No. 12-1281

# In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

NOEL CANNING, A DIVISION OF THE NOEL CANNING CORP., ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING RESPONDENTS


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## INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues and litigates regularly before this Court.

SLF's direct interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, which is a vital component of the Nation's laws and a critical safeguard of political liberty. This case concerns a separation-of-powers violation by the President and thus implicates one of SLF's core concerns.

The *amicus* brief of Professor Williams – which argues that the Court should abstain based on the political question doctrine – is of particular concern. His brief promotes the expansion of that doctrine to an extent that would impede the Court's enforcement of the separation of powers and undermine the benefits of that political safeguard. SLF files this *amicus*

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[1] Pursuant to Sup. Ct. R. 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

brief to explain why the political question doctrine does not apply here.

## SUMMARY OF THE ARGUMENT

Professor Williams' acknowledgement that his political question arguments "did not fair [sic] well in courts below" is an understatement. (*Amicus Curiae* Br. Of Professor Victor Williams In Supp. Of Pet'r And Urging Reversal at 28 [hereafter Williams Br.].) Six courts of appeals have heard challenges to recess appointments on the grounds raised in this appeal. Each of them decided those challenges on the merits. None held that the challenges were nonjusticiable. And not even the National Labor Relations Board (Board) advocates that the questions presented in this appeal are nonjusticiable political questions, though the Board would have every incentive to advance that argument if it was plausible.

The uniform rejection of Professor Williams' position comports with this Court's settled precedent. The political question doctrine is narrow. It does not bar judicial review because the actions of a coordinate Branch are at issue. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Nor does it bar review because a case may have "significant political overtones." *INS v. Chadha*, 462 U.S. 919, 942 (1983). Rather, the doctrine is confined to six limited circumstances, and throughout history, the Court has been reluctant to find those circumstances present. The Judiciary has the responsibility to decide cases, "even those it 'would gladly

avoid,'" and that responsibility cannot be evaded through the political question doctrine. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

Professor Williams emphasizes two factors. First, he contends that the Constitution reflects a "textual commitment" of the questions presented to the President's discretion. (Williams Br. at 10.) Second, he contends that there is a "lack of judicially discoverable and manageable standards" to resolve those questions. (*Id.* at 24.) He is incorrect on both scores. Nothing in the Constitution vests the President with sole authority to decide what is meant by the phrase "all Vacancies that may happen during the Recess of the Senate." That phrase is an express textual limitation on the President's appointment power, and it is the province of the Judiciary to enforce such limitations that the Constitution imposes on the other Branches when there is a dispute over their meaning. *Powell v. McCormack*, 395 U.S. 486, 519-20 (1969). Moreover, the Court need look no further than the decision below for a judicially discoverable and manageable standard. That decision bases its ruling on the text, structure and history of the Recess Appointments Clause – time-honored sources for judicial interpretation of the Constitution – and discerns bright-line rules that are easy to apply. It is a standard example of "what courts do." *Zivotofsky*, 132 S. Ct. at 1430.

Professor Williams' contrary arguments are unavailing. Most fundamentally, he misperceives the

questions presented. He argues that the President has broad discretion in how he exercises the recess appointment power, but that is not the issue. The issue is a narrower one. It is whether the preconditions exist for the President to exercise his recess appointment power at all – namely, is the Senate in the Recess and does a qualifying Vacancy exist. The President's discretion whether to fill a qualifying Vacancy while the Senate is in the Recess – and his discretion over the choice of any appointee – have no bearing on those antecedent questions.

Professor Williams' other arguments fare no better. Infected by his misapprehension of the questions presented, his arguments do not present valid grounds for the Court to abdicate its responsibility to decide this case:

- Professor Williams erroneously construes the absence of any advice-and-consent-role by the Senate over the President's choice of a recess appointee as a textual commitment to the President of unbridled discretion to decide whether the Senate is in the Recess and when a Vacancy happened. But the choice of a recess appointee is manifestly distinct from whether the Senate is in the Recess and when a Vacancy happened. Neither political Branch is committed with the sole discretion to decide those issues. It is a matter for the Judiciary when the Branches' views are in conflict.

- Professor Williams erroneously recounts the history of the Constitutional Convention. Contrary to his assertion, that body did not favor giving the President predominate authority over federal appointments. The Delegates at the Convention were deeply divided over the issue and resolved the controversy by giving the President and the Senate joint responsibility over federal appointments.

- Professor Williams is incorrect that the case will ensnare the Court in a "political thicket" that lacks manageable standards. That argument again reflects his misunderstanding of the questions presented, as well as his misplaced effort to expand this appeal to address the filibuster rule and the politics of the Senate's advice and consent role.

- Precedent squarely rejects Professor Williams' contention that the Court ought to abstain because the appointment power allegedly poses a "conflict" for the Judiciary. This Court regularly decides challenges to the appointment of federal officers and indeed has declared that courts should decide such challenges "on the merits." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

- The *de facto* officer doctrine defeats Professor Williams' alarmist proposition that affirmation of the decision below

will retroactively invalidate every intra-session appointment ever made. That doctrine confers validity upon acts performed by a person acting under color of official title against belated challenges, even if it is later discovered that the legality of the person's appointment to office was deficient. *Ryder*, 515 U.S. at 180; *Norton v. Shelby County*, 118 U.S. 425, 440 (1886).

- In *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990), the Court rejected Professor Williams' suggestion that a separation-of-powers challenge is non-justiciable because it does not involve individual rights. The Court held that the alleged absence of an individual right is not among the factors that determine whether a claim is political and that the separation of powers is vital "to secure liberty" in any event.

## ARGUMENT

### I. Precedent overwhelmingly demonstrates that the narrow questions presented in this appeal are justiciable.

Six courts of appeals have considered whether the President's recess appointment power applies to intra-session adjournments of the Senate and whether that power is additionally limited to Vacancies that arise during the Recess in which the President seeks

to make the appointment. Three of those courts considered those issues in connection with the same appointments that are at issue here. *NLRB v. Enter. Leasing Co. Se., LLC,* 722 F.3d 609 (4th Cir. 2013); *NLRB v. New Vista Nursing & Rehab.,* 719 F.3d 203 (3d Cir. 2013); *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom*. *NLRB v. Noel Canning*, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281). The other three considered them in connection with other appointments. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley,* 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco,* 305 F.2d 704 (2d Cir. 1962).

Each of those courts decided the issues on the merits. Not one held that the issues were non-justiciable political questions. One of those courts in particular, the Third Circuit in *New Vista*, considered Professor Williams' arguments in detail and rejected them all, describing them as "unfounded" and not "persuasive." *New Vista*, 719 F.3d at 215, 217. The Third Circuit's analysis of Professor Williams' arguments is well reasoned. Settled precedent squarely establishes that the narrow questions presented in this case are justiciable.

### A. The political question doctrine does not allow courts to abstain except in very limited circumstances that are rarely present.

The political question doctrine is "narrow." *Zivotofsky v. Clinton,* 132 S. Ct. at 1427. A nonjusticiable

political question does not exist unless at least one of the following is an "inextricable" aspect of the issue: (i) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (ii) a lack of judicially discoverable and manageable standards for resolving the issue; (iii) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; (iv) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate Branches of government; (v) an unusual need for unquestioning adherence to a political decision already made; and (vi) the potential for embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 1431 (Sotomayor, J., concurring); *Chadha*, 462 U.S. at 941; *Powell*, 395 U.S. at 518-19; *Baker*, 369 U.S. at 217.

The Court has boxed the political question doctrine within those six parameters, to ensure the Judiciary fulfills its duty "to say what the law is." *Zivotofsky*, 132 S. Ct. at 1427-28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). As the Court has explained, "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky,* 132 S. Ct. at 1427-28 (quoting *Cohens*, 19 U.S. at 404). "That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political

implications.'" *Zivotofsky,* 132 S. Ct. at 1427-28 (quoting *Chadha*, 462 U.S. at 943) (alteration in original).

Accordingly, the political question doctrine does not bar judicial review because the actions of a co-ordinate Branch are at issue. *Baker*, 369 U.S. at 211-12. Nor does it bar review because the case touches on political events of the day and may have "significant political overtones," *Chadha,* 462 U.S. at 942; *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (*accord*), or because "the question is difficult, the consequences weighty, or the potential for real conflict with the policy preferences of the political branches." *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring). The doctrine is one of "political questions," not one of "political cases." *Baker*, 369 U.S. at 217.

