UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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Case Nos. 12-1115 and 12-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,

Petitioner & Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent & Cross-Petitioner

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760,

Intervenor -- Respondent.

On Petitions for Review and Order of the National Labor Relations Board

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BRIEF FOR AMICUS CURIAE PROFESSOR VICTOR WILLIAMS IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. **Parties and Amici.** All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner/Cross-Respondent Noel Canning, except that this brief is filed on behalf of Professor Victor Williams in support of Respondent NLRB and Respondent-Intervenor International Brotherhood of Teamsters Local 760.

B. Rulings Under Review. The ruling under review is the Decision and Order of the National Labor Relations Board in *Noel Canning and Teamsters Local 760*, NLRB-19-CA-32872, 358 NLRB No. 4 (2012).

C. Related Cases. Other related cases of which counsel is aware are listed in the Brief for Petitioner Noel Canning, the Brief for Amici Landmark Legal Foundation et al, and the Brief for the Respondent NLRB.

Dated: November 2, 2012

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CERTIFICATE AS TO NECESSITY OF SEPARATE AMICUS BRIEF

Pursuant to D.C. Circuit Rule 29(d), the undersigned counsel certifies that this separate brief is necessary as Amicus Curiae Professor Victor Williams offers a unique, alternative argument: Petitioner's claims regarding the president's January 4, 2012, appointments raise a nonjusticiable political question doctrine. In doing so, Amicus relays his ongoing research regarding Article II, Section 2, Clause 3 and the Framers' design for presidential appointment predominance.

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GLOSSARY

Petitioner Noel Canning (Company)

Respondent National Labor Relations Board (NLRB)

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

This brief is offered by Amicus as an individual. Institutional affiliation is noted for identity purposes only. No party's counsel authored this brief in whole or in part, and no party, nor other person, contributed money intended to fund the preparation or submission of this brief.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF AMICUS

Amicus Victor Williams is a law professor at the Catholic University of America's School of Law. Prior to his present affiliation, Amicus was a tenured faculty member at the City University of New York's John Jay College. Professor Williams has researched and published in the area of constitutional law and the federal appointments process for twenty-two years. Amicus's published scholarship and commentary has offered support for the appointment prerogatives of four presidents (without regard to their party affiliation). He has particular knowledge and expertise regarding the text, history and interpretation of both appointment clauses of Article II, Section 2 (both the ordinary and recess). And, he has been a leading advocate of the Executive use of the Recess Appointment option to fill empty Executive, regulatory and judicial positions. In support of the Respondent, Amicus submits this brief together with a timely Motion requesting leave of the Court to appear as Amicus. November 2, 2012.

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ARGUMENT

Introduction: A Nonjusticiable Political Question

Offered in support of Respondent NLRB, this Amicus Brief fully endorses and incorporates Respondent Brief's arguments on the merits and does not duplicate them. Amicus presents an alternative theory that the Petitioner Company's claims raise a nonjusticiable political question. The Company challenge to the validity of the president's recess appointments "raise issues whose resolution has been committed to the political branches by the text of the Constitution." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The Supreme Court has also invoked the political question doctrine to preclude review of claims involving specific constitutional provisions. *See e.g., Pac. States Tel. v. Oregon*, 223 U.S. 118 (1912) and *Coleman v. Miller*, 307 U.S. 433 (1939).

In *Baker,* the Supreme Court identified six independent characteristics "[p]rominent on the surface of any case held to involve a political question" including, as most relevant here, "a textually demonstrable constitutional

commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. The doctrine also precludes judicial review of an issue where there is a "lack of judicially discoverable and manageable standards for resolving it" or when it is impossible for the court to undertake "independent resolution without expressing lack of the respect due coordinate branches of government." *Id.*

Although the Company and supporting congressional amici have thus far avoided reference to the political question doctrine as framed in this Amicus Brief, the issue's emergence should not be unexpected. Congress' own nonpartisan Congressional Research Service issued a report in late January 2012, describing in some detail how a court could dismiss "a challenge to the President's recess appointments—prior to reaching the merits of the case—as a nonjusticiable political question." *See* DAVID H. CARPENTER, ET AL, CONG. RESEARCH SERVICE, R42323, *President Obama's January 4, 2012, Recess Appointments: Legal Issues* 11 (2012).

The following two-part analysis is offered to assist this Court in its "delicate responsibility" of political question determination by arguing that "the challenged action was one committed by the Constitution to the authority of a political branch." *Id.* at 219. As instructed by *Nixon v. United States*, 506 U.S. 224 (1993), this analysis begins by interpreting Article II, Section 2, Clause 3 to "determine

whether and to what extent the issue is textually committed" to the president. 506 U.S. at 228. Amicus will argue below that the text and drafting history of the Recess Appointment Clause clearly show that the Executive alone is charged with power over recess appointments.

Just as in *Nixon*, this Court should determine that "there is no separate provision of the Constitution that could be defeated" by allowing the President "final authority" to utilize his Clause 3 appointment authority. 506 U.S. at 237. The Respondent NLRB's brief exposes and defeats the "flawed" arguments offered by the Company and Senate Minority amici which attempt to implicate constitutional provisions other than the Recess Appointments Clause for this Court's merit analysis. *See* Respondent's Brief 48-60.

This Amicus Brief will next argue below that if this Court does go beyond the Recess Appointments Clause to review the Company's broader claims as supported by Senate Minority and House Majority amici it will be entering into the densest of modern "political thickets." This Court will discover no "manageable standards" to solve the partisan conflict between the Executive and Congress (and the equally rancorous internal conflict among congressional factions) regarding the appointment process.

When rejecting a challenge to President George W. Bush's recess appointment of Judge William Pryor, the *en banc* Eleventh Circuit ruled that just such an argument "presents a ***political question*** that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity and good policy." *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004)(emphasis added). The Eleventh Circuit determined that the judiciary was precluded from creating a standard to measure "how much presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives ***fully*** to him. *Id.* (emphasis added).

In addition to being unable to discover "manageable standards" by which to resolve the escalating conflict underlying the Company's claims, Amicus will describe below how it is impossible for this Court to "undertake independent resolution" of the increasingly rancorous partisan appointment conflict "without expressing lack of the respect due coordinate branches of government." *Baker, 369* U.S. at 217.

It should be noted, before proceeding with Amicus' two-part analysis, that there is a related -- but separate – consideration: the nation's *extreme* need for *finality* in the president's recess appointment practice. This need for finality weighs heavily in favor of a political question determination. As Judge Steven

Williams reasoned in 1991, when *Nixon v. United States* was before this Court: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment of impeachment trials to the Senate, the need for finality also demands it." *Nixon v. United States,* 938 F.2d 239, 245-46 (D.C. Cir. 1991)(citations omitted). The cost of judicial review is chaos:

> If claims such as Nixon's were justiciable, procedural appeals from every impeachment trial would become routine.... For the impeachments that are anything but routine, those of presidents and chief justices, the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos.

Id at 246.

Procedural appeals from the official acts of challenged recess appointed officials are now becoming "routine." For future recess appointments that are "anything but routine" (those of department secretaries, central bank heads, judges, and chief justices) "the intrusion of the courts would expose the political [and economic] life of the country to months, or perhaps years, of chaos." *Id.* at 246. Even when a recess appointed official's authority is eventually confirmed by a court, "their review would undermine the [official's] legitimacy for at least as long as the process took." *Id.* This Court ruled: "If the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead." *Id.*

I. Textual Commitment to Executive Alone: Recess Appointments Power was Capstone of Framers' Design for Presidential Predominance.

Framing the 1787 Philadelphia debate regarding appointments were the unhappy experiences of most of the independent states which had constitutions that mandated state legislatures appoint officials and judges. As Gordon Wood describes: "The appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 407 (1969). The Convention's delegates repeatedly considered, and ultimately rejected, all proposals to give the Congress as a whole, or, alternatively, the Senate alone, any significant appointment authority. The Supreme Court in *Buckley v. Valeo* described how the Framers sought to restrict the Congress:

> [T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. An interim version of the draft Constitution had vested in the Senate the authority to appoint.... [T]he language of Art. II as finally adopted is a distinct change in this regard. We believe that it was a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were 'Officers of the United States.'

Buckley v. Valeo, 424 U.S. 1, 129 (1976) (per curium)(footnote omitted).

