No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING,
A DIVISION OF THE NOEL CORP.,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

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International Brotherhood of Teamsters Local 760 – the charging party before the National Labor Relations Board and the intervenor in the court of appeals – files this brief in support of the petitioner National Labor Relations Board.

STATEMENT

This case arises out of the 2010 negotiations between Noel Canning and Teamsters Local 760 over a successor collective bargaining agreement. Pet. App. 65a-66a. At the December 8 bargaining session, the Company and Union negotiators reached agreement on all the terms of a new collective bargaining agreement. *Id*. at 66a-67a. One element of the agreement was that the covered employees would be allowed to vote to select one of two wage-benefit packages. *Id*. at 67a. On December 15, the employees voted to select one of the packages. *Id*. at 75a. The Union then drafted a collective bargaining agreement containing the agreed upon terms, including the wage-benefit package selected by the employees, and presented it to Noel Canning. *Id*. at 80a. The Company refused to execute the collective bargaining agreement, insisting that the parties had not reached agreement on the alternative wage-benefit packages. *Id*. at 83a-84a.

The Union filed unfair labor practice charges with the National Labor Relations Board alleging that the Company's refusal to execute the agreed-upon con-

tract constituted bad faith bargaining in violation of Section 8(a)(5) of the National Labor Relations Act. Pet. App. 63a. The NLRB General Counsel concluded that the Union's charges had merit and issued a complaint alleging that Noel Canning had violated NLRA § 8(a)(5). *Id.* at 64a.

Noel Canning "conceded to the Board that '[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations.'" Pet. App. 10a. "[T]he company's chief argument before the Board [was] that the parties failed to reach *any* agreement at the December 2010 negotiation session." *Id.* at 9a (emphasis in original). The Board, however, accepted the administrative law judge's determination that the witnesses who testified that an agreement had been reached were more credible than the witnesses who testified that an agreement had not been reached. *Id.* at 81a-82a. On this basis, the Board found that an agreement had been reached and that Noel Canning's failure to execute a collective bargaining agreement containing the agreed-upon terms was a violation of the Company's duty to bargain in good faith. *Id.* at 84a.

In challenging the Board's decision, Noel Canning advanced two perfunctory arguments on the merits. The Company argued first – contrary to the position it had taken before the Board and contrary to well-settled law – that it had a right under the State of Washington's statute of frauds to repudiate the oral agreement it had reached with the Union. Second, the Company challenged the credibility determina-

tion of the administrative law judge on the ground that the affidavit submitted to the NLRB by one of the credited witnesses suggested that an agreement different than that reached by the negotiators had been presented to the Union membership for a vote. The court of appeals easily disposed of both arguments. Pet. App. 7a-10a.

Noel Canning's principal argument in the court of appeals was that the NLRB lacked a quorum on the date the Board issued its decision in this case, because three of the sitting members had been invalidly appointed. The three members in question had been appointed on January 4, 2012 pursuant to the President's recess appointment authority. The Company argued that the Senate was not in recess on that date because it had convened in a pro forma session on January 3 and was scheduled to convene in another pro forma session on January 6.

The court of appeals ruled that the three challenged NLRB members had not been validly appointed but did so based on an interpretation of the Recess Appointments Clause that had not been advanced by Noel Canning or by its principal amici. *See* D. C. Cir. Oral Arg. Tr. 10 & 25 (asking first the petitioner and then an amicus for petitioner why they had not advanced the interpretation ultimately adopted by the court of appeals). The court of appeals first held unanimously that the President can exercise his recess appointment authority only during the recesses that occur between sessions of Congress. Pet. App. 34a. Since the January 4, 2012 appointments were made after the second session of the 112th Congress had begun, the court held that the

appointments were invalid on that basis. A majority of the court of appeals panel further held that the President may exercise his recess appointment authority to fill only those vacancies that first arise during the intersession recess in which the appointments are made. The panel majority held that the three vacancies filled by the January 4, 2012 appointments did not arise during the recess and that the appointments were invalid on that basis as well.

SUMMARY OF ARGUMENT

The Recess Appointments Clause provides 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. The first two questions presented by this case are interpretative: i) whether the phrase "the Recess of the Senate" includes both inter- and intrasession recesses of the Senate; and ii) whether the prepositional phrase "during the Recess of the Senate" describes when "the President shall have the Power to fill up all Vacancies" as opposed to describing when the vacancies that he may fill must first arise. The third question involves application of the Recess Appointments Clause, as properly construed, to the particular recess appointments at issue in this case.

Taking up each question in turn, we show first that, consistent with the long-settled mutual understanding of both the Senate and the President, the President may exercise his recess-appointment power during lengthy recesses of the Senate,

whether those recesses occur during or between sessions, and he may exercise that authority to fill all vacancies that exist during such recesses, including vacancies that first arose prior to the recess. We then show that – in accordance with this settled and correct interpretation of the Recess Appointments Clause – the Senate was in recess when the appointments at issue here were made, because those appointments were made in the midst of an extended period during which the Senate was bound to conduct *no* business and *no* Senator, aside from the Acting President Pro Tempore, had a duty to be in attendance.

ARGUMENT

I. THE RECESS APPOINTMENTS CLAUSE GRANTS THE PRESIDENT THE POWER TO FILL VACANCIES DURING INTRASESSION RECESSES OF THE SENATE.

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." Art. II, Sec. 2, cl. 2. At the same time, the Constitution also provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate" on a temporary basis without the Senate's advice and consent. Art. II, Sec. 2, cl. 3.

The first interpretative question presented here is whether the term "the Recess of the Senate" in the Recess Appointments Clause is limited to "intersession" recesses or includes both "intersession" and "intrasession" recesses. We address that question in

two steps. First, we contrast the definition of "the Recess of the Senate" articulated by the Executive Branch and the Senate with the definition of that phrase articulated by the court below. Second, we consider the proper weight to be given the concrete application of that definition by the extended practice of the Executive Branch in making intrasession recess appointments and the Senate's acquiescence in that practice.

A. The President and the Senate have long agreed that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905), reprinted in 39 Cong. Rec. 3823-24 (1905). The President and the Senate have also long agreed that in determining whether a "recess" has occurred in that "common and popular sense," *ibid.*, "the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained." *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 21-22 (1921) (emphasis in original). This "practical construction" was first articulated in "the report of the Senate Judiciary Committee presented on March 2, 1905." *Id.* at 25, citing S. Rep. No. 4389. And, under that construction, "the essential inquiry" