's current members, Chairman Pearce and Member Hayes, were nominated by the President on July 9, 2009 and confirmed by the Senate on June 22, 2010.[3] And the third member, Craig Becker, was recess-appointed by the President on March 27, 2010.[4] Pursuant to the Recess Appointments Clause, however, Mr. Becker's term expired at the end of the First Session of the 112th Congress—at the latest, on January 3, 2012. *See* U.S. Const. art. II, § 2, cl. 3. Consequently, as of January 3, 2012, the Board had only two members and lacked the statutorily required quorum to do business.

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[1] Press Release, National Labor Relations Board, White House Announces Recess Appointments of Three to Fill Board Vacancies (Jan. 4, 2012), *available at* http://www.nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies.

[2] *New Process Steel*, 130 S. Ct. at 2644-45.

[3] Press Release, National Labor Relations Board, Brian Hayes, Mark Pearce confirmed by Senate as Board members (June 22, 2010), *available at* http://www.nlrb.gov/news-media/news-releases/archive-news; 156 Cong. Rec. S5217 (daily ed. June 22, 2010).

[4] Press Release, White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions. The Senate went into a two-week recess on March 26, 2010, before the President recess appointed Mr. Becker. *See* 156 Cong. Rec. S2180 (daily ed. Mar. 26, 2010). The constitutionality of Mr. Becker's appointment was thus never challenged.

2. On December 17, 2011, the Senate agreed by unanimous consent to remain in session from December 20, 2011, through January 23, 2012, by convening in pro forma sessions every three business days.[5] This was necessary because, under the Constitution's Adjournment Clause, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]" Art. I, § 5, Cl. 4. And here, the U.S. House of Representatives did not consent to a Senate adjournment exceeding three days. Rather, the House determined to withhold its consent following a letter from 20 Senators to Speaker Boehner asking him "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term,"[6] as well as a letter from 78 Representatives requesting that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for

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[5] 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011); *see also* U.S. Senate, Daily Summary, Senate Floor Schedule for Pro Formas and Monday, January 23, 2012 (Dec. 17, 2011), http://democrats.senate.gov/2011/12/17/senate-floor-schedule-for-pro-formas-and-monday-january-23-2012/.

[6] Press Release, Senator David Vitter, Vitter, DeMint Urge House to Block Controversial Recess Appointments (May 25, 2011) (*available at* http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77&Region_id=&Issue_id=) ("Vitter Press Release"); *see also, e.g.*, Vivian S. Chu, Cong. Research Serv., RL33009, *Recess Appointments: A Legal Overview* at 20-21 (2012), *available at* http://digital.library.unt.edu/ark:/67531/metadc40201/m1/1/high_res_d/RL33009_2011May12.pdf.

the remainder of the 112th Congress."[7] Indeed, the Senate never even sought the House's consent to adjourn for more than three days under the Adjournment Clause.

During the December 17 to January 23 period, the Senate then proceeded to conduct two important pieces of business in its pro forma sessions. First, on December 23, the Senate passed a temporary extension to the payroll tax cut. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Second, under the Twentieth Amendment to the Constitution, the Senate is required to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2. The Senate fulfilled this constitutional obligation by convening pro forma on January 3, 2012.

The Government does not dispute that these were constitutionally meaningful sessions of Congress. The President signed the payroll tax cut extension enacted at the December 23 pro forma session without questioning its validity.[8] And in other litigation challenging these recess appointments, the Government has taken the position that the Senate's January 3 meeting was a constitutionally sufficient session

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[7] Letter from Rep. Jeff Landry, U.S. House of Representatives, to John Boehner, Speaker of the House, (June 15, 2011) *available at* http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf (letter from 78 representatives requesting that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress") ("Landry Letter").

[8] White House Office of the Press Secretary, Statement by the Press Secretary on H.R. 3765, *available at* http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765.

that marked the beginning of the supposed recess. *See* Government's Opposition to Respondent's Motion to Dismiss at 20, *Paulsen v. Renaissance Equity Holdings*, Civ. No. 12-cv-00350 (E.D.N.Y. Feb. 22, 2012) (arguing that "the pro forma sessions between January 3 and 23, 2012, did not interrupt the Senate's twenty-day intrasession recess for purposes of that Clause"); Brief for the Board, *D.R. Horton, Inc. v. N.L.R.B.*, Case No. 12-160031 (5th Cir. Sept. 4, 2012), at 48-52 (arguing that Member Becker's original recess appointment lasted until noon on January 3, 2012, "with the commencement of the next session" of Congress).

Convening pro forma sessions in order to conduct legislative business is not new. As described in greater detail below, the Senate has long used pro forma sessions to do Senate business. For example, the Senate has routinely used pro forma sessions to comply with the Adjournment Clause when the House will not consent to an adjournment exceeding three days, U.S. Const. am. XX, § 2, and to comply with the Twentieth Amendment's requirement that Congress "assemble at least once in every year" in a "meeting" that "shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." *Id.* *See infra* at 43-45.

The Senate has also used pro forma sessions to do Senate business, including passing two major pieces of legislation. The Senate has also previously used pro forma sessions to prevent the President from making recess appointments. Senator Byrd first proposed this measure in 1985, after which he and President Reagan entered into a compromise that implicitly acknowledged the validity of pro forma

sessions. *See infra* at 53-54. Senator Reid then implemented this practice in 2007 to prevent President George W. Bush from making recess appointments, a practice that was continued into the current Administration. Until now, this measure has been effective: "The Senate pro forma session practice appears to have achieved its stated intent: President Bush made no recess appointments between the initial pro forma sessions in November 2007 and the end of his presidency."[9] As then-Solicitor General Kagan would later represent to the Supreme Court of the United States, "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007" because it "convened pro forma every three days."[10] *See infra* at 51-52.

3. Notwithstanding this history, on January 4, 2012, the day after the Senate's January 3 pro forma session commencing the Second Session of the 112th Congress, the President purported to appoint Ms. Block, and Messrs. Flynn and Griffin pursuant to the Recess Appointments Clause of the Constitution, U.S. Const.

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[9] Henry B. Hogue, Cong. Research Serv., RS 21308, *Recess Appointments: Frequently Asked Questions* at 8 (2012) (*available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A).

[10] Letter from Elena Kagan, Solicitor General to William K. Suter, Clerk, Supreme Court of the United States, at 3 (April 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("Kagan Letter").

art. II, § 2, cl. 3.[11] The nominations were quite recent at the time. The President nominated the two Democratic nominees, Ms. Block and Mr. Griffin, on December 15, 2011, less than three weeks earlier and just two days before the Senate supposedly went into recess. On January 4, the day of the putative recess appointments, the required committee questionnaire and background check for the nominees had not even been submitted to the Senate,[12] generally a prerequisite to any Senate action on a nomination.

The next week, on January 12, 2012, the Department of Justice's Office of Legal Counsel released an opinion, dated January 6, 2012, explaining the legal rationale underlying the appointments. The OLC Opinion first stated that "the President is [] vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate."[13]

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[11] Press Release, White House, President Obama Announces Recess Appointments (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[12] Press Release, U.S. Senate Committee on Health, Education, Labor &Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012), *available at* http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb.

[13] *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro forma Sessions*, 36 Op. O.L.C. at 5 (2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921)) ("OLC Memo").

It then expressed the view that the Senate is in recess whenever the President determines that the Senate is "unavailable . . . to 'receive communications from the President or participate as a body in making appointments.'"[14] Key to this conclusion was the assertion that "Congress's provision for pro forma sessions . . . does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause and that the President may properly conclude that the Senate is unavailable for the overall duration of the recess."[15]

4. Shortly thereafter, on February 8, 2012, the Board issued its decision against Noel Canning.

a. Noel Canning is a company engaged in the bottling and distribution of soft drinks in Yakima, Washington and is part of the Noel Corporation. The Board's decision involves a dispute between Noel Canning and Teamsters Local 760. That dispute centered on whether Noel Canning violated the National Labor Relations Act by making certain statements in the course of bargaining and by refusing to execute and enter a collective bargaining agreement that had allegedly been verbally agreed upon during negotiations. *Noel Canning*, 358 NLRB No. 4 at 3 (2012).

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[14] *Id.*; *see also id.* at 1, 4, 9, 15.

[15] *Id.* at 9.

b. Specifically, the Board's ruling ordered Noel Canning to cease and desist from its purported refusal to bargain, and from otherwise interfering with employee rights under Section 7 of the National Labor Relations Act. The Board found that the question of a contract's validity in the context of labor disputes "is not subject to state law." *Noel Canning*, 358 NLRB No. 4 at 7. Instead, the Board held that, under Federal law, "[o]nce a verbal agreement is reached by the parties, they are obligated to abide by the terms of the agreement even though those terms have not been reduced to writing." *Id.*

c. The Board's decision against Noel Canning came subsequent to the appointments of Ms. Block, and Messrs. Flynn and Griffin. This action required a quorum of the Board. *See New Process Steel*, 130 S. Ct. at 2644-45. Thus, in issuing its decision, the Board has necessarily decided that these appointments were proper and that it possesses a proper quorum. The Board has since reaffirmed that decision. *See, e.g.*, *Center for Social Change, Inc.*, 358 NLRB No. 24 at 1 (2012) ("[W]e reject the Respondent's arguments that the Board lacks a quorum."). Noel Canning filed its Petition for Review of the Board's decision on February 24, 2012. (Doc. 1360898.)

5. On March 15, 2012, the Chamber and CDW moved to intervene in this proceeding. (Doc. 1363942.) On June 21, 2012, this Court held that "[w]hile the motion satisfies the standards for intervention under Federal Rule of Appellate Procedure 15(d), movants and respondent are directed to address in their briefs the

question of movants' standing to intervene rather than incorporate those arguments by reference." (Doc. 1379992 at 2.)

a. The Chamber is the world's largest business federation. Noel Canning is a member of the Chamber. (Doc. 1363942, Ex. A, Declaration of Randel K. Johnson at ¶ 2.) Other members of the Chamber were awaiting decisions from the Board on February 24, 2012, the day that Noel Canning filed its Petition for Review in this Court. (Declaration of Randel K. Johnson at ¶¶ 2-4, Ex. A.)

b. CDW consists of over 600 member organizations and employers, who in turn represent millions of additional employers. Noel Canning is a member of CDW (*see* Doc. 1363942, Ex. B, Declaration of Josh Ulman at ¶ 3), as is the Chamber (*see* Doc. 1370252, Ex. A, Declaration of Randel K. Johnson at ¶ 4).

c. Board proceedings are not *per se* precedential, but the Board routinely relies on its prior decisions as authority. *See, e.g.*, *Noel Canning*, 358 NLRB No. 4 at 7 (citing *Young Women's Christian Association (YWCA)*, 349 NLRB 762, 771 (2007) and *Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998)). The Board's decisions therefore regulate the conduct of non-party employers, including many members of the Chamber and CDW.

SUMMARY OF ARGUMENT

1. The "recess" appointments of Ms. Block and Messrs. Flynn and Griffin were invalid. The Board therefore lacked a quorum to enter the Order against Noel Canning.

a. It has long been established that intrasession recess appointments are permissible only if, at a minimum, the Senate first "adjourn[s] for more than three days" under the Adjournment Clause. The Adjournment Clause is a parallel provision in the Constitution that forbids one House of Congress from adjourning for more than three days without the other House's consent. In doing so, the Adjournment Clause explicitly distinguishes between breaks of constitutional significance ("more than three days") and breaks with no constitutional significance (three days or less).

b. Here, it is undisputed that the Senate never "adjourn[ed] for more than three days" under the Adjournment Clause and, indeed, never received the House's consent to do so. Instead, the Senate met its constitutional obligation by holding pro forma sessions every three days from December 17, 2011, to January 23, 2012. The Senate was therefore constitutionally available to do business throughout that period and never went into "recess" within the meaning of the Recess Appointments Clause. The January 4, 2012, "recess" appointments were, in turn, invalid.

2. The Government has nevertheless, through an Office of Legal Counsel memorandum issued in conjunction with the appointments at issue, taken the position that the Senate was in recess. This is plainly wrong for a number of reasons.

First, even though the Executive Branch has long relied on the Adjournment Clause as the basis for its position that three days is the minimum intrasession break in which the President may make recess appointments (a position the Government

has not disavowed), the Government asserts that it is irrelevant whether the Senate actually "adjourn[ed] for more than three days" for purposes of the Adjournment Clause. This assertion makes no sense. The entire point of relying on the Adjournment Clause to establish the floor for a Senate recess is that the Adjournment Clause defines constitutional unavailability. It ensures that neither House of Congress becomes constitutionally unavailable without the other's consent. In so ensuring, the Adjournment Clause makes clear that breaks of three days or less are constitutionally *de minimis*. Relying on this rule, while adopting a shifting definition of what satisfies it, would render the rule meaningless. Indeed, if the Adjournment Clause's three-day rule does not define the lower boundary of a constitutional "recess," then what constitutes a "recess" must be determined on an arbitrary, ad hoc basis. Courts would have to draw amorphous distinctions between three-day breaks, lunch breaks, weekend breaks, refusal to release nominations from committee, and the myriad other incidents that cause temporary suspensions of Senate business—all of which would become potential "recesses" in the absence of the Adjournment Clause's three-day rule. Such indeterminacy is anathema to the separation of powers. *See, e.g.*, *Plaut*, 514 U.S. at 239 ("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.").

Second, the Government claims that there is a constitutional difference between pro forma sessions and all other sessions. But the Constitution makes no such

distinction, and decades of history refute it. The Senate has long used pro forma sessions to do business, including when it passed the Temporary Payroll Tax Cut Continuation Act of 2011 during its December 23 pro forma session just two weeks before the supposed "recess" here. The Senate is fully capable of providing advice and consent at these sessions. That is dispositive. The fact that the Senate chose not to act on the pending nominations does not mean it was unavailable to do so. That is likely why the Government previously argued in the Supreme Court that pro forma sessions preclude recess appointments, and why Presidents of both political parties previously abstained from attempting recess appointments when the Senate was meeting pro forma.

Finally, the Government's overarching claim is that the President possesses unfettered "discretion" to declare the Senate to be in recess. But that cannot possibly be right. If anyone has the power to decide whether the Senate is in recess, it is the Senate and not the President. The Constitution's Rules of Proceedings 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). Here, the Senate clearly concluded that it was in "in a condition to transact business." *Id.* That conclusion is dispositive, particularly buttressed, as it is, by the supporting conclusion of the House of Representatives.

Moreover, if the President did have unilateral "discretion" to "determine" that the Senate is in recess, that "discretion" would eviscerate the advice-and-consent

requirement and its underlying principles. The recess appointments power was intended to be a minor, emergency power, "auxiliary" to the "general" mode of appointment wherein the Senate provides advice and consent. *The Federalist No. 67* (Alexander Hamilton) (*available at* http://constitution.org/fed/federa67.htm)("*Federalist 67*"). The Appointments Clause thus gives the President unfettered discretion to decide whether to make a recess appointment and whom to appoint. But nowhere does it give the President the additional power to *create* a Senate recess by simply asserting that the Senate is "unavailable . . . to . . . 'participate as a body in making appointments.'" *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro form Sessions*, 36 Op. O.L.C. at 1 (2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf ("*OLC Memo*"). If the President had both unilateral power to make recess appointments, and unilateral power to declare Senate recesses, then the "auxiliary" power to make short-term recess appointments would promptly subsume the "general" one. Senate confirmation would be a fading memory.

3. Finally, the Government is likely to argue that adopting Petitioner and Movant-Intervenor's position would undermine the President's recess appointments power. In fact, the original understanding of the Recess Appointments Clause demonstrates that the precise opposite is true. It is the Government's position that would overturn the constitutional order by expanding an already excessively-robust recess appointment power into the very "absolute power of appointment" the

founders explicitly rejected. *Federalist 76*. Petitioner and Movant-Interevenors, by contrast, merely ask this Court to enforce a line that has never before been crossed: The President may not make intrasession recess appointments unless, at a minimum, the Senate "adjourn[s] for more than three days" in accordance with the Adjournment Clause.

4. The Board also erred in holding that Noel Canning's verbal contract was invalid. It is well-settled Washington state law that contracts must be written to be enforceable. The alleged oral "agreement" the Board is seeking to enforce is therefore not enforceable.

5. Finally, the Board's decision was not supported by substantial evidence. While Noel Canning and the Teamsters *discussed* the terms that the Board is now seeking to enforce, they never *agreed* to those terms. The evidence to that effect is extensive, and the contrary evidence nil.

STANDING

In its June 21, 2012, Order, this Court held that the Movant-Intervenors "satisf[y] the standards for intervention under Federal Rule of Appellate Procedure 15(d)," but instructed them to address the question of standing in their merits briefing. (Doc. 1379992.) They do so here pursuant to that Order and Circuit Rule 28(a)(7).

It is established law that an association has standing if one of its members has standing. *See, e.g.*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).[16] Here, the Chamber and CDW plainly meet that standard and therefore have standing. This is true for three independent reasons. *First*, Noel Canning obviously has standing, and Noel Canning is a member of both the Chamber and CDW. That confers standing on both. As numerous courts have held, "[w]here an organization alleges associational standing," it need only show "'that at least *one member* has standing to pursue its challenge.'" *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 818-19 (D.C. Cir. 2006) (quoting *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005) (emphasis added)). Noel Canning is a member and Noel Canning has standing. That resolves the matter.

Second, separate and apart from Noel Canning's standing, it is clear that multiple other members of Movant-Intervenors also have standing. On the date that Noel Canning filed its Petition for Review, numerous of Movant-Intervenors' members had matters pending before the Board and thus faced the prospect of imminent, unlawful Board action in the form of quorumless adjudications. Under basic principles of

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[16] Associations must also show that "(b) the interests [they] seek[] to protect are germane to the organization[s'] purpose[s]; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. The Board has not challenged either of these standing requirements, and it is clear that both are amply satisfied.

standing doctrine, those members have standing to challenge the Board's decision that it has a quorum. Movant-Intervenors thus have standing on this basis too.

Finally, both Movant-Intervenors have countless members that routinely engage in collective bargaining. Those members are directly burdened by the Board's adjudicative rule that verbal agreements are enforceable notwithstanding contrary state law. That gives those members standing to intervene, and thus confers an additional basis for Movant-Intervenors' standing here.

Standing is thus triply clear. This Court has already determined that Movant-Intervenors otherwise meet the standards for Rule 15(d) intervention. *See* Doc. 1379992. Intervention should be granted.

A. Movant-Intervenors Have Standing Because Noel Canning Has Standing And Is A Member Of Both Movant-Intervenors.

The most straightforward basis for Movant-Intervenors' standing is the fact that Noel Canning clearly has standing. It has been black letter law for at least three decades that an association has standing if *any* of its "members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. Noel Canning is a member of both Movant-Intervenors.[17] Movant-Intervenors thus have standing too. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("[To establish standing], the association must show . . . that *one or more* of its members are injured." (emphasis added)); *Utility*

[17] *See* Doc. 1363942, Ex. A, Declaration of Randel K. Johnson at ¶ 2; Doc. 1363942, Ex. B, Declaration of Josh Ulman at ¶ 3.

Air Regulatory Grp. v. EPA, 471 F.3d 1333, 1339-40 (D.C. Cir. 2006) (holding that injury to "at least one member" establishes organizational standing).

The fact that Noel Canning is a party to this litigation makes no difference. Nothing in *Hunt* or the Supreme Court's subsequent associational standing cases suggests that this would matter, and courts routinely find associational standing when the member supplying standing is also a party. For example, in *Doe v. Porter*, the Freedom From Religion Foundation and two of its members filed a single lawsuit against a defendant. 370 F.3d 558 (6th Cir. 2004). After concluding that the members had standing, the Sixth Circuit held that the Foundation "may have associational standing to assert the rights of one or more of its members, even if it suffers no direct injury." *Id.* at 561-62. The court concluded that because "John Doe and Mary Roe"—the two member-plaintiffs—"have standing to bring this action in their individual capacities, and are members of the [Foundation]," the Foundation had standing too. *Id.* at 562. The members' presence in the litigation changed nothing. Numerous other courts have easily concluded the same. *See, e.g.*, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005) ("We have found that the individual plaintiffs have standing, and Honeywell does not challenge the District Court's membership findings . . . [a]ccordingly, ICO has established associational standing."); *Fair Housing in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 363 (2d Cir. 2003) ("At least two of FHHC's members[, the two individual plaintiffs,] have standing and, thus, [FHHC] may bring suit in a representative capacity . . . .");

Central Delta Water Agency v. United States, 306 F.3d 938, 951 (9th Cir. 2002) ("Because we have determined [] that the individual plaintiffs have standing, the first *Hunt* factor is satisfied.").

This straightforward application of *Hunt* makes perfect sense. Standing ensures that there is the "requisite 'case or controversy' between" the litigants, *Hunt*, 432 U.S. at 344, and "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor," *United Fed'n of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462, 469-70 (D.C. Cir. 1969). And indeed, as Wright & Miller explains, "actual participation by individual members may ease the way to accepting organization standing—although one plaintiff with standing ordinarily is enough, there may be some advantage in identifying the organization as a party rather than remitting it to a behind-the-scenes role." 13A Wright & Miller, Federal Practice and Procedure § 3531.9.5 (3d ed. 2012). There is plainly a live "case or controversy" between Noel Canning and the Board, and Movant-Intervenors' participation furthers all of standing's objectives. Movant-Intervenors thus have standing too.

B. Movant-Intervenors' Members Have Faced And Continue To Face Imminent Harm Due To The Board's Decision That It Possesses A Lawful Quorum.

But even if Noel Canning was somehow unable to confer standing on Movant-Intervenors, it would change nothing. Both Movant-Intervenors have multiple other members that were undergoing Board proceedings or awaiting a decision from the

Board on the date that Noel Canning filed its Petition for Review. *See* Declaration of Randel K. Johnson at ¶¶ 3-4, Ex. A; *see also,e.g.*, *New Mexico Atty. Gen. v. F.E.R.C.*, 466 F.3d 120, 122 (D.C. Cir. 2006) (per curiam) ("Standing is assessed at the time the action commences, i.e., in this case, at the time [Petitioners] sought relief from an Article III court." (alteration in original) (quotation omitted)). In its proceeding against Noel Canning, the Board ruled—as a general matter, spanning all future adjudications—that it possesses a quorum and intends to exercise its full powers. *See supra* at 14. That ruling directly subjected Movant-Intervenors' members to the imminent harm of quorumless adjudications. Each of those members therefore has standing, supplying Movant-Intervenors with standing too.

Hornbook standing doctrine makes clear that Movant-Intervenors' members have standing to challenge the Board's decision: (1) The harm they face is *imminent* because the Board will continue to subject them to unlawful Board action by adjudicating pending cases without the required quorum, *see Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988) (party has standing to challenge an agency's assertion of authority that creates the possibility of unlawful "agency review in future cases involving [similar] disputes," even if no standing otherwise); (2) The harm will invade their *legally protected interest* in adjudications by a Board that possesses a lawful quorum, *New Process Steel*, 130 S.Ct. at 2644-45; (3) The harm is *fairly traceable* to the Board's decision that it possesses a quorum; and (4) The harm would be *redressed* by a ruling in this Court that the Board lacks a quorum.

This Court's recent decision in *Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010), erases any doubt. There, the FDA argued that a company lacked standing to challenge a rule set forth in an adjudication to which the company was not a party. *Teva* flatly rejected this argument, explaining that standing exists because "[i]t is clear what the [agency] will do absent judicial intervention and what the effect of the agency's action will be." *Id.* at 1312. This case is no different. It is "clear" that—absent judicial intervention—the Board will adjudicate Movant-Intervenors' members' cases without a quorum, with "the effect" of subjecting those members to illegal Board action. *Id.* Each member therefore has standing to challenge this "imminent threat." *Id.*

The fact that the Board announced its decision that is has a proper quorum through adjudication changes nothing. All standing requires is that the harm be "imminent" rather than "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, the harm plainly was. The Board said it had a quorum and was actively deciding cases. The Board could and would decide Movant-Intervenors' members' cases any day. *Teva* makes clear that such a threat amply supplies standing:

> For the purpose of the classic constitutional standing analysis, it makes no difference to the "injury" inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by Ouija board; provided the projected sequence of events is sufficiently certain, *the prospective injury flows from what the agency is going to do, not how it decided to do it.*

Teva, 595 F.3d at 1312 (emphasis added); *see also Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49 (D.C. Cir. 2002) (adjudicating pre-enforcement challenge to an agency policy in a letter addressed to neither the petitioner nor the intervenors).

Finally, the harm facing Movant-Intervenors' members is directly redressable here. The NLRA gives the United States Court of Appeals for the D.C. Circuit jurisdiction over all Board adjudications. *See* 29 U.S.C. § 160(f). This Court's decision will thus directly redress the imminent harm of unlawful Board action facing Movant-Intervenors' members. Indeed, even the Board itself has previously acknowledged as much. For example, in the proceedings leading up to the Supreme Court's decision in *New Process Steel*, the Board supported its petition for certiorari from this Court's pre-*New Process Steel* decision by pointing out that D.C. Circuit decisions effectively bind the Board nationwide: "Section 10(f) of the NLRA permits any aggrieved person to seek review of a Board order in the D.C. Circuit," such that the D.C. Circuit's pre-*New Process Steel* holding that the NLRA requires a quorum "could prevent the current Board from enforcing the NLRA throughout the country." Pet. for Cert., *NLRB v. Laurel Baye Healthcare of Lake Lanier*, 130 S. Ct. 3498 (2010) (No.09-377), 2009 WL 3122602. Redressability—which need only be "likely, as opposed to merely speculative," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 187 (2000)—is thus easily satisfied. Here too, standing is clear.

C. Movant-Intervenors Have Standing To Challenge The Board's Adjudicative Rule That Verbal Agreements Are Valid Notwithstanding Contrary State Law.

Finally, Movant-Intervenors have standing to intervene on yet another basis. Both have numerous members with standing to challenge the Board's adjudicative rule that verbal agreements are enforceable notwithstanding contrary state law. *Noel Canning*, 358 NLRB No. 4 at 7. Board decisions inform future Board decisions, *see, e.g.*, *id.* (citing prior Board decisions), and both Movant-Intervenors have members who regularly engage in collective bargaining. (Declaration of Randel K. Johnson at ¶ 5; Doc. 1363942, Ex. B, Declaration of Josh Ulman at ¶ 3.) The Board's rule thus imposes concrete injury on Movant-Intervenors' members, giving Movant-Intervenors standing to challenge it. *See, e.g.*, *Teva*, 595 F.3d at 1312 (dismissing as "trivial" the uncertainty of whether the Agency will "stick to" a rule adopted in an adjudicative proceeding); *Ass'n of American R.R.s v. DOT*, 38 F.3d 582, 586 (D.C. Cir. 1994) (per curiam) ("additional regulatory burden" from "a federal agency's unlawful adoption of a rule" confers standing).

It makes no difference whether the Government thinks Noel Canning's claims lack merit, as it asserted before the motions panel. (Doc. 1366144 at 18.) Standing depends *solely* on whether the rule *harms* Movant-Intervenors' members. *Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005) ("[I]n order to establish injury in fact, petitioners must show that there is a substantial probability that the [] order will harm the concrete and particularized interests of at least one of their members."). The

Board's rule here plainly does. Movant-Intervenors thus have standing to challenge it on any ground, including the Board's lack of authority to adopt it. Rule 15(d) intervention should be granted.

ARGUMENT

I. THE SENATE WAS NOT IN RECESS AT THE TIME OF THE PURPORTED "RECESS" APPOINTMENTS HERE

The issue here is whether the Senate was in "recess" on January 4, 2012, when the President purported to make intrasession "recess" appointments of Sharon Block, Terence Flynn, and Richard Griffin to the Board. It was not. The Senate had convened just one day before, on January 3, to commence the second session of the 112th Congress, and convened again two days later, on January 6. Such short, three-day intrasession breaks are not recesses. Otherwise, every weekend, night, or lunch break would be a "recess" too, effectively enabling Presidents to make "recess" appointments at their convenience. This, in turn, would transform recess appointments into the norm, rather than the "auxiliary" method of appointment they were intended to be. That is not the law. Rather, it has long been recognized that, at a minimum, the President may make intrasession "recess" appointments only if the Senate has adjourned for more than three days under the Adjournment Clause. And here, it is undisputed that, on January 4, the Senate had not adjourned for more than three days under the Adjournment Clause. Accordingly, the appointments at issue here were invalid.

A. The Senate Must Adjourn For More Than Three Days Before It Goes Into "Recess."

Alexander Hamilton long ago explained that "[t]he ordinary power of appointment is confined to the President and Senate jointly," with the recess appointment power embodying a mere "auxiliary method of appointment, in cases to which the general method was inadequate." *Federalist 67*. The "auxiliary method" was thus confined to "temporary appointments 'during the recess of the Senate.'" *Id.* To that end, three Clauses are particularly relevant here.

First, the Constitution's Appointments Clause provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

U.S. Const. art. II, § 2, cl. 2.

Second, the Recess Appointments Clause provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, § 2, cl. 3.

And finally, also relevant is the Adjournment Clause, which provides:

> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

U.S. Const. art. I, § 5, cl. 4.

It has long been agreed that the President may not make an intrasession recess

appointment under the Recess Appointments Clause unless, at a bare minimum, the Senate adjourns for more than three days under the Adjournment Clause. As the Department of Justice recently argued:

> Given the extensive evidence suggesting that 'adjournment' and 'recess' are constitutionally equivalent . . . and the commonsense notion that overnight, weekend, and perhaps even long-weekend breaks do not affect the continuity of government or other operations, it would make eminent sense, 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; *see also, e.g.*, David Carpenter, et al, Cong. Research Serv., R42323, *President Obama's January 4, 2012 Recess Appointments: Legal Issues*, at 19 (2012) ("Because of the ambiguous nature of the Recess Appointments Clause, the Adjournment Clause has historically been drawn upon to impart meaning to the term 'Recess.'").

Indeed, as far back as 1921, in an opinion claiming, for the first time, that the recess appointments power extends to intrasession adjournments, Attorney General Daugherty argued that "no one . . . would for a moment contend that the Senate is not in session" unless it adjourns for more than three days. *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921) ("OLC Memo"). As General Daugherty explained:

> 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*.

Id. at 24-25 (emphasis added). General Daugherty thus reasoned that the Adjournment Clause set a constitutional minimum baseline for a Senate "recess."

Consistent with this analysis, a long line of Executive Branch opinions and practice have embraced this constraint ever since General Daugherty's 1921 opinion:

- Internal memoranda have reiterated this rule: "Arguably, the three days set by the Constitution as the time during which one House may adjourn without the consent of the other, U.S. Const. art. I, § 5, cl. 4, is also the length of time amounting to a 'Recess' under the Recess Appointments Clause," Memorandum from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel for Alberto R. Gonzales, Counsel to the President, *Re: Recess Appointments in the Current Recess of the Senate* at 2 (Feb. 20, 2004).[18]
- The Executive Branch has taken this position in litigation at all levels of the judiciary. *See, e.g.*, Reply Brief for Intervenor United States at 20-21, *Evans*, 407 F.3d 1272 (No. 02-16424) (citing "extensive evidence suggesting that

[18] *See also Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315-16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970); Memorandum from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel for John W. Dean III, Counsel to the President, *Re: Recess Appointments* at 3-4 (Dec. 3, 1971).

'adjournment' and 'recess' are constitutionally equivalent").[19]

- Presidents have long refrained from attempting recess appointments when the Senate has not "adjourn[ed] for more than three days." In the past thirty years—the full period in which the Congressional Research Service has carefully tracked this information—the shortest recess during which any President attempted to make a recess appointment was 10 days.[20]

Indeed, until now, the Congressional Research Service has not identified *any* instance of any President ever attempting to make an intrasession "recess" appointment where—as here—the Senate had not "adjourn[ed] for more than three days." *See, e.g.*, Hogue, *Recess Appointments: Frequently Asked Questions* at 10-11. This is significant, since such "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *see also, e.g.*, *Plaut*, 514 U.S. at 230 ("[The President's]

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[19] *See also, e.g.*, Transcript of Oral Argument at 50, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) (explaining that for the President to make a recess appointment "the recess has to be longer than 3 days").

[20] *See* Hogue, *Recess Appointments: Frequently Asked Questions* at 10; *see also, e.g.*, Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* at 12 (2012) ("Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a President made a recess appointment was 11 days, and the shortest intrasession recess during which a President made a recess appointment was 10 days.").

prolonged reticence would be amazing if such [an ability] were not understood to be constitutionally proscribed.").[21]

This parallel understanding of the two clauses makes sense. The terms "recess" and "adjournment" are often used interchangeably. *See, e.g.*, *The Pocket Veto Case*, 279 U.S. at 686 & n.11 (describing "adjournment to a particular day" as an instance where "Congress has temporarily taken a recess or an adjournment" (citation omitted)); *Harris v. Bd. of Governors of the Fed. Reserve Sys.*, 938 F.2d 720, 723 (7th Cir. 1991) ("all 'adjournment' means is that the Congress is in recess"). And as explained at greater length below, both Clauses relate directly to Congressional ability to do business and should therefore be interpreted together. *See infra* at 38-41.

The basic rule is thus clear. At a minimum, the Senate must "adjourn for more than three days" under the Adjournment Clause before the President may make an intrasession "recess" appointment under the Recess Appointments Clause. *See also, e.g.*, 158 Cong. Rec. S316 (daily ed. Feb. 2, 2012) (Sen. Hatch) ("[F]or decades, the

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[21] This understanding is also in accord with the limited existing judicial precedent. No court has ever upheld a recess appointment made during an adjournment of less than 11 days, let alone a mere three-day adjournment. *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (11-day intrasession adjournment); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc) (18-day intersession recess); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) (five-month intersession recess); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367 (Ct. Int'l Trade 2002) (19-day intersession recess); *Gould v. United States*, 19 Ct. Cl. 593 (1884) (five-month intrasession adjournment).

standard has been that a recess must be longer than 3 days for the President to make a recess appointment."); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 424 (2005) ("[T]he recess appointment power is best understood as available during . . . Senate recesses of more than three days.").

B. The Senate Never Went Into Recess Because It Never "Adjourned For More Than Three Days."

Here, it is undisputed that the Senate never adjourned for more than three days under the Adjournment Clause. *See, e.g.*, 158 Cong. Rec. S24 (daily ed. Jan. 23, 2012) (Sen. Grassley) ("No concurrent resolution authorizing an adjournment was passed by both chambers."). It instead met in pro forma sessions every three or four days between January 3, 2012, and January 23, 2012.[22] Indeed, Congress has "commonly and without objection" used pro forma sessions to satisfy the Adjournment Clause

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[22] Sundays do not count for purposes of the Recess Appointments Clause, such that four-day breaks including a Sunday are interchangeable with three-day breaks not including a Sunday. This is because in congressional practice, Sunday is a dies non. 5 *Hinds' Precedents of the House of Representatives* 846 (1907). Sundays are therefore ignored when determining how long each house can adjourn without the consent of the other and should not be considered in assessing the length of a recess. *Id.*; *see also, e.g.*, Jefferson's Manual and Rules of the House of Representatives (Washington: GPO, 2007), § 83 ("Sunday is not taken into account in making this computation."); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, at 15-16, 1265 (Washington: GPO, 1992). Petitioner and Movant-Intervenors do not understand the Government to be disputing this bedrock principle of legislative practice. For the sake of simplicity, this Brief will therefore refer to each of the Senate's breaks between January 3 and 23 as being three days long.

since the 1920s, 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee); *see also infra* at 42-43, and it is undisputed that the sessions here actually occurred, *see* 158 Cong. Rec. S3, S5, S7, S9, S11. Therefore, applying "the three-day rule explicitly set forth in the Adjournment Clause," Reply Brief for Intervenor United States at 21, *Evans*, 407 F.3d 1272 (No. 02-16424), the Senate did not go into "recess" here.

This should be the end of the matter. Because the Senate did not adjourn for more than three days under the Adjournment Clause, it did not go into recess under the Recess Appointments Clause. There was, therefore, no "recess" when the President purported to appoint Ms. Block and Messrs. Flynn and Griffin to the Board. Consequently, this Court should hold that the Board lacked a quorum when it issued its Order against Noel Canning. *See New Process Steel*, 130 S. Ct. at 2644-45.

II. THE GOVERNMENT'S RATIONALES FOR CONCLUDING THE SENATE WAS IN RECESS ARE FLAWED

The Government does not challenge this straightforward reasoning, but instead attempts to circumvent it. First, it reasons that, even though the Adjournment Clause is used to define the minimum break required for a "recess" under the Recess Appointments Clause, the Senate can still be in "recess" even if it does *not* adjourn for more than three days under the Adjournment Clause. This is so, the Government claims, because "adjournment" is merely a matter of Congressional "housekeeping" and is thus not a "good analog[y]" to "recesses" under the Recess Appointments Clause. *OLC Memo* at 19-20. Second, and relatedly, the Government argues that pro

forma sessions are constitutionally meaningless for purposes of the Recess Appointments Clause. This apparently means that the Senate was in "recess" for more than three days even though it never "adjourn[ed] for more than three days" under the Adjournment Clause. And third, the Government argues that the President has "discretion" to unilaterally decide that the Senate is unavailable and thus in "recess," such that he can then make unilateral recess appointments. *OLC Memo* at 1. Each of these arguments is demonstrably flawed.

A. The Government Is Incorrect That It Makes No Difference Whether The Senate "Adjourned" For More Than Three Days Under The Adjournment Clause.

As explained above, the political branches have long agreed that the President may not make an intrasession recess appointment unless, at the very least, the Senate first adjourns for more than three days. This rule makes perfect sense. The Adjournment Clause exists to ensure Congressional availability. It does so by enabling one House of Congress to prevent the other House from rendering itself unavailable to do business. The Clause thus expressly defines the minimum break—three days—that Congress can take before it is considered constitutionally unavailable. As James Madison explained: "[I]t would be very exceptionable to allow the senators, or even the representatives, to adjourn, without the consent of the other house, at any season whatsoever, without any regard to the situation of public exigencies." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 368 (Virginia convention) (remarks of James Madison) (Adjournment

Clause). *See also, e.g.,* 1 St. George Tucker, *Blackstone's Commentaries* Note D, 206 (1803) ("[T]o prevent the evils which might result from the want of a proper concert and good understanding between the houses, it is provided, that neither house, during the session of congress shall, without consent of the other, adjourn for more than three days . . . .").

Similar constitutional provisions confirm the basic inference that the Adjournment Clause is the lodestar of Congressional availability. For example, the Pocket Veto Clause provides:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress *by their Adjournment prevent its Return*, in which case it shall not be a Law.

U.S. Const. art. I, § 7, cl. 2 (emphasis added). The Supreme Court long ago held that the President cannot exercise his substantive power to pocket veto a bill if the originating House of Congress has not "adjourn[ed] for more than three days" under the Adjournment Clause (provided that the originating House has appointed someone to receive presidential messages during its intervening three-day breaks). *See Wright v. United States*, 302 U.S. 583, 589-90, 595-96, 598 (1938). The Executive Branch has since agreed:

> Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress *remains in session* and not adjourned for purposes of the pocket veto clause. Congress is not adjourned.

> Under those circumstances, the pocket veto clause is not applicable and the President has to return veto because Congress *is not adjourned* and he can return it in any way suitable.

A Bill to Clarify the Law Surrounding the President's Use of the Pocket Veto: Hearing on H.R. 849 Before the Subcomm. On the Legislative Process of the H. Comm. on Rules, 101st Cong. (1989) (then-OLC head William P. Barr testifying before Congress) (emphases added).

These three provisions all turn on the same thing—Congressional availability to do business—and should therefore be construed together. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6-7 (2009) (interpreting the language of a constitutional provision "in light of its purpose, a purpose that mirrors the intent of other constitutional provisions . . . ."). The Adjournment Clause limits breaks to three days to ensure that Congress *remains available* to do business. The Pocket Veto Clause and the Recess Appointments Clause, by contrast, give the President special powers during periods when Congress is *unavailable* to do business—whether that business is accepting returned bills from the President (Pocket Veto Clause) or acting on nominations (Recess Appointments Clause). When the Senate is meeting every three days in compliance with the Adjournment Clause, it is available for all constitutional purposes and the latter provisions are not triggered. *See also, e.g.*, *Kennedy v. Sampson*, 511 F.2d 430, 440 (D.C. Cir. 1974) ("The modern practice of Congress with respect to intrasession adjournments creates neither of the hazards—long delay and public uncertainty—perceived in the *Pocket Veto Case*."); *Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314,

316 (1979) (noting the "functional affinity between the pocket veto and recess appointment powers"). The provisions thus function together sensibly.

Further, if the meaning of "recess" in the Recess Appointments Clause is *not* tethered to the three-day rule in the Adjournment Clause, then there is no basis for using the Adjournment Clause's three-day rule in the first place. Instead, the Executive, Legislative, and Judicial Branches would be left to determine on an ad hoc basis which breaks are constitutional "recesses" and which are not. The question would not be whether the Senate had "adjourn[ed] for more than three days," but whether the Senate was sufficiently "busy" to be considered "in session." Under this analysis, it is conceivable that recess appointments could be made over the weekend or even during a lunch break. Such indeterminate rules, however, are anathema where the separation of powers is concerned. As the Supreme Court has explained: "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.

The Government's position, moreover, would incorrectly and needlessly complicate the Constitution. The Government has not challenged the settled understanding that the Adjournment Clause defines the minimum time the Senate must break before it goes into recess, *OLC Memo* at 9 n.13, but nonetheless claims that individual Senate sessions which count for one Clause (Adjournment) are nullities under the other (Recess). *See id.* at 19. That unnecessary twist makes no sense. The

Senate is either constitutionally unavailable or it is not. The Adjournment Clause says that the Senate is not constitutionally unavailable unless it "adjourn[s] for more than three days" with the consent of the House. That is why the Adjournment Clause has long been understood to establish the minimum break required for a Senate "recess" under the Recess Appointments Clause. And nothing in the Constitution's text or basic logic suggests that there are different definitions of what constitutes a legitimate Senate session for the Adjournment Clause, the Recess Appointments Clause, and the Pocket Veto Clause—even though all three Clauses incorporate the Adjournment Clause's three-day rule. The Court should therefore reject the Government's attempt to circumvent the longstanding reliance on the Adjournment Clause and its three-day rule.

B. Pro Forma Sessions Are Actual Senate Sessions.

In addition to arguing that the Adjournment Clause is ultimately irrelevant in assessing whether the Senate is in recess, the Government attempts to draw a constitutional line between pro forma sessions and all other sessions. *See OLC Memo* at 9. No such line exists. The Senate is just as available to provide advice and consent in pro forma sessions as it is in any other sessions. History, moreover, demonstrates that pro forma sessions are legitimate Senate sessions, as the Senate routinely does business at pro forma sessions—everything from receiving formal messages, to allowing committees to meet, to passing legislation—including during the so-called "recess" here. Indeed, even the Government agrees that *some* pro forma sessions

count under the Recess Appointments Clause. It is thus clear that the purported line between pro forma sessions and all other sessions has no constitutional basis.

1. The Senate Is Fully Capable Of Doing Business At Its Pro Forma Sessions.

The Senate has long used pro forma sessions to conduct all manner of legislative business, and nobody has ever questioned that practice. These examples—which span decades—demonstrate that there is no meaningful factual difference between pro forma sessions and other sessions, let alone a constitutional one. Unless all of this business was illegitimately done, then the Senate was entirely capable of doing business, including confirming nominees, at each of the pro forma sessions it held every three days from December 17, 2011, to January 23, 2012. A brief review of history makes this clear. Consider:

1. Adjournment Clause. As noted above, since at least 1929, Congress has used pro forma sessions to satisfy the Adjournment Clause's requirement that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4.[23] The

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[23] For example, in 1929, the Senate and the House adopted a concurrent recess resolution, which required the House to return from summer recess on September 23. 71 Cong. Rec. 3045 (1929). But rather than reconvene in regular session on the specified date, the House passed a separate resolution the next day providing that "after September 23, 1929, the House shall meet only on Mondays and Thursdays of each week until October 14, 1929," *id.* at 3228 (1929), while agreeing internally "that there shall be nothing transacted [during the Monday and Thursday

longstanding use of pro forma sessions to satisfy the Adjournment Clause is especially relevant because, as outlined above, the Adjournment Clause and the Recess Appointments Clause both turn on the Senate's availability to conduct business. *See supra* at 37-41.

2. Twentieth Amendment. Since at least 1980, both Houses of Congress have used pro forma sessions to satisfy the Constitution's requirement that Congress "assemble at least once in every year" in a "meeting" that "shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const., am. XX, § 2; *see also, e.g.*, 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee).[24] The

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sessions] except to convene and adjourn; no business whatever," *id.* at 3229 (statement of Rep. Tilson); *see also* 8 C. Cannon, *Precedents of the House of Representatives* § 3369, at 820 (1935) (describing this incident as one in which the House "provid[ed] for merely formal sessions"); *OLC Memo* at 19 n.25 (recounting the same). Since at least 1949, the Senate has also scheduled pro forma sessions in its adjournment orders to ensure that it never adjourned for more than three days without the House's consent. *See, e.g.*, 95 Cong. Rec. 12,586 (Aug. 31, 1949); *id.* at 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); *id.* at 7821 (May 29, 1950); *id.* at 16,980 (Dec. 22, 1950); *id.* at 17,020 (Dec. 26, 1950); *id.* at 17,022 (Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); *id.* at 2898 (Mar. 26, 1951); *id.* at 10,956 (Aug. 31, 1951); *id.* at 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr. 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957); 126 Cong. Rec. 2574 (Feb. 8, 1980); *id.* at 2614 (Feb. 11, 1980); *id.* at 2853 (Feb. 14, 1980); 127 Cong. Rec. 190 (Jan. 6, 1981); *id.* at 238 (Jan. 8, 1981); *id.* at 263 (Jan. 12, 1981); *id.* at 276 (Jan. 15, 1981).

[24] *See, e.g.*, H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) ("[W]hen the Congress convenes on January 3, 1980, . . . neither the House nor the Senate shall conduct organizational or legislative business until Tuesday, January 22, 1980, [unless convened sooner by House and Senate leaders]."); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (providing that neither House shall "conduct organizational or

use of pro forma sessions to satisfy the Twentieth Amendment is especially relevant here, because—as with the Adjournment Clause, the Pocket Veto Clause, and the Recess Appointments Clause—the purpose of the Twentieth Amendment's January 3 meeting requirement is to ensure that Congress is available to do business. The annual-meeting requirement seeks "[t]o prevent those inconveniencies which might arise from the national legislatures omitting to assemble as often as the affairs of the nation require." St. George Tucker, *supra*, at 206.[25] The Senate's longstanding use of pro forma sessions to satisfy the Twentieth Amendment thus not only reinforces the "past consensus that such sessions are of constitutional significance," 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee), it demonstrates the widespread recognition that the Senate is fully capable of addressing "the affairs of the nation" at pro forma

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legislative business" on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (Senate order providing for "a pro forma session only" on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session on January 3, 2012). Indeed, on at least one occasion, Congress even varied the date of its first session by legislation and both Houses of Congress then complied with the specifically chosen date using pro forma sessions. *See* Pub. L. No. 111-121, 123 Stat. 3479 (2009) (providing that the second session of the 111th Congress begin on January 5, 2010); 155 Cong. Rec. S14,140 (daily ed. Dec. 24, 2009) (Senate order providing for "a pro forma session only" on January 5, 2010); 156 Cong. Rec. H2-H8 (daily ed. Jan. 5, 2010) ("[N]o organizational or legislative business will be conducted on this day.").

[25] Tucker was referring to the precursor requirement in Article I, Section 4 that Congress convene at least once a year, on the first Monday in December, unless legislation provides otherwise. The Twentieth Amendment changed the date, but not the obligation.

sessions. Indeed, that fact is particularly powerful here, given that the President made his "recess" appointments just one day after the Senate made itself available in compliance with the Twentieth Amendment.

3. Other Parliamentary Purposes. The Senate also regularly uses pro forma sessions for a variety of other parliamentary purposes. One particularly instructive example is the use of pro forma sessions to enable Senate committees to meet. For example, as Senator Reid explained on September 17, 2008: "We are going to have to get some committee hearings underway, which is why we are not going to adjourn. We will be in pro forma session so committees can still meet, though we won't have any activities here on the floor . . . ." 154 Cong. Rec. S8907 (daily ed. Sept. 17, 2008) (Sen. Reid). Committee meetings are, of course, where the Senate does most of its work on nominations. That the Senate sometimes uses pro forma sessions specifically in order to permit committee meetings illustrates its ability to work on nominations at those sessions.

Likewise, the Senate counts pro forma sessions as days that the Senate is "in session" for the purpose of allowing a cloture vote to ripen. As *Riddick's* explains, cloture motions are "voted on the second calendar day thereafter that the Senate is in session" and "[a] pro forma session of the Senate would constitute the intervening day contemplated by the rule," whereas "[d]ays on which the Senate is not in session are not counted." *Riddick's Senate Procedure*, *supra*, at 331; *see also, e.g.*, 133 Cong. Rec. 15,445 (1987) ("The Senate will go over until Monday pro forma, no business, no

speeches, just in and out, and the pro forma meeting on Monday would qualify the cloture motion to be voted on Tuesday . . . .").

Numerous other examples abound. For instance, the Senate has:

- Convened pro forma for the purpose of hearing a presidential address, *see, e.g.*, 139 Cong. Rec. 3039 (1993) ("Any sessions will be pro forma or solely for the purpose of hearing the Presidents' Day address on Wednesday morning.").
- Entered formal messages into the Congressional Record when convening pro forma, *see, e.g.*, 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011).
- Altered the future Senate schedule during a pro forma session, *see, e.g.*, 127 Cong. Rec. 263 (1981) (Senator requesting and receiving "unanimous consent that the order for the convening of the Senate on Monday, January 19, 1981, be changed from 11 a.m. to 4 p.m.").
- And, while meeting pro forma, authorized its "Presiding Officer . . . to sign bills and joint resolutions passed by the two Houses and found truly enrolled," 109 Cong. Rec. 22, 941 (1964).

4. Legislation. Were there doubt about the Senate's ability to conduct business during pro forma sessions—and there should not be—it is dispelled by the fact that the Senate has twice passed major legislation during pro forma sessions in the past year, including during the same period at issue here. As noted above, at its December 23, 2011, pro forma session, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). Likewise, at its August 5, 2011, pro forma session, the Senate

passed the Airport and Airway Extension Act of 2011, *see* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Both bills were passed by unanimous consent. The pro forma sessions at which the Senate passed these bills were no better attended, longer lasting, or more formal than the Senate's other pro forma sessions.[26] *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (59 seconds and only two senators mentioned in the Congressional Record); 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (1 minute, 25 seconds and only two senators mentioned in the Congressional Record). Indeed, the December 23, 2011, legislation is especially noteworthy because the Senate passed it during a pro forma session scheduled by (and subject to) the *same* adjournment order that was in effect on January 4, 2012—the date of the so-called "recess" appointments here. The adjournment order in place when the Airport and Airway Extension Act was passed likewise provided that the Senate would "convene for pro forma sessions only, with no business conducted on the following dates and times . . . ." 157 Cong. Rec. S5292 (daily ed. Aug. 2, 2012). The President promptly signed both bills without expressing any reservations about the Senate's authority to pass them.[27]

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[26] This is evident from the video of the December 23, 2011 pro forma session at which the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011. *See* Senate Pro Forma Session (Dec. 23, 2011), C-SPAN, *available at* http://www.c-spanvideo.org/program/303363-1.

[27] *See* White House Office of the Press Secretary, Statement by the Press Secretary on H.R. 2553 (*available at* http://www.whitehouse.gov/the-press-office/2011/08/05/statement-press-secretary-hr-2553); White House Office of the

5. Nominations. Finally, and perhaps most importantly, the Senate is fully capable of providing advice and consent to nominations at its pro forma sessions. The Senate's recent passage of legislation makes this clear. The Senate passed the Airport and Airway Extension Act of 2011 and the Temporary Payroll Tax Cut Continuation Act of 2011 during pro forma sessions by unanimous consent without a quorum call. *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011); 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). This is the same procedure by which the Senate confirms most nominees.[28] The Senate easily could have used this procedure to act on the nominations of Ms. Block and Messrs. Flynn and Griffin to the Board had it chosen to do so. *See also, e.g.*, 158 Cong. Rec. S113 (daily ed. Jan. 26, 2012) (Sen. Lee) ("During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent."); Letter from 34 Senators to Senator Reid (Feb. 2, 2012) ("[Y]ou are obviously well aware that the Senate is able to conduct significant business during a

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Press Secretary, Statement by the Press Secretary on H.R. 3765 (*available at* http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765).

[28] *See, e.g.*, *Riddick's Senate Procedure* at 952 ("A request for unanimous consent that the Senate proceed to consider nominations . . . does not require a quorum call."); Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, at 9 (2011) ("Most nominations are brought up by unanimous consent and approved without objection.").

scheduled pro forma session . . . .").[29] Indeed, even the Government concedes that the Senate *could* "provide advice and consent on pending nominations during a pro forma session in the same manner." *OLC Memo* at 21 ("Conceivably, the Senate might . . . .").[30]

In light of this history, there can be no serious question that the Senate is fully capable of acting on nominations during pro forma sessions. Nor was this ability to act somehow constrained by the Senate's prediction in its December 17, 2011, adjournment order that it would not conduct business at its pro forma sessions. Such predictions are just that—*predictions*. If the Senate needs to do business at a pro forma session, it will and often does, just as it did when it passed legislation at its pro forma sessions on August 5 and December 23, 2011. Or to take another example, the Space Shuttle Columbia exploded on February 1, 2003, two days before a prescheduled pro forma session. Despite having stated in its January 30, 2003 adjournment order that "[n]o business will be conducted during Monday's session," 149 Cong. Rec. 2270

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[29] *Available at* http://isakson.senate.gov/press/2012/2-2-12Isakson,Chambliss%20Demand%20Answers%20from%20Reid%20over%20Recess%20Appts.html.

[30] The fact that few Senators attend pro forma sessions makes no difference. The Senate's Rules are clear that "[u]ntil a point of no quorum has been raised, the Senate operates on the assumption that a quorum is present, and even if only a few Senators are present, a measure may be passed or a nomination agreed to." *Riddick's Senate Procedure* at 1038; *see also, e.g.*, *id.* at 952 ("A request for unanimous consent that the Senate proceed to consider nominations as in executive session does not require a quorum call preceding the submissions of the agreement to the Senate.").

(2003), the Senate cast that prediction aside and proceeded to do business addressing the disaster, *see id.* at 2298. Moreover, after addressing the disaster, the Senate *proceeded to consider nominations*, making revisions to its schedule for consideration of Miguel Estrada's nomination to the D.C. Circuit Court of Appeals, *id.*—all regardless of its initial prediction that "[n]o business will be conducted."

Indeed, here, the President clearly knew that the Senate's December 17, 2011, adjournment order did not preclude it from doing business. After all, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011 at its December 23 pro forma session—scheduled by the *same* adjournment order in effect throughout the supposed "recess"—just twelve days before the January 4 "recess" appointments.[31] It is therefore clear that the Senate is fully capable, even if sometimes unwilling, of acting on nominations and conducting legislative business during pro forma sessions.

2. Even The Government Agrees That Pro Forma Sessions Have Constitutional Significance.

The Executive Branch's prior statements and actions further demonstrate the hollowness of the supposed distinction between pro forma sessions and other sessions. Foremost, just two years ago, in a formal letter filed in the Supreme Court of the United States, the Executive Branch *agreed* that pro forma sessions preclude a recess. At the time, this was not a novel position. Since the Senate first threatened to

[31] *See* Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

use pro forma sessions to preclude recess appointments during the Presidency of Ronald Reagan, the Executive Branch has consistently recognized that a Senate convening pro forma every three days is not in "recess." And even now, the Government's position is internally inconsistent: The Government continues to maintain that the Senate's pro forma sessions are constitutionally meaningful for some purposes (e.g., for the purpose of passing favored legislation and extending the duration of recess appointments), even if not for others (e.g., preventing a recess).

(a) The Executive Branch Previously Agreed That Pro Forma Sessions Preclude A Recess.

As noted, in the last year, the President signed into law two bills that were passed in pro forma sessions. In addition, just two years ago, the Executive Branch embraced the precise opposite of its current position. Through a letter filed by then-Solicitor General Elena Kagan, the Government argued to the Supreme Court of the United States that the Senate *can* preclude the President from making recess appointments by meeting in pro forma sessions every three days. As General Kagan wrote, "[a]lthough a President may fill [Board] vacancies through the use of his recess appointment power . . . the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period." Letter from Elena Kagan, Solicitor General, Office of the Solicitor General to William K. Suter, Clerk, Supreme Court of the United States at 3 (Apr. 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("*Kagan Letter*"). General Kagan's letter further emphasized

that this is exactly what the Senate did "for over a year beginning in late 2007," *id.*, during which period the Senate adjourned subject to an Order that—just like the adjournment Order here—scheduled pro forma sessions every three days "with no business conducted," *see* 153 Cong. Rec. S14,661 (daily ed. Nov. 16, 2007) (Sen. Webb).