Fifteen years later, Justice Antonin Scalia similarly described how the "Framers' experience with post-revolutionary self-government had taught them that

combining the power to create offices with the power to appoint officers was a recipe for legislative corruption." *Freytag v. Commissioner*, 501 U.S. 868, 904 (1991) (Scalia, J. concurring)(emphasis in original). The Framers appointment design "is, intentionally and self-evidently, a limitation on *Congress*." *Id.* at 904 n. 4. The Constitution grants the president not only with appointment power but also provides him "with the means to resist legislative encroachment upon that power." *Id.* at 906. As Scalia reasoned: "A power of appointment lodged in a President surrounded by such structural fortifications could be expected to be exercised independently, and not pursuant to the manipulations of Congress." *Id.* at 907.

A. Presidential Predominance in Appointments

As the state legislature appointment processes "had fallen easy prey to demagogues, provincialism, and factions," the 1787 Convention delegates "quickly accepted the desirability of a significant presidential role in making federal appointments." MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 18 (2003). The Convention Record is indeed "replete" with both reasoned and passionate arguments by James Wilson, Alexander Hamilton, Gouverneur Morris, and William Patterson imploring fellow delegates to empower the Executive with authority over appointments. *Id.* at 17-25. The founding era was a time when debate and deliberation mattered. Persuaded to

change his appointment views during the Summer, James Madison came to argue strongly that a predominant presidential role was required for the new Republic's effective governance. *Id.* at 23-24. Madison suggested to the Convention in mid-July that presidential appointments should automatically vest unless the Senate, by two-thirds vote, rejected them within a ***specific number of days***. *Id.* at 24. (In our age in which the Senate confirmation process takes many months or years, it is telling that 1787 delegates were debating the appointment process as one involving ***only days***.)

The Convention's final judgment was to grant the president a predominant authority over appointments while restricting the Senate to an advisory consent vote in Section 2, Clause 2, ordinary appointments. *See* John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 646-51 (2003). Obvious by textual logic, the unavailable Senate was to have no role or involvement with Section 2, Clause 3 recess commissions. The Framers' grant of appointment authority to the president is ultimately presented as a *mandatory obligation* in Article II, Section 3: "he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

In *Federalist* writings, accepted as the most helpful primary source to understand the original meaning of constitutional text, Alexander Hamilton

favorably described – with "particular commendation" -- the Article II, Section 2 creation of a strong appointment authority in the Executive "to promote a judicious choice of men for filling the offices of the Union." THE FEDERALIST NO. 76, at 510-11 (Alexander Hamilton)(Jacob E. Cooke ed., 1961).

Hamilton argues "that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment." He stressed the wisdom of assigning the selection power to one individual: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." *Id.*

In explaining the Convention's final decision to give such substantial authority to the Executive while restricting the Senate only to voting an advisory consent in ordinary appointments, Hamilton explained that any legislative assembly's "systematic spirit of cabal and intrigue" was incompatible with appointment power. *Id.* at 510. Hamilton contrasted appointment by a "single well-directed man" who would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *Id.* at 511.

As if prescient of the modern House Majority's 2011 scheduling "scheme" to keep the Senate from adjourning for the specific intent of interfering with the president's appointment responsibility, Hamilton specifically cautioned against allowing the House of Representatives to have any role in the appointment process. In *Federalist No. 77*, Hamilton felt obliged to take notice of a "scheme" advocated by "just a few" to give the House of Representatives influence in the federal appointment process. Hamilton predicted that House appointment involvement would manifest "infinite delays and embarrassments." Indeed, it has. THE FEDERALIST NO. 77 at 519 (Alexander Hamilton)(Jacob E. Cooke ed., 1961).

Hamilton was unreserved in his criticism of any significant legislative appointment authority as promoting petty party negotiations and corrupting bargains: "In the last, the coalition will commonly turn upon some interested equivalent: 'Give us the man we wish for this office, and you shall have the one you wish for that.'" FEDERALIST NO. 77 at 511. Hamilton might well have been describing a 2010 Alabama senator placing a procedural "blanket" hold on over 70 nominees while demanding provincial largesse. *See* Kate Phillips and Jeff Zeleny, *Roadblock in the Senate*, N.Y. TIMES, Feb. 6, 2010 at 11.

Thus the president's Article II, Section 2, Clause 3 unilateral recess appointment authority is best viewed in context of the Framers' broader goal of

separating Executive function from the national legislature; in context of their goal to remove congressional corruptions from the important business of appointments. The recess appointment addition was the final, cumulative measure in the Convention's dedicated work to try to insulate the president's appointment authority from the national legislature's corrupting "manipulations."

B. Recess Appointment Authority as the Capstone of Presidential Predominance in Appointments; North Carolina's Contribution

The capstone of the Philadelphia Convention's design to give the president a predominant authority in appointments came from North Carolina Delegate Richard Dobbs Spaight. It happened during the most critical day of the long Summer's many debates regarding appointments, when the final accord was struck for ordinary appointments by restricting the Senate to an advisory consent of the president' choice. Spaight moved to grant the president unilateral appointment authority when the Senate was unavailable to render its advisory consent vote. 2 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1798, at 539 (Max Farrand ed., 1966). The delegates immediately and unanimously accepted the grant of exclusive term appointment authority for the president. Spaight's motion prompted no additional Convention debate perhaps because it was so obviously practical; indeed, it was integral to the delegates' plan for predominant presidential appointment authority.

Having already rendered valued service to North Carolina in the Revolutionary War and the Confederation Congress, Richard Spaight was well regarded at the Philadelphia Convention. Spaight subsequently led the Federalist fight for North Carolina's eventual ratification of the Constitution, served three terms as North Carolina's Governor, and oversaw the opening of the University of North Carolina. Spaight is best known to legal history for his spirited communication with James Iredell urging judicial restraint and judicial deference to the political branches. *See Letter from Richard Dobbs Spaight to James Iredell* (Aug. 12, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, at 168, 169-70 (Griffith J. McRee ed. 1858). Now the judicial restraint inherent in this Court's political question determination is needed to protect his unique contribution to our constitutional order.

As has been noted by scholars, there is a "striking similarity" between Straight's motion to give the president exclusive appointment power and the language of the existing North Carolina Constitution which gave the Governor unilateral term appointment authority as an exception to the state legislature's general appointment power. *See* Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1770 (1984). The 1776 North Carolina Constitution's recess clause stated:

> That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.

Id. at 1771. (citing N.C. Const. of 1776, § XX, reprinted in 7 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 473 (1979)). It is therefore particularly significant that strong approval of the Recess Appointment Clause's grant of authority to the president is found in the North Carolina Ratification Convention's debates: "Therefore the executive ought to make temporary appointments…. This power can be vested nowhere but in the executive, because he is perpetually acting for the public… during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences." *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 135-36 (Jonathan Elliott ed., 2d ed. 1836) (statement of Archibald Maclaine at the North Carolina ratification convention) (July 28, 1788).

The Framers' dual appointment design (ordinary and temporary) charges the president with an obligation to keep the federal government fully staffed. Hamilton explained in *Federalist 67* that the Article II, Section 2, Clause 3 recess appointment is "intended to authorize the President ***singly*** to make temporary

appointments." It grants exclusive power to the president by providing an "auxiliary method of appointment" required for vacancies "which it might be necessary for the public service to fill without delay." THE FEDERALIST NO. 67 at 455 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)(emphasis in original).

C. Framers' Functional Efficiencies with Recess Appointments: Allowing "Play in the Joints" of Governmental Machinery

A core purpose of the 1787 Convention was to redesign the central government to better address the problems of a new nation. The Founders sought to remedy the Articles of Confederation's chief institutional defect by formally separating executive authority from the Congress. *See* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC: 1763-89, 129-44 (3d ed. 1992). The Confederation Congress had failed badly in its attempts to administer the new Republic. Neither specially constituted congressional committees nor congressionally-appointed administrators had been successful in executing the law. *Id.* at 123-28.

In both form and function, Article II was drafted to provide effective and practical governance through a strong Executive. Central to that practical design was Executive predominance of authority over all principal officer and judicial appointments, and a sole recess commissioning authority to insure a fully staffed government and judiciary. *See* Victor Williams, *A Constitutional Charge and a*

Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary, 37 WM. & MARY L. REV. 535, 550-54 (1996).

The Framers thus gave the Article II, Section 2, Clause 3 appointment option generous efficiencies which are dependent on no Senate role and which allow no Senate interference. The Framers could have limited a recess appointment's duration by giving the Senate power of subsequent ratification or nullification when the upper chamber had returned from its immediate recess; or the Framers could have ended the appointee's term at the end of the Senate's current session. Instead, a recess appointment lasts until the end of the *"next"* session with no Senate ratification needed or interference allowed. A president's well-timed recess commission lasts up to 24 months (half of a presidential term). The Framers could have prohibited successive recess commissions. They did not. Presidents have not infrequently made re-recess appointments. *See* Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointment Clause?*, 92 MICH. L. REV. 2204, 2209 (1994) (citing 15 Op. Off. Legal Counsel 98 (1991) ("It is well-established that the President may make successive recess appointments to the same person.'") (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 2 (Nov. 28, 1989)).

The Framers could have easily included specificity sufficient to restrict the type or duration of Senate break needed to trigger the Executive's power. Instead, the Framers kept the term open to meet all future contingencies yet unknown. The wisdom of their Summer's work on appointments was that it allows what Justice Oliver Wendell Holmes, Jr. described as a requirement for constitutional government: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Texas v. Pension,* 282 U.S. 489, 501 (1931). Thus, presidents throughout the Republic's history have signed commissions during various types and durations of Senate breaks, recesses, suspensions, and adjournments.

The Framers could have restricted the function, position, level, or authority of recess appointed officials. Instead, recess appointed officials carry fulsome authority in all principal officer posts, including judicial positions. *See generally*, Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Article III Judges*, 97 VA. L. REV. 1665, 1680-81 (2011).

As referenced above, the Eleventh Circuit rejected a challenge to President George W. Bush's recess commissioning of Judge William Pryor to a vacancy preexisting the eleven day, intrasession Senate break. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004). The Eleventh Circuit *en banc* opinion addressed these exact

efficiencies: "The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause. And we do not set the limit today." *Id.* at 1225. And the opinion was clear that "[t]he Constitution, on its face, neither distinguishes nor limits the powers that a recess appointee may exercise while in office." *Id.* at 1223. The opinion noted that over 300 individuals had risen to the federal bench by recess commissions, including 15 to the Supreme Court, and it referenced the Second and Ninth Circuits' rejection of similar challenges to recess appointed federal judges. *Id.* at 1222-23.

The Eleventh Circuit's opinion then referenced the adjudication's broader claim (which had been supported by Senator Edward Kennedy's amicus brief). George Bush's recess commissioning of a filibustered judicial nominee had shown an "improper lack of deference" to the Senate's role in the appointment process. The court avoided the political thicket: "This kind of argument presents a political question that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity and good policy. These matters are criteria of political wisdom and are highly subjective." *Id.* at 1227.

II. Dense Political Thicket: Court's Review Beyond Text Will Discover "Unmanageable" Partisan Appointment Obstruction – Holds, Filibusters, House Majority- Senate Minority Scheduling Schemes

Scholars chronicling the worsening cycles of appointment conflict often trace its origin to the partisan campaign against Judge Robert Bork during his 1987 confirmation battle for the Supreme Court. Cycles of partisan confirmation obstruction payback played out in the George H.W. Bush and William Clinton presidencies. *See* Victor Williams, *Senators Cannot Be Choosers*, 15 NAT'L L.J. 19 (Feb. 1, 1993). It was partisan confirmation filibusters against ten of President George W. Bush's judicial nominees, however, that marked a substantial escalation in the partisan cycle of confirmation obstruction payback. *See* Victor Williams, *Estrada: Do a Recess Appointment*, 26 NAT'L L.J. 12 (March 10, 2003). The history of that obstruction and subsequent obstruction payback traces forward to the present when vacancies are allowed to hobble departments and strip agencies of their legal authority. The judiciary pays a special cost for longstanding bench vacancies – including three open on this Court for several years.