That this appeal concerns the separation of powers between the Executive and Legislative Branches does not counsel a different result. As the Court recently acknowledged in rejecting the contention that a separation-of-powers issue poses a nonjusticiable political question, the Judicial Branch "appropriately exercises" its authority to decide cases "where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

That holding rests on a long line of decisions adjudicating the merits of separation-of-power claims

over the contention that they are nonjusticiable political questions. *See*, *e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990) (deciding the merits of an Origination Clause dispute over contention that it raised a nonjusticiable separation-of-powers issue); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1989) ("[A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them"); *Chadha*, 462 U.S. at 941 (holding that separation-of-powers challenge to legislative veto presented no political question); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.").

Indeed, the Judiciary ought to be especially diligent to decide separation-of-powers cases in light of their importance to our constitutional structure and its preservation of liberty. As the Court has explained: "[T]he greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). Or as the Court has more succinctly put it: "'[T]he Constitution diffuses power the better to secure liberty.'" *Morrison*

*v. Olsen*, 487 U.S. 654, 694 (1988) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The separation of powers enshrined in the Constitution's treatment of federal appointments – through the check and balance provided by the Senate's advice and consent power – is an integral part of that safeguard. That check and balance, the Court has explained, "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley*, 424 U.S. at 125) (italics in original).

The Court would erode that safeguard if it abstained from cases challenging the constitutional propriety of federal appointments, and so the Court has declared that such challenges ought to be decided on their merits:

> We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise *Appointments Clause* challenges with respect to questionable judicial appointments.

*Ryder*, 515 U.S. at 182-83. In fact, constitutional challenges to appointments are so important that the Court has considered their merits even when they

were not preserved below. *Freytag*, 501 U.S. at 878-89.

Consistent with that directive, the cases are legion in which the Court decided the merits of Appointments Clause challenges. The political question doctrine did not bar resolution of those challenges even though they entailed separation-of-powers violations. *See, e.g., Morrison,* 487 U.S. at 693 (upholding a statute that allowed appointment of independent counsel by Judiciary against claim that it violated separation of powers "by unduly interfering with the role of the Executive Branch."); *Bowsher v. Synar,* 478 U.S. 714, 734 (1986) (holding unconstitutional a statute that permitted Congress to remove official who participated in executive powers, because it violated separation of powers); *Buckley*, 424 U.S. at 120-43 (holding unconstitutional a statute that prescribed the manner for appointing members of Federal Election Commission as violation of separation of powers).

### B. None of the circumstances necessary to make an issue a nonjusticiable political question are present here.

This case no more presents a nonjusticiable political question than the myriad of cases in which the Court previously adjudicated the merits of appointment challenges that implicated the separation of powers. None of the factors necessary for a political question are present.

**1. The Constitution does not commit resolution of the questions presented to the President.**

The Third Circuit succinctly explained in *New Vista* why the first factor – a textually demonstrable constitutional commitment of the issue to the President – is absent. It wrote:

> Nothing in the language of the Recess Appointments Clause textually commits to the president the task of defining "recess." The Clause states that "[t]he 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. This language lacks the explicit assignment of power to any one branch, such as the assignment found in the Constitution's Impeachment Trial Clause which states that "[t]he Senate shall have the sole Power to try all Impeachments."

*New Vista*, 719 F.3d at 216. In so holding, the Third Circuit contrasted the present situation with the impeachment challenge that the Court confronted in *Nixon v. United States*, 506 U.S. 224 (1993). There, an impeached judge challenged the Senate's procedures for impeachment trials. The Court held that challenge raised a nonreviewable political question because the Constitution expressly states that the Senate has the "sole Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6. The Court viewed that proviso as an exclusive grant that made the Senate's

choice of procedures for an impeachment trial unreviewable. *Nixon,* 506 U.S. at 228-37. But unlike that case, the Recess Appointments Clause has no comparable language giving the President "sole" authority to decide when the Senate is in the Recess and when a Vacancy happened.

Properly read, the phrase "all Vacancies that may happen during the Recess of the Senate" is a limiting condition on the exercise of the President's appointment power. It defines, and thereby limits, the circumstances in which the President is empowered to appoint federal officers without the Senate's advice and consent. As such, the Judiciary is empowered to interpret that limitation and enforce it, to ensure that the Executive Branch exercises the power only when the specified conditions are present and does not "aggrandiz[e] its power at the expense of" the Senate. *Zivotofsky,* 132 S. Ct. at 1428.

The Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), illustrates this point. In *Powell*, the Court considered whether it could review the House of Representatives' conclusion that Clayton Powell was "unqualified" to sit as a Member because he had been accused of misappropriating public funds and abusing the judicial process of the State of New York. *Id.* at 492-93. The House contended that its decision was a nonjusticiable political question because Article I, § 5 of the Constitution directs that the House shall "be the Judge of the Elections, Returns and Qualifications of its own Members." The House argued that this was a textual commitment of unreviewable authority

to it. *Id.* at 519. However, Article I, § 2 of the Constitution specifies only three qualifications for membership in the House: age, citizenship, and state residency. Powell argued that these constrained the grounds on which the House could declare a member unqualified and that the Court could declare whether the grounds for his expulsion satisfied those criteria. *Id.*

The Court agreed with Powell. The Court held that the qualifications stated in Article I, § 2 constrain the House's exercise of power under Article I, § 5 because they prescribe the only grounds on which the House can declare a Member unqualified. *Id.* at 548. So even though a court cannot second-guess the House's determination that a Member does not meet one of the three qualifications, a court can review that determination to assess whether the House improperly relied on some other ground. The enforcement of that limitation was not a nonjusticiable political question. *Id*. As the Court later described its holding: "The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to *what* these qualifications consisted of was not." *Nixon*, 506 U.S. at 237.

The Constitution contains many other instances where a discretionary power of a political Branch is subject to a judicially enforceable condition, such as the 10-day period allowed the President to decide whether to veto a bill submitted by Congress, U.S. Const. art. I, § 7, cl. 2, and the requirement for a two-thirds vote for the Senate to approve a constitutional amendment. U.S. Const. art. V. The Court has

routinely adjudicated the meaning of those types of conditions and enforced them even though it cannot review the substantive merits of the political Branches' decisions in those instances. *See, e.g., Chadha*, 462 U.S. at 940-41 (holding that Congress' plenary authority over immigration and naturalization does not render its actions in that area immune from judicial review under the political question doctrine); *Buckley*, 424 U.S. at 132 (holding that Congress is not allowed to exercise its plenary authority in a manner that "offend[s] some other constitutional restriction").

The same is true here. The President may have unreviewable discretion whether to fill a qualifying Vacancy during the Recess of the Senate. The President does not, however, have unreviewable discretion to decide when the Senate is in the Recess or when a Vacancy happens. Nothing in the Constitution commits to the President the sole authority to decide whether those prerequisites to the exercise of the appointment power exist. Those are matters that the courts are empowered to adjudicate and are grounds upon which the courts can declare a recess appointment invalid.

### 2. Traditional sources of Constitutional interpretation readily provide judicially discoverable and manageable standards to resolve this appeal.

The parties' briefs dispel any suggestion that there are no "judicially discoverable and manageable standards" to decide this appeal and that the Court must resort instead to "policy determinations." The Board and Noel Canning advocate interpretations of the Recess Appointments Clause grounded in the text, structure and history of the Clause. Though they reach conflicting conclusions, their arguments "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 132 S. Ct. at 1430. They require the Court to undertake a "careful examination of the textual, structural and historical evidence put forward by the parties." *Id*. That is a standard method for judicial interpretation of the Constitution and demonstrates that the case does not "turn on standards that defy judicial application." *Baker*, 369 U.S. at 211. As the Court stated in *Zivotofsky*: "This is what courts do. The political question doctrine poses no bar to judicial review of this case." 132 S. Ct. at 1430; *see also Munoz-Flores*, 495 U.S. at 395 (noting the Government's concession that "the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function").

What the Court is called upon to do in this case is thus no different than what the Court did in *The*

*Pocket Veto Case*, 279 U.S. 655 (1929). There, the Court interpreted the word "Adjournment" in the Presentment Clause. U.S. Const. art. I, § 7, cl. 2. To do so, the Court examined the text, structure and purpose of the clause. *Pocket Veto*, 279 U.S. at 673-74. It considered the proceedings and debates of the Constitutional Convention. *Id*. at 675-76. It considered historical practices. *Id*. at 682-88. The Court held that in light of those considerations that, "Adjournment" in the Presentment Clause is not limited to a final adjournment that terminates the legislative existence of a Congress, but includes the end of an interim congressional session. *Id.* at 680, 691-92. The Court is called upon to undertake the same type of analysis in this case with respect to the terms "the Recess" and "happen." And just as the meaning of "Adjournment" was not a nonjusticiable political question that defied judicial explication, the meaning of "the Recess" and "happen" can be ascertained from the same sources that typically guide the Court's interpretation of the Constitution.

The Court also need look no further than the decision below for manageable standards to be used as the meaning of those terms. The D.C. Circuit held that the Senate is in "the Recess" when the Senate ends a session by adjourning *sine die*. *Noel Canning*, 705 F.3d at 512-13. It further held that the only Vacancies the President can fill during a particular Recess are those that arose during that Recess. *Id.* at 513.

Those are bright-line rules that are easy to apply, in keeping with this Court's direction for "high walls and clear distinctions" to preserve the separation of powers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). An adjournment *sine die* has a well established meaning. Indeed, the U.S. Code is replete with statutes that use the term. *E.g.,* 2 U.S.C. §§ 29(a), 36, 43b-2, 198, 288i(c)(2), 641; 5 U.S.C. §§ 906(b)(1), 3131, 3345, 3346; 7 U.S.C. § 1343; 10 U.S.C. §§ 652, 671b, 2401, 2464, 2484, 6035, 7306, 7307; 12 U.S.C. §§ 635, 2252; 15 U.S.C. §§ 719f, 1204, 1276, 2083; 16 U.S.C. §§ 470w-6, 1434, 1606, 1823, 3166, 3232; 20 U.S.C. § 4502; 22 U.S.C. § 2799aa-1; 28 U.S.C. §§ 153, 992; 33 U.S.C. § 1414; 38 U.S.C. § 510; 42 U.S.C. §§ 2000e-4, 2000ee, 2159(g)(1)(A), 2210, 6272, 6421, 6422, 9655, 10135; 44 U.S.C. § 2203; 45 U.S.C. § 718.

It is also easy to know when the Senate has adjourned *sine die.* The Senate says so in its orders. As the Board concedes, the Senate adjourns *sine die* when it adjourns "without specifying a day for its return." (Br. For The Pet'r at 12.) That makes the determination of whether the Senate has adjourned *sine die* a straightforward matter. In the words of the Third Circuit, the standards adopted by the D.C. Circuit are judicially manageable because "they rely on regular procedures employed in the Senate and found in the Senate's record." *New Vista*, 719 F.3d at 217. And, of course, not even Professor Williams questions that it is a straightforward matter to determine when a Vacancy happens.

It is true that the Board's more open-ended definition of the Recess, as Professor Williams notes, might be unmanageable because it does not rely on any particular Senate procedure and would require judicial review of communications between the Executive and Legislative Branches in addition to review of congressional scheduling schemes. (Williams Br. at 22-25.) But this only cautions against selecting the Board's standard rather than showing that there are no judicially manageable standards available.

### 3. The remaining factors do not apply to this case.

There is no need to dwell on the remaining factors that could cast an issue as a political question because they are not applicable here. The Court has stated that the kind of cases that might pose those circumstances are "rare" and "exceptional," *Zivotofsky*, 132 S. Ct. at 1434 (Sotomayor, J., concurring), and this case does not rise to that level. Indeed, Professor Williams does not suggest any potential for "embarrassment from multifarious pronouncements" by the various Branches, and the Third Circuit in *New Vista* explained why the other two remaining factors are inapposite as well.

As the Third Circuit explained, defining the term the Recess "does not express a lack of respect for coordinate branches of government because defining the word is merely an exercise of [the courts'] judicial

authority 'to say what the law is.'" 719 F.3d at 215 n.5. That is true even though the Court is asked to declare unconstitutional the actions of another Branch. As the Court's decisions make clear, courts have the "duty" to review the constitutionality of the actions of the political Branches, and it is no disrespect for the courts to perform that duty. Otherwise, "*every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390; *accord Powell*, 395 U.S. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

Nor are the President's recess appointments freighted with "an extreme need for finality" in contrast to, for example, the situation posed by the President's decision to end a military conflict. *Baker*, 369 U.S. at 213 (discussing the need for finality in the context of the President's war power to end a conflict). Indeed, the President is "pledge[d] to uphold the entire Constitution, not just those provisions that protect its institutional prerogatives." *Munoz-Flores*, 495 U.S. at 392-93 (emphasis in original). It certainly cannot be the case that the President's decisions that impinge on another Branch's prerogatives demand finality beyond the ken of judicial review in light of the President's duty to uphold all of the Constitution.

## II. Professor Williams' arguments lack merit.

Professor Williams' arguments flow from a fundamental misapprehension of the narrow questions presented on appeal. Those questions are: (1) is the term "the Recess" limited to breaks between Senate sessions; (2) are the only Vacancies that the President may fill during a particular Recess those that arise during that Recess; and (3) do *pro forma* sessions of the Senate count as part of a Senate session. Those questions do not seek review of how the President exercises his appointment power. That is, they do not seek review of the President's decision to fill a qualifying Vacancy through a recess appointment or his choice of appointee. Rather, they concern whether there is a qualifying Vacancy that the President may fill. Professor Williams overlooks that distinction and argues as if the former is the object of this appeal. As the Third Circuit described Professor Williams' error, he improperly "merges the issue present in this case (when the President can use his recess-appointments power) with an issue not in this case (how the President can use that power)." *New Vista*, 719 F.3d at 217. That error permeates and invalidates his arguments for nonjusticiability.

### A. Professor Williams' efforts to find a textual commitment to the President are flawed.

Professor Williams advances three reasons why he contends the Constitution endows the President with unreviewable discretion to make the recess

appointments in this case. None of those propositions is correct.

First, Professor Williams points to the lack of any advice-and-consent role for the Senate over the President's choice of a recess appointee. That argument is a non-sequitur. It does not follow that the Constitution gives the President discretion over the meaning of the terms "the Recess" and "Vacancies that may happen" because it gives him discretion over the separate matter of the choice of a recess appointee. By way of comparison, the Constitution gives the Congress unreviewable discretion to decide when to end an annual session. U.S. Const. art. I, § 4, cl. 2; amend. XX, § 2. But no one suggests that because the Senate determines when an intersession recess starts, the Senate also gets to determine whether the President's appointment power is limited to such breaks. The short answer is that the Constitution does not give either political Branch discretion over that issue. That is what the Third Circuit held in *New Vista*, stating that the Recess Appointment Clause "does not contain an imperative to either branch to craft a rule regarding the meaning of recess – or, more broadly, when the president may use his recess appointments power." 719 F.3d at 216.

Likewise flawed is Professor Williams' second contention that no provision of the Constitution would be impaired if the President were held to have exclusive authority to decide when recess appointments can be made. (Williams Br. at 18.) That argument overlooks the Appointments Clause. Any

expansion in the scope of the Recess Appointments Clause necessarily would come at the expense of the Senate's advice-and-consent power under the Appointments Clause. This competing tension, which Professor Williams ignores, provides further weight to the conclusion that the Constitution did not commit to either political Branch the authority to decide the questions presented in this appeal and left it to the Judiciary to arbitrate. *See Freytag*, 501 U.S. at 879-80 (rejecting the argument that the Court should defer to the Executive's view that there has been no encroachment of the separation of powers in an Appointments Clause challenge).

Finally, Professor Williams places great stock in the debates at the Constitutional Convention. (Williams Br. at 11-14.) Professor Williams depicts those debates as embodying a universal sentiment among the Framers that the President was to have primacy in filling federal offices and that Congress was viewed as too political to play a role in that process. His recitation of history is incorrect.

"The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (citation omitted). The question of where to repose the appointment power thus was of vital concern to the Delegates to the Constitutional Convention, and it proved especially difficult to resolve.

Some Delegates favored vesting the power in the President; others favored Congress. The intensity of opposing views prevented resolution of the matter for months. Professor Williams notes that during those debates the Convention rejected proposals to give Congress sole power to fill federal offices. (Williams Br. at 11.) But the Convention likewise rejected all proposals to give the President that sole power. *See* Joseph Harris, *The Advice and Consent of the Senate* 20-22 (University of Calif. Press 1953); Charles Warren, *The Making of the Constitution* 642 (rev. ed. 1937).

The controversy was not resolved until the Convention's end when, after much debate, the Framers devised a compromise: they vested the appointment power for principal federal officers in the President and Senate jointly, and they allowed Congress alone the power to decide how inferior officers are appointed. The Federalist Papers relate the importance the Framers attached to the Senate's role in the appointment process:

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

The Federalist No. 76 (Alexander Hamilton) (C. Rossiter ed. 2003).