The Government took this position in order to keep the Supreme Court from dismissing *New Process Steel* on the ground that then-recent recess appointments had supplied a quorum and thus mooted the dispute. *Kagan Letter* at 1. It argued that "the need for prospective guidance remains important" because "given the complexities and potential length of the Senate confirmation process, multiple vacancies could arise again in the future"; vacancies which the Senate might block from being filled with recess appointees by "declining to recess for more than two or three days at a time over a lengthy period." *Kagan Letter* at 3. Recognizing that pro forma sessions preclude a recess was thus a key component of the Government's argument. And of course that argument succeeded, because the Supreme Court kept the case and issued a ruling on the merits.

(b) These Statements Were Consistent With The Executive Branch's Prior Practice.

General Kagan's argument to the Supreme Court did not constitute a departure from prior practice. To the contrary, for several years, presidents from both political parties have refrained from attempting recess appointments when the Senate was

convening pro forma every three days. The Senate first began using pro forma sessions for the purpose of preventing recess appointments in November 2007. The Bush Administration, like the Obama Administration prior to January 4, 2012, acknowledged that three-day breaks punctuated by pro forma sessions are not "recesses," and therefore abstained from attempting recess appointments. As one commentator has observed: "The Senate pro forma session practice appears to have achieved its stated intent: President Bush made no recess appointments between the initial pro forma sessions in November 2007 and the end of his presidency." Hogue, *Recess Appointments: Frequently Asked Questions* at 8.

Indeed, the Executive Branch's recognition that pro forma sessions preclude recess appointments stretches back to (at least) the Reagan administration. As Senator Inhofe has recounted:

> [Senator Byrd] extracted from [President Reagan] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would have to give the list to the majority leader . . . in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or *by not going into recess and staying in pro forma* so the recess appointments could not take place.

145 Cong. Rec. 29,915 (1999) (Sen. Inhofe) (emphasis added). Implicit in President Reagan's compromise, therefore, was the premise that the Senate *could have* prevented him from making any recess appointments by convening pro forma. President Reagan's willingness to compromise—rather than simply make recess appointments

without regard for the Senate's pro forma sessions—strongly "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 908 (1997).

(c) Even Here, The Government Agrees That Pro Forma Sessions Are Sometimes Constitutionally Significant For The Recess Appointments Clause.

Finally, even now, the Government continues to acknowledge that some pro forma sessions have constitutional significance under the Recess Appointments Clause. Rather than take the position that pro forma sessions never count for purposes of the Recess Appointments Clause—and that the Senate was therefore in recess from the moment of its adjournment on December 17, 2011, until it reconvened in a non-pro forma session on January 23, 2012—the Government maintains that one pro forma session held during this period was constitutionally significant. Specifically, the Government claims that the Senate's January 3, 2012, pro forma session *does* count for purposes of the Recess Appointments Clause, *see OLC Memo* at 1 ("[O]n January 3, 2012, the Senate convened one such pro forma session to begin the second session of the 112th Congress . . . ."), even though that January 3 session was no less pro forma than any of the others. *See* 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012) (41 seconds and one Senator mentioned in the record).

The reason the Government takes this inconsistent position is because, by maintaining that the Senate's January 3, 2012 pro forma session was sufficient to convene the Second Session of the 112th Congress for purposes of the Recess Appointments Clause, the term of office for each "recess" appointee is increased by a

year. Recess appointments "expire at the End of [the Senate's] *next* Session," U.S. Const. art. II, § 2, cl. 3 (emphasis added), which means that the appointments will, if valid, likely last the entirety of this Senate Session and the next—a full two years. *See, e.g.*, Hogue, *Recess Appointments: Frequently Asked Questions* at 4-5 ("A recess appointment expires at the sine die adjournment of the Senate's 'next session' . . . [which] means that a recess appointment could last for almost two years."). If the January 3, 2012, pro forma session was a nullity, by contrast, then the Senate did not commence the Second Session of the 112th Congress until its first non-pro forma session of the year, on January 23, 2012. In that circumstance, the "next" session after the January 4, 2012, "recess" appointments would be the one that began on January 23, 2012, meaning that the appointments at issue here would expire sometime in December 2012, when the current session ends.

There is, of course, no basis in logic or law for distinguishing between the January 3 pro forma session and all others. Either pro forma sessions count or they do not. It cannot be that pro forma sessions count only whenever counting them expands Executive power. The correct answer is that pro forma sessions always count, including for purposes of the Adjournment Clause, the Pocket Veto Clause, the Twentieth Amendment, passing legislation and conducting other legislative business, and for purposes of the Recess Appointments Clause. There is no other plausible way to make sense of the Constitution's text, history, and historical implementation.

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In sum, there is no constitutional difference between pro forma sessions and any other sessions. Both satisfy the Senate's obligation under the Adjournment Clause. Moreover, the Senate can, and does, do business in both. The claim that the Senate was "unavailable" to act on nominations from January 3, 2012, to January 23, 2012, is thus factually wrong. The Government's objection is, in reality, not that the Senate was unable to act, but that the Senate was unwilling to act. For better or worse, though, deciding whether to confirm presidential nominees is the Senate's exclusive prerogative. Refusal to do so on the Executive Branch's preferred timetable does not render the Senate's sessions meaningless any more than does Senate delay via other parliamentary procedures such as protracted committee review, Senators placing "holds" on particular nominees, or the refusal to schedule floor votes.

C. If Any Branch Has The Power To Determine Whether The Senate Is In "Recess," It Is The Senate.

For the reasons stated, a series of brief adjournments punctuated by pro forma sessions cannot constitute a "recess" under the Recess Appointments Clause. But even if there were some ambiguity about whether the Senate was in "recess" despite meeting pro forma every three days, that ambiguity must be resolved in favor of what the relevant constitutional actor says about its *own* internal practices. That is, the judiciary must defer to *the Senate's* view of whether the Senate is in "recess."

The Government's contrary claim—that the President, notwithstanding the views of Congress, has unilateral "discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise the power to make recess appointments," *OLC Memo* at 1—is plainly wrong. Under this atextual and ahistorical view of Executive power, the President would have virtually unreviewable discretion to make "recess" appointments whenever he deemed the Senate to be "unavailable." If the President truly has such "discretion," the judiciary would have no principled basis to stop the President from determining that, for example, weekends or evenings or even lunch breaks are "recesses." After all, if the definition of "adjourn[ment] for more than three days" under the Adjournment Clause does not constitute the constitutional floor for a "recess" under the Recess Appointments Clause, then there is no logical reason why the "three days" in the Adjournment Clause would nonetheless establish the temporal floor.

Accordingly, the Government's breathtaking assertion of Executive power would enable the President to circumvent the Senate's advice-and-consent function by making recess appointments at virtually any time. The "recess" exception would promptly swallow the advice-and-consent rule, which is why it is essential to establish a clear limitation on what constitutes a "recess." And for the reasons stated, the Adjournment Clause provides the only cognizable limit with grounding in the Constitution's language and history.

If the Court declines to resolve the "recess" question using this clear guidance in the Constitution's text and history, however, it nonetheless cannot, for basic structural reasons, vest the Executive Branch—the same Branch whose power increases during a "recess"—with unilateral power to override the Legislative Branch's view of whether the Senate is in "recess." Such judicial deference to the Executive, rather, would contravene the well-established principle that each Branch is the master of its own procedures.

Thus, if *any* branch has the authority to determine whether the Senate is in session, it is the Senate. And here, the Senate determined that it was not in "recess" from January 3 to January 23, 2012. That determination should be conclusive. Were there any doubt, the House of Representatives' agreement that the Senate was not in "recess" dispels it.

1. The Senate Determined That It Was In Session During The Period In Question.

Here, the Senate said it was not in recess and took numerous steps to avoid a recess. Everything the Senate did prior to and during the period from January 3, 2012, to January 23, 2012, made this clear. The Senate, for example, did not even seek the House's consent to adjourn for more than three days and, accordingly, no such consent was given. Instead, on December 17, 2011, the Senate adjourned pursuant to an Order providing that it would "convene for pro forma sessions only, with no business conducted." *See* Orders for Tuesday, December 20, 2011 through Monday,

January 23, 2012, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Senate thus expressly stated that it would "convene" for "sessions" every three days and not go into recess. Indeed, the Senate's explicit purpose for convening in pro forma sessions every three days was to prevent a "recess" during which the President could make recess appointments. *See supra* at 8-9; Vivian S. Chu, Cong. Research Serv., RL33009, *Recess Appointments: A Legal Overview* at 20 (2012) *available at* http://digital.library.unt.edu/ark:/67531/metadc40201/m1/1/high_res_d/RL33009_2011May12.pdf (describing the Senate's repeated use of pro forma sessions to maintain constitutional availability and thus prevent a recess). As between the President and the Senate, the Senate's determination should be conclusive. *See, e.g.*, William Rawle, *A View of the Constitution of the United States* 162-67 (2d ed. 1829) ("It would be improper to pass over the construction given by the senate to the power of appointing during their recess.").[32]

First, the Rules of Proceedings Clause, U.S. Const., art. I, § 5, cl. 2, provides that "each House may determine the Rules of its Proceedings." It thus "commits to the Senate the power to make its own rules." *United States v. Smith*, 286 U.S. 6, 48 (1932); *see also, e.g.*, Thomas Jefferson, *Constitutionality of Residence Bill of 1790* (July 15, 1790), reprinted in 2 *The Founders' Constitution*, Document 14 ("Each house of

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[32] This passage can found online at http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s56.html).

Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."). And 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*." *Ballin*, 144 U.S. at 6 (emphasis added).

In *Ballin,* the Supreme Court rejected a challenge to a Congressional enactment on the ground that the House of Representatives lacked a quorum at the time of passage. The Court held that the House of Representatives had exclusive power to determine whether it possesses a proper quorum, explaining that "all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *Id.* at 5. The broad authority manifested in the Rules Clause, the Court explained, empowered each House of Congress to "prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the house *is in a condition to transact business*." *Id.* at 6 (emphasis added); *see also, e.g.*, *Mester Mfg. Co. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989) ("The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress.").

Ballin thus establishes the primacy of the Senate in determining when it is in "recess." And here, the Senate stated its intent to remain in session and did, in fact, regularly gavel into session. *See* 158 Cong. Rec. S1 (meeting pro forma on Jan. 3,

2012), *id.* at S3 (same for Jan. 6, 2012), *id.* at S5 (Jan. 10), *id.* at S7 (Jan. 13), *id.* at S9 (Jan. 17), *id.* at S11 (Jan. 20). The Senate thus clearly determined that it was "in a condition to transact business." Under *Ballin*, its determination should be conclusive. *See, 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 own house precludes him from imposing his control in the house of another who is master there."); *Ballin*, 144 U.S. at 6; *see also, e.g.*, 158 Cong. Rec. S113 (daily ed. Jan. 26, 2012) (Sen. Lee) ("It is for the Senate and not for the President of the United States to determine when the Senate is in session."); *id.* at S316 (daily ed. Feb. 2, 2012) (Sen. Hatch) ("Under the Constitution, the Senate has the authority to determine its own procedural rules, including the what, when, and how long of Senate recesses."); Laurence H. Tribe, *American Constitutional Law* § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself").

Second, this conclusion is further confirmed by the *Marshall Field* doctrine, established by the Supreme Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892), which, significantly, was decided on the same day as *Ballin*. There, the Court held that Congress has exclusive power to decide whether legislation was properly enacted, explaining that the attestations of "the two houses, through their presiding officers" are "sufficient evidence that [a bill] passed Congress." *Id.* As this Court has since recognized, the *Marshall Field* rule is grounded upon considerations of public policy and "separation of powers concerns," particularly "the respect due to a

coordinate branch of the government." *Public Citizen v. U.S. Dist. Court for Dist. Of Columbia*, 486 F.3d 1342, 1349-50 (D.C. Cir. 2007).

Nor is the *Marshsall Field* rule limited to merely assessing whether a bill actually passed the House and Senate. "[T]he Courts of Appeals have consistently invoked *Marshall Field* in refusing to conduct other inquiries 'into the internal governance of Congress.'" *Public Citizen*, 486 F.3d at 1351-52 (quoting *Mester Mfg. Co.*, 879 F.2d at 571). For example, in *United States v. Campbell*, No. 06-3418, 221 F. App'x 459, 2007 WL 1028785, at *1 (7th Cir. Apr. 3, 2007), the Seventh Circuit invoked *Marshall Field* in refusing to consider challenges to the validity of legislation on the grounds that the House and the Senate voted on the legislation in different sessions. And in *Mester Manufacturing*, the plaintiff challenged legislation on the ground that "Congress has no constitutional authority to present a bill after adjournment *sine die*." 879 F.2d at 570-71. The Ninth Circuit refused to consider the challenge, explaining that "[i]n the absence of express constitutional direction, we defer to the reasonable procedures Congress has ordained for its internal business." *Id.* at 571; *see also id.* ("The Constitution [] requires extreme deference to accompany any judicial inquiry into the internal governance of Congress."). Older examples exist too. For instance, in *Gibson v. Anderson*, the Ninth Circuit rejected a litigant's claim "that an act which purports to have been approved on a certain date was in fact approved on a different date." 131 F. 39, 42-43 (9th Cir. 1904).

The *Marshall Field* rule reinforces the basic principle that the Executive Branch may not second-guess Congress on Congressional procedures. Whether Congress properly enacted a statute has broad significance—affecting everything from the President's responsibility to approve or veto a law, U.S. Const. art. I, § 7, cl. 2 ("[e]very Bill which *shall have passed* the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President . . ."), and "take Care that the Laws be faithfully executed," art. II, § 3, cl. 5, to the citizenry's right to be bound by only properly enacted laws. But the Supreme Court has nonetheless made clear that "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated . . . ." *Marshall Field*, 143 U.S. at 672. That principle governs here. Just as courts may not inquire "into the internal governance of Congress" to determine whether a bill was properly enacted, *Public Citizen*, 486 F.3d at 1351, the Executive Branch may not second-guess the Senate in matters of its ability to conduct business.

In short, the President has unfettered discretion to decide whether to make a recess appointment, and to select whom to appoint. On these matters, Congress has no say. But he may not also determine when the Senate is in recess. That decision—one of the few remaining checks on the Recess Appointment Power, as explained below in Section III—is for the Senate alone. *See also, e.g.*, Arthur S. Miller, *Congressional Power to Define the Presidential Pocket Veto Power*, 25 Vand. L. Rev. 557, 567

(1972) ("Surely the determination of what constitutes adjournment is a 'proceeding' within the terms of [the Rules of Proceedings Clause.]").

2. The House of Representatives Prevented The Senate From Taking A "Recess."

Moreover, the House of Representatives agreed that the Senate was not in recess from January 3, 2012, to January 23, 2012, and, in fact, took steps to prevent the Senate from taking a "recess." The Government's position, therefore, would not only nullify Congress's uniform understanding; it would render the Senate in violation of the Adjournment Clause.

In a June 15, 2011, letter to the Speaker of the House, the House majority leader, and the House majority whip, seventy-eight Representatives requested that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress."[33] Consistent with this letter, "[a]s of January 5, 2012, no concurrent resolution of adjournment had been introduced in either chamber since May 12, 2011," Hogue, *Recess Appointments: Frequently Asked Questions* at 9; *see also, e.g.*, 158 Cong. Rec. S24 (daily ed. Jan. 23, 2012) (Sen. Grassley) ("No concurrent resolution authorizing an adjournment was passed by both chambers."), which meant that the Senate could not go into "recess" under "the three-day rule explicitly set forth in the Adjournment

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[33] Landry Letter, *supra*.

Clause," Reply Brief for Intervenor United States at 21, *Evans*, 407 F.3d 1272 (No. 02-16424), 2004 WL 3589822. Thus, the House both believed that the Senate was not in recess and took affirmative steps to prevent a Senate recess.

The House's action has two implications for the present case. First, it establishes Congress's uniform understanding that the Senate had not gone into recess, thus further undermining the Executive Branch's authority to overrule that uniform view. *C.f. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."). Second, if the Government is correct that the Senate was actually in recess from January 3, 2012, to January 23, 2012, that would mean the Senate has been acting unconstitutionally for decades. *See, e.g.*, 158 Cong. Rec. S24 (daily ed. Jan. 23, 2012) (Sen. Grassley) ("The President's erroneous belief that he can determine whether the Senate was in session would place us in the position of acting unconstitutionally. If he is right, we recessed for more than 3 days without the consent of the other body."); *see also supra* at 42-43. Needless to say, it strains credulity to believe that the Senate has consistently and without objection been violating its constitutional obligations. That, however, is the direct consequence of accepting the Government's position.

3. The Government's Position Would Create A Limitless Recess Appointments Power.

Finally, the Government's claim that the President has the power to both unilaterally make recess appointments *and* declare Senate recesses would give the President the very "absolute power of appointment" that the Founders withheld and would thus cause the "auxiliary" recess appointments power to subsume the "general" one. *Federalist 67; Federalist 76*. In doing so, it would upend the process through which the Government's upper echelons are staffed.

The Government concedes that "[t]he Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations." *OLC Memo* at 1. But by claiming the power to unilaterally decide what "continuously in session" means, the Government renders this concession meaningless. Here, the Senate said it was "in session" and met every three days to ensure it, but the President nonetheless used his supposed "discretion" to "determine" that the Senate was actually in recess. That logic has no end point. If the President can unilaterally disregard pro forma sessions, there is no reason why he could not disregard other sessions. He could, for example, likewise unilaterally declare that sessions in which a quorum is not present are constitutional nullities, deem irrelevant sessions in which he believes the Senate is engaged in excessive debate, disregard sessions in which the Senate is refusing to address nominations, and so forth.

Such an outcome would create an enormous loophole in the Senate's advise and consent power. "[I]f the President alone can define a recess, he can make recess appointments during every weekend or lunch break." 158 Cong. Rec. S316 (daily ed. Feb. 2, 2012) (Sen. Hatch). The recess appointments exception would swallow the rule of requiring the Senate's advice and consent, such that "the President could issue the Senate out of the process all together." *Id.* Recess appointments would become the norm.

Nor is this just a hypothetical. It is precisely what happened in this case. Here, the Senate had not been dilatory in acting on the nominations. Ms. Block and Mr. Griffin had been nominated just three weeks prior to their recess appointments, and, on January 4, neither nominee's required committee questionnaire and background check had been submitted to the Senate. The President nonetheless justified his "recess" appointments by declaring in a January 4, 2012, speech that "'I refuse to take no for an answer.'" Peter Nichola, Lisa Mascaro & Jim Puzzanghera, *With Senate Idle, Obama Goes To Work*, L.A. Times, Jan. 5, 2012, at A1. But the recess appointments power is not a "refuse to take no for an answer" power. It is the power to make appointments when the Senate is incapable of answering due to a recess. The President can no more "refuse to take no for an answer" on nominations than he can "refuse to take no for an answer" on proposed legislation. Moreover, the President did not even receive "no" for an answer because he acted before getting any answer. The Senate was capable of giving an answer from January 3, 2012, to January 23, 2012,

but it never had the chance. The President may have disliked the Senate's failure to immediately confirm his nominees, but that does not mean the Senate was unable to act.

One other oddity in the Government's position bears mention. The President made the appointments at issue on January 4, 2012—just one day after the Government claims the "recess" began. He did so even though the Government has not claimed that the President may make recess appointments during breaks of under three days. *See, e.g.*, *OLC Memo* at 9. But on January 4, the President could not have known whether the Senate's break would last more than three days, and thus could not have known whether the Senate would ultimately go into recess, even by the Government's own standard. The Government thus not only claims that the President—rather than the Senate or the House—has the power to determine when the Senate is in recess; it makes the even greater claim that the President has the power to unilaterally decide *in advance* whether the Senate will *eventually* go into recess. That, too, cannot be correct.

III. THE ORIGINAL UNDERSTANDING OF THE RECESS APPOINTMENTS CLAUSE CONFIRMS THAT THE APPOINTMENTS AT ISSUE HERE WERE INVALID

Finally, the Government is likely to argue that adopting Petitioner and Movant-Intervenor's position would undermine the President's recess appointments power. In fact, the original understanding of the Recess Appointments Clause demonstrates that the opposite is true. As originally understood, the Recess Appointments Clause

was subject to two limits, both of which have, over time, been ignored by successive Presidents. Neither the Supreme Court nor this Court has ever addressed these issues, and, if squarely presented, it is not clear they would sanction the Executive Branch's position. *See INS v. Chada*, 462 U.S. 919 (1983) (invalidating the line item veto even though it had been adopted in dozens of statutes passed by Congress and signed by the President). But regardless, a review of this original understanding establishes that, here, the Government seeks to expand the recess appointment power *even further* than ever before, allowing, for the first time, intrasession recess appointments where, as here, the Senate has not adjourned for more than three days under the Adjournment Clause. This Court, however, should hold the line where it has always stood, for if adopted, the Government's position would eliminate one of the few remaining checks on an already excessively-robust conception of the President's recess appointments power.

The recess appointments power was intended to be a minor power, "auxiliary" to the "general" mode of appointment subject to Senate advice and consent. *Federalist 67*. This "auxiliary" power served an obvious purpose in an era when the Senate met for one long session per year, after which the Senators rode hundreds of miles on horseback to their States for a lengthy intersession recess. *See id.* (explaining that the recess appointments power frees Senators from the "oblig[ation] . . . to be continually in session for the appointment of officers and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay"). For

example, if Secretary of State Monroe had died in the midst of the War of 1812 while the Senate was in its intersession recess, President Madison needed to be able to name a replacement without waiting for men to ride out into the States and ferry the Senators back to Washington for a confirmation hearing.

Consistent with this modest role, the recess appointments power was originally understood as being subject to two important limits. *First*, the President could make recess appointments only to positions that became vacant *during* the recess, that is, to fill "all Vacancies that *may happen during* the Recess." U.S. Const. art. II, § 2, cl. 3. Thus, both Alexander Hamilton and the nation's first Attorney General, Edmund Randolph, agreed that the President could not use the Clause to fill vacancies that arose during a Senate session and continued into its subsequent recess.[34] In 1823, however, Attorney General Wirt abandoned this interpretation and concluded that the President could fill existing vacancies whenever the Senate was in recess, regardless of when the vacancies arose. *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631,

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[34] *See* Letter from Alexander Hamilton to James McHenry (May 3, 1799), 23 *The Papers of Alexander Hamilton* 94, 94 (Harold C. Syrett ed., 1976) ("It is clear [that] . . . the President cannot fill a vacancy which happens during a session of the Senate."); Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson*, at 165-67 (John Catanzariti et al. ed., 1990); *see also* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1518–38 (2005) ("A wide range of leading figures from the Framers' generation read the Recess Appointments Clause to [authorize only the filling of vacancies that arise during recesses]."); *Evans v. Stephens*, 387 F.3d 1220, 1230 n.4 (Barkett, J., dissenting) (detailing original understanding of the Recess Appointment Clause).