Supreme Court Chief Justice John Roberts addressed the "urgent need for the political branches to find a long-term solution" to the "recurring problem" of judicial vacancies in his December 2010, State of the Judiciary report. Roberts described the escalating cycles of partisan obstruction payback: "Over many years, however, a persistent problem has developed in the process of filling judicial

vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes." Hon. John G. Roberts, *Year-End Report on the Federal Judiciary 8* (2010). Justice Anthony Kennedy challenged bar members at the August 2012, Ninth Circuit Conference to help end the increasing "partisan intensity" of the confirmation and appointment process: "This is bad for the legal system. It makes the judiciary look politicized when it is not, and it has to stop."

The Senate's internal partisan conflict has become so rancorous that Senate Majority Leader Harry Reid publically praised the president for his recess appointments, and publically called on the president to "recess appoint all" nominees that were being blocked by the Senate Minority. Unlike the Company's Senate Minority amici, Reid was speaking for the controlling majority of the upper chamber. Indeed, the Senate Majority effectively acceded to the January 4, 2012 NLRB appointments. A majority is still needed for senatorial standing. *See generally, Raines v. Byrd*, 521 U.S. 811 (1997).

Then again, the Framers determined a majority was sufficient for the Senate's advisory consent vote. As John Roberts stated, each political party will "turn on a dime." A confirmation filibuster effectively amends the Constitution by requiring a supermajority procedural vote before a simple-majority advisory consent vote can occur. Senate concern about this constitutional rending appears

to depend on whose partisan ox is being gored. *See e.g.* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J .L. & PUB. POL'Y 181 (2003) and Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2011).

The congressional obstructionist strategy against Obama nominees only incorporated and escalated the intensity of tactics used against prior presidents' nominees. Senate opponents of the Obama nominees substantially increased the use of hostage holds, filibuster threats, and outright confirmation filibusters. The political and economic harm of the Senate's escalating confirmation dysfunction is widespread and significant. Executive departments critical to economic and national security interests have been left years without leadership. Regulatory agencies have long standing vacancies and the independent judiciary struggles with empty benches and caseload emergencies. *See* Victor Williams and Nicola Sanchez, *Confirmation Combat*, 32 NAT'L L.J. 34 (Jan. 4, 2010).

This Court's inquiry into the Company's claim would certainly necessitate judicial notice of the scheduling schemes of the Senate Minority and House Majority to prevent the Senate's December 2012, adjournment requiring Senate pro forma sessions. The scheduling was explicitly orchestrated to "prevent any

and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress." *See* Victor Williams, *House GOP Can't Block Recess Appointments*, 33 NAT'L L. J. 39 (Aug. 15, 2011)(quoting Representative Jeff Landry, letter to the Speaker of the House John Boehner, et al., June 15, 2011)(emphasis added). The partisan congressional scheduling acts are purposefully conducted to interfere with, and encroach upon, the Executive Branch's authority. *See* Laurence H. Tribe, *Games and Gimmicks in the Senate,* N.Y. TIMES, Jan. 5, 2012. ("In these sham sessions, manifestly serving only to circumvent the recess appointment safety valve, a lone senator gavels the Senate to order, usually for just a few minutes; senators even agree beforehand that no business will be conducted.")

The irony of the pro forma scheduling strategy is that the obstruction tactic is based on the specious premise that there exists a three day recess minimum to trigger the president's Article II, Section 2 recess appointment authority. The faulty premise is again presented by the Company and supporting amici, but was fully refuted by Respondent's brief. There is no minimum Senate recess time required to trigger the president's Section 2, Clause 3 term appointment authority. This Amicus asserts separately that a future president may need to sign recess commissions during a break shorter than three days if a national exigency demands. President Theodore Roosevelt signed over 160 recess commissions

during a "constructive" recess lasting only a fraction of a minute between the 58th Congress' first and second sessions. *See* Victor Williams, *Senate Pro Forma Follies: Recess Appointment Authority is Not Limited by Sham Sessions*, 33 NAT'L L. J. 51 (Oct. 11, 2010).

A "manageable standard" by which to set such a minimum should not be conjured. *Baker*, 369 U.S. at 217. The pro forma sessions orchestrated since 2007 by both parties against presidents of opposite parties were constitutional farces. The thirty second sessions did not restrict either Barack Obama or George W. Bush's constitutional appointment authority. In his discretion and policy judgment, the 43rd President chose to ignore supportive advice to challenge the Senate abuse. *See* Victor Williams, *Averting the Crisis: High Level Vacancies*, 30 NAT'L. L. J. 23 (March 10, 2008).