History shows, contrary to Professor Williams' depiction that "[t]he President's power to select principal officers of the United States was not left unguarded." *Edmond*, 520 U.S. at 659. The requirement for the Senate's advice and consent was included precisely "to curb executive abuses of the appointment power" and "to promote a judicious choice of [persons] for filling the offices of the union." *Id*. (quoting The Federalist No. 76). In sum, Professor Williams is just plain wrong that the Delegates at the Constitutional Convention favored giving the President predominant authority over appointments. *See Freytag*, 501 U.S. at 879-80 (holding that the structural prerogatives of the Appointments Clause do not speak exclusively, or even primarily, to the Executive's interest); *Buckley*, 424 U.S. at 121 ("The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President.").

Furthermore, it is significant that the Recess Appointments Clause was agreed to only after the last minute compromise on the Appointments Clause, and was added without objection or recorded debate. *See* 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 292 (Jonathan Elliot ed., 2d ed. 1836-1845) [hereafter, J. Elliot]; 2 *The Records of the Federal Convention of 1787*, at 46 (Max Farrand ed., Yale University Press 2d ed. 1937); James Madison, *Notes of Debates in the Federal Convention of 1787*, at 599 (Ohio Press 1966). The Recess Appointments Clause would not have been

uncontroversial if the Framers viewed it as undoing the compromise that they had so painstakingly worked out in the Appointments Clause after months of debate. There would have been rancor and heated debate if the Recess Appointments Clause was a back-end way to give the President predominant authority over federal appointments, rather than a limited exception applicable only to breaks between Senate sessions.

### B. The case will not embroil the Court in a political thicket.

Professor Williams' warning that there are no manageable judicial standards "to resolve the escalating campaign of appointment obstruction" (Williams Br. at 6) is yet another manifestation of his misunderstanding of this appeal's limited focus. The question he frames is not what the Court is called upon to answer, which is the meaning of "the Recess" and "happen" as used in the Recess Appointments Clause. Professor Williams offers no commentary on those issues, and certainly does not explain why those limited issues defy judicial interpretation.

Related to this point, Professor Williams states that the Eleventh Circuit in *Evans* agreed with his view and held that a challenge to a recess appointment was a nonjusticiable political question. (Williams Br. 25-26.) He misreads that opinion. The court in that case addressed head-on whether the President may make a recess appointment during an intra-session Senate adjournment, whether the President

may do so to fill a vacancy that arose while the Senate was in session, and whether an intra-session adjournment of eleven days is of sufficient length to constitute a "recess" – all issues implicated by the instant appointments. This is exactly what the D.C. Circuit did in this case and the Third and Fourth Circuits did in *New Vista* and *Enterprise*, respectively.

The issue the *Evans* court declined to address was one *not* presented in this appeal: whether the President should have selected as a recess appointee an individual whose prior nomination "had been especially controversial and [whose] confirmation had been blocked in the Senate." *Evans,* 387 F.3d at 1227. The court recognized this last 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*. That issue is very different than the questions presented in this appeal.

As this shows, Professor Williams misconstrues the nature of the challenges – and the circuit court's ruling – in *Evans*. The only claim that was rejected on nonjusticiability grounds in *Evans* focused on the fitness of the individual chosen for a recess appointment. The court decided the merits of the appellant's challenges to the President's authority to make the appointment at all. The *Evans* court ruled the appellant's narrow challenge to the choice of nominee was the only one that strayed into purely political matters beyond the court's jurisdiction to decide. *Id*. The Eleventh Circuit's approach to the nonjusticiability

question is entirely consistent with the approach taken by the *New Vista* and *Enterprise* courts and the lower court in this case.

Here, like in *New Vista* and *Enterprise*, the respondent is not asking this Court to opine on the fitness for duty of the Board members whose appointments are challenged. Nor is it asking this Court to pass judgment on what Professor Williams calls the "House majority and Senate minority scheduling collusion." (Williams Br. at 5.) It asks that the Court do only what every other federal appellate court to have addressed these issues has done, and what *Zivotofsky* demands – to interpret the text of the Constitution, define "the Recess of the Senate," and address the merits of the Respondent's challenges to the appointments.