633-634 (1823) (acknowledging that the Hamilton-Randolph "construction is, perhaps, more strictly consonant with the mere letter [of the Constitution]," but concluding that his broader interpretation was in keeping with the Clause's "spirit, reason, and purpose").[35]

Second, the Recess Appointments Clause was historically understood as being limited to *inter*session recesses (those occurring between sessions) and was not originally used during *intra*session recesses (those occurring during a single session). *See, e.g.*, Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1549 (2005) ("[T]he evidence from text, structure, purpose, and history strongly favors the intersession interpretation . . . ."). This construction flowed from the Clause's text and structure, which provides that a recess appointee's commission "shall expire at the End of [the Senate's] *next* Session," U.S. Const. art. II, § 2, cl. 3 (emphasis added), rather than expiring at the end of the session during which the appointment was made. That means the terms of recess appointees installed during, say, a July 4 *intra*session recess, last twice as long as those installed during, say,

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[35] Although Attorney General Wirt's view of the recess appointments power at first met with resistance, *see, e.g.*, Chu, *Recess Appointments: A Legal Overview* at 4 (noting that "the Senate expressed opposition to [his] interpretation"); *Appointment of Judges for Iowa and Florida*, 4 Op. Att'y Gen. 361, 363 (1845) (opinion of Attorney General John Y. Mason reasserting the narrower view), "formal Attorneys General opinions returned to the Wirt interpretation beginning in 1855." Chu, *Recess Appointments: A Legal Overview* at 5.

a December 28 *inter*session recess—a result that makes little sense. Thus, in 1901, Attorney General Knox concluded, in the first Executive Branch opinion to address the issue, that the Recess Appointments Clause did *not* authorize intrasession recess appointments.[36] As noted above, in 1921, Attorney General Daugherty abandoned this view, holding that recess appointments could be made during intrasession recesses if, at a minimum, the Senate adjourned for more than three days in accordance with the Adjournment Clause. *See supra* at 31-32.

As the foregoing history demonstrates, the Executive Branch's modern application of the recess appointments power is, even without the Government's most recent innovation, far more robust than it was originally understood to be. Indeed, under the original understanding, each of the three appointments at issue would be invalid intrasession recess appointments. Here, however, this Court need not determine whether these departures from the Clause's original understanding are valid, because, even assuming *arguendo* that they are, the Government seeks to go

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[36] *See Appointments of Officers – Holiday Recesses*, 23 Op. Att'y Gen. 599, 604 (1901)("The conclusion is irresistible to me that the President is not authorized to appoint an [officer] during the current [intra-session] adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate.") Indeed, up until that time, no President attempted to make an intrasession recess appointment, except "a limited number . . . during the troubled presidency of Andrew Johnson." Rappaport, 52 UCLA L. Rev. at 1572. But even for those few appointments, "the Johnson Administration issued no written opinions that argued for the constitutionality of intrasession recess appointments." *Id.*

much further. For the first time in history, it claims Executive power to make recess appointments (1) to fill vacancies that did not arise during the supposed recess; (2) during an intrasession recess; *and (3) when the Senate has not adjourned for more than three days under the Adjournment Clause.* This Court should refuse that expansion. Instead, it should draw the line where—until now—it has always stood and never been transgressed: At the bare minimum, the President may not make intrasession recess appointments unless the Senate adjourns for more than three days in accordance with the Adjournment Clause. Otherwise, the Founders' refusal to vest an "absolute power of appointment" in the Executive will be for naught. *The Federalist No. 76*.

IV. THE BOARD ERRED IN HOLDING THAT VERBAL CONTRACTS ARE BINDING

It is well established in the State of Washington that "any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith . . . ." Wash. Rev. Code § 19.36.010; *see also, e.g.*, *French v. Sabey Corp.*, 951 P.2d 260, 262-63 (Wash. 1998). There are certain exceptions to this rule, but none apply to collective bargaining agreements like the one that was supposedly agreed-upon here. *See id.* Given "the importance of the principle of freedom of contract in labor law," *N.L.R.B. v. U.S. Postal Service*, 8 F.3d 832, 837 (D.C. Cir. 1993), the Board was wrong to disregard fundamental principles of Washington law and enforce a "contract" that is plainly invalid under those principles—an outcome directly contrary

to the reasonable expectations of the bargaining parties. Therefore, even if the Court concludes that the "recess" appointments here were somehow valid, Noel Canning's Petition should be granted, and the Board's Cross-Petition for Enforcement denied, on this basis.

V. THE BOARD'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Finally, to be enforceable, the Board's Order must be supported "by substantial evidence in the record considered as a whole." *General Electric Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997). Here, however, substantial evidence did not support the Board's determination that Noel Canning and the Teamsters formed a binding agreement.

The General Counsel claimed before the Board that Noel Canning and the Teamsters reached a binding agreement pursuant to which workers would vote on two different compensation packages. But while it is true these options were *discussed*, the evidence clearly showed that these terms were never formally *agreed upon*. (TR 142:3-23; 144:8-1; 148:26; 170:19-23; 171:14-23; 189:22-190:1; 198:19-21.) The primary witness in support of the supposed agreement was Union Representative Koerner ("Koerner"). Yet in the affidavit Koerner provided to the Region during the investigation phase, he explicitly alluded to *two* agreements—*one* that had been orally agreed and a *different one* that the workers voted upon. TR 103:14-25 (explaining 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.'d" (emphasis added).) It is that latter, "different" contract—one that Koerner's own affidavit states is different from any supposed prior agreement—that the Board seeks to enforce. Despite Mr. Koerner reaffirming the correctness of his affidavit, TR 112:15-17, the Board simply brushed this evidence aside on the basis of conjecture only: "While Koerner so testified, I believe it is more likely that the quoted language also confused Koerner, and that the affidavit simply contained a spelling error." 358 NLRB No. 4 at 5 n.8.

This inconsistency between Koerner's testimony and the "facts" as found by the Board came atop numerous other inconsistencies in Koerner's testimony that demonstrated his unreliability as a witness. To take a few:

- Koerner testified that the employer made the last proposal, but he was unable to identify which person actually made the proposal. (TR 58:9.)
- Koerner initially testified that he asked another participant in the negotiations to read the proposal and took notes as she did so. (TR 59:10-21.) But his affidavit to the region differed. There, Koerner swore that he merely *checked* his notes rather than writing additional ones. (TR 101:10-19.)
- Koerner testified on direct that upon receiving Noel Canning's written proposal by email on December 9th, he called Roger Noel (the company's owner and chief negotiator). (TR 68:5.) But other witnesses testified that it was Roger Noel who placed the call *to* Koerner. (TR 149:1-3; 187:21.) Koerner's affidavit likewise contradicts his testimony. (TR 102:5.)
- Koerner denied that he was at the dump when a telephone call was

received. (TR 102:24.) Others testified that Koerner stated that he was at the dump. (TR 149:14-15; 187:22.)

The list continues, but these examples capture the point. Koerner's testimony was the sort of "hopelessly incredible" and "self-contradictory" testimony that this Court has held cannot supply substantial evidence for Board action. *Elastic Stop Nut Div. of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1281 (D.C. Cir. 1990). The Board's decision is thus not supported by substantial evidence. For this reason too, Noel Canning's Petition should be granted and the Board's Cross-Petition should be denied.

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 on the ground that the President's purported "recess" appointments of Members Block, Flynn, and Griffin were invalid and that the Board's February 8, 2012, ruling against Noel Canning is void under 29 U.S.C. § 153(a) because it was issued without a proper quorum. *See New Process Steel*, 130 S. Ct. at 2644-45. Alternatively, it should vacate the Board's ruling that verbal contracts are valid or, failing that, hold that the Board's Order is not supported by substantial evidence.

Dated: September 19, 2012

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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 19,729 words as determined by the word-counting feature of Microsoft Word.

Dated: September 19th, 2012

/s/ Noel Francisco
Noel J. Francisco

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 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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Dated: September 19th, 2012

Respectfully submitted,

/s/ Noel Francisco
Noel J. Francisco

STATUTORY ADDENDUM

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

§ 153. National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

CREDIT(S)

(July 5, 1935, c. 372, § 3, 49 Stat. 451; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 139; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§ 701(b), 703, 73 Stat. 542; Jan. 2, 1975, Pub.L. 93-608, § 3(3), 88 Stat. 1972; Mar. 27, 1978, Pub.L. 95-251, § 3, 92 Stat. 184; Dec. 21, 1982, Pub.L. 97-375, Title II, § 213, 96 Stat. 1826.)

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)
§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(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. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing,

modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this

title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

CREDIT(S)

(July 5, 1935, c. 372, § 10, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§ 704(d), 706, 73 Stat. 544; Mar. 27, 1978, Pub.L. 95-251, § 3, 92 Stat. 184; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(31), 98 Stat. 3360.)

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

END OF DOCUMENT

West's Revised Code of Washington Annotated Currentness
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.36. Contracts and Credit Agreements Requiring Writings (Refs & Annos)

19.36.010. Contracts, etc., void unless in writing

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his or her own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

CREDIT(S)

[2011 c 336 § 540, eff. July 22, 2011; 1905 c 58 § 1; RRS § 5825. Prior: Code 1881 § 2325; 1863 p 412 § 2; 1860 p 298 § 2; 1854 p 403 § 2.]

Current with all Legislation from the 2011 2nd Special Session and all 2012 Legislation

END OF DOCUMENT

EXHIBIT A

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.**	**Case No. 12-1115**

DECLARATION OF RANDEL K. JOHNSON

I, Randel K. Johnson, hereby state and declare as follows:

1. My name is Randel K. Johnson, and I currently serve as the Senior Vice President for Labor, Immigration, and Employee Benefits with the Chamber of Commerce of the United States of America (the "Chamber"). In that capacity, I am familiar with the Chamber's membership.

2. The Chamber's membership includes companies that, as of February 24, 2012, were awaiting decisions from the National Labor Relations Board (the "Board"). At that point, the Board could have issued its decisions any day.

3. For example, on February 24, 2012, Goya Foods, which is a member of the Chamber, was awaiting a decision in *Goya Foods of Florida, Inc. v. Southern*

Regional Joint Board, Workers United, a/w SEIU, Case Nos. 12-CA-19668, et al, which was at that point fully briefed and ripe for decision by the Board.

4. As a matter of public record, other Chamber members had cases pending before the Board on February 24, 2012, and are currently awaiting decisions from the Board. This is clear from a comparison of the Chamber's publicly available Board of Directors (all companies with officers listed are members of the Chamber), available here: http://www.uschamber.com/about/board/board-directors, and the Board's public docket, available here: http://www.nlrb.gov/cases-decisions/casesearch.

5. In addition, a number of the Chamber's members engage in collective bargaining and are thus subject to the Board's rule that verbal labor agreements are enforceable notwithstanding contrary state law.

I hereby declare under penalty of perjury that the forgoing is true and correct.

Signed this **[Date]**.

September 17, 2012

Randel K. Johnson

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 13th day of September, 2012
Teresa V. George
Teresa V. George, Notary Public, D.C.
My commission expires August 14, 2015.