The Supreme Court explained in *Nixon v. United States* that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon,* 506 U.S. at 228. So it is with the cycles of partisan appointment obstruction that worsen with each passing year and the president's

exclusive textual obligation to keep the government fully staffed. As example, this Court's review of the Company's claim would lead it to explore communications between the Senate Minority and the president as the 112th Senate left for its scheduled five-week intercession break.

In December 2011, Minority Leader Mitch McConnell unsuccessfully attempted to coerce a recess concession from the president. McConnell asked that the president promise not to sign any recess commissions during the scheduled Senate break. When the Executive ignored the minority's demands, McConnell blocked a confirmation vote for 50 critically important officials. *See* Alexander Bolton, *McConnell Demands Assurances from Obama on Recess Appointments*, THE HILL. Dec. 17, 2011. The Senate Minority again worked with the House majority to keep both chambers in pro forma sessions over the five-week break in an attempt to bluff the president. Then, two days into the Senate's five-week intersession break, the Senate Minority sent the president a formal letter specifically warning against the president signing recess commissions to keep the NLRB from losing quorum and authority. The Senate Minority warned that recess commissions would "undermine the Senate's advice and consent role." *See* Kevin Bogardus, *Senate GOP to Obama: Don't Make Recess Appointments to NLRB*, THE HILL, Dec.19. 2011. It was much the same argument that Company and Senate Minority amici now repeat in the instant case, and it underscores that the

Company's claims taken together with the escalating partisan conflict present a nonjusticiable political question. In *Evans v. Stephens*, a very similar argument was made that President George W. Bush was "circumventing and showing an improper lack of deference to the Senate's advice-and-consent role" when he recess appointed a judicial nominee whose confirmation had been blocked by a Senate filibuster. *Evans*, 387 F.3d at 1227. The Eleventh Circuit ruled that judicial involvement in, and consideration of, this kind of partisan argument "presents a ***political question*** that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity and good policy." *Id.* (emphasis added).

Neither should this Court move beyond the Article II, Section 2, Clause 3 text. There are no manageable standards available to revolve to the Company's claims. There are no manageable standards available to resolve to the underlying cycles of partisan confirmation obstruction payback which caused the NLRB vacancies. It is impossible for this Court to undertake "independent resolution" or even prolonged judicial notice of such rancorous partisan conflict "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The solution must come from our elected political leaders.

As a final point; *Goldwater v. Carter* is often described as the textbook example of a court's most efficient political question determination. 444 U.S. 996 (1979). *Goldwater* involved a group of senators who sued the president for his controversial abrogation of a United States treaty with the Republic of China (Taiwan). The Supreme Court firmly rejected the attempted legislative interference with Executive authority. Without oral argument, the high court announced: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.*

In a concurring statement Justice William Rehnquist instructed: "[T]he basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable." *Id.* at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id* at 1003.

Similarly here, "while the Constitution is express as to the manner in which the Senate shall participate" in the confirmation of an ordinary appointment, its next clause negates "that body's participation" in the president's signing of a recess commission. *See* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 265-69 (2008). The Hein article references Laurence Tribe's acknowledgement of the

parallel structure of the Treaty Clause and Appointments Clause- both of the same Article II, Section 2, Clause 2. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1273 (1995). If the Company, through its supporting congressional amici, is insistent about wanting to add a Senate role into the Constitution's Recess Appointment Clause, Article V gives clear guidance. *See Coleman v. Miller*, 307 U.S. 433 (1939).

Conclusion: When the president signed three recess commissions to bring the NLRB membership back up to quorum on January 4, 2012, he was practicing the constitutional lesson that Justice Scalia taught in *Freytag*: "A power of appointment … exercised independently, and not pursuant to the manipulations of Congress." *Freytag,* 501 U.S. at 907(Scalia, J. concurring). The Company's challenge to that power is a nonjusticiable political question, and its petition for review should be denied and the Board's order fully enforced.

Dated: November 2, 2012

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 29(d) because this brief contains 6493 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C Circuit Rule 32(a)(1); and

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