### C. The Judiciary does not have a conflict of interest.

There is no merit to Professor Williams' contention that the Court should abstain because this appeal "presents a significant conflict-of-interest for the judiciary." (Williams Br. at 19.) The Court has regularly and consistently decided challenges to the appointment of federal officers. The Court has never intimated that it is disabled from deciding them because of a conflict of interest, even when the officer has judicial functions. *E.g., Edmond v. United States,* 520 U.S. 651 (1997) (challenge to appointment of civilian judges to Coast Guard Court of Criminal

Appeals); *Weiss v. United States*, 510 U.S. 163 (1994) (challenge to appointment of military judges); *Morrison v. Olson*, 487 U.S. 654 (1988) (challenge to appointment of independent prosecutor by Article III court); *Buckley v. Valeo*, 424 U.S. 1 (1976) (challenge to appointment of Federal Election Commissioners).

Professor Williams' contention reflects a misconstruction of *Nixon v. United States*, 506 U.S. 224 (1993). The Court noted in that opinion that the Framers viewed impeachment as a check that Congress has on the Judiciary. *Id.* at 234-35. That fact bolstered the Court's conclusion that the Judiciary should not override the Constitution's express conferral to the Senate of "sole Power" to try impeachments, because otherwise the Judiciary could sit in judgment of the Senate's decision to convict an impeached judge. *Id.* at 234-36. A grant of "sole Power" to the Senate in one clause of the Constitution in no way supports the very different notion that an utterly distinct and wholly unrelated clause containing no such grant is likewise a check on the Judiciary. There is no historical support for this novel proposition, and Professor Williams cites nothing to show that the Framers viewed the Recess Appointments Clause as a check on the Judiciary by the Executive.

### D. Affirmation will not retroactively invalidate all prior intra-session appointments.

Professor Williams' alarmist contention that affirmation of the decision below will invalidate all prior intra-session appointments overlooks the *de facto* officer doctrine. That doctrine confers validity upon acts performed by a person acting under the color of official title against belated challenges, even if it is later determined that the person's appointment was legally deficient. *Ryder*, 515 U.S. at 180; *Norton*, 118 U.S. at 440. The Court has relied on that doctrine to uphold actions of otherwise improperly appointed federal officials against belated challenges to their appointments. *E.g., McDowell v. United States*, 159 U.S. 596 (1895); *Ball v. United States*, 140 U.S. 118 (1891). One of those instances even involved a recess appointee. *Ex parte Ward*, 173 U.S. 452 (1899) (applying *de facto* officer doctrine to district court judge who was recess appointee). The chaos that Professor Williams fears has not occurred during the century (and more) that the Court has applied the *de facto* officer doctrine, so there is no reason to cry wolf now.

### E. The asserted lack of individual rights is not germane.

Finally, Professor Williams adds that it "is important to underline that no individual rights claim" is involved in this case. (Williams Br. at 18-19.) He does not explain why he thinks that is important, but this Court's decision in *United States v. Munoz-Flores*,

495 U.S. 393 (1990), forecloses any contention that it is germane to the political question doctrine. The claim in that case concerned the constitutionality of a statute that had been passed in violation of the Origination Clause. In arguing – unsuccessfully – that the claim was a nonjusticiable political question, the Government argued that the Origination Clause "does not significantly affect individual rights." *Id.* at 392. The Court rejected that contention on two grounds. The Court observed first that "the asserted lack of a connection between the constitutional claim and individual rights" is not a factor that its decisions identify "as a characteristic of cases raising political questions." *Id*. at 392. The asserted lack of an individual right, the Court expanded, "is simply irrelevant to the political question doctrine." *Id.* at 393-94. Second, the Court explained that any suggestion that compliance with the Origination Clause "is irrelevant to ensuring rights is in error." *Id*. at 394. That clause is part of the Constitution's separation of powers, with its checks and balances, which the Court has repeatedly emphasized, is vital "to secure liberty." *Id.* at 394. Professor Williams repeats the Government's unsuccessful argument from *Munoz-Flores*, and it deserves the same fate here.



## CONCLUSION

The Court should reject any contention that the questions presented in this appeal are nonjusticiable political questions. Those questions concern express

constitutional limitations on the President's recess appointment power. The Court is empowered, and obligated, to adjudicate what those restrictions mean and to invalidate the appointments at issue since they were made in contravention of those restrictions.

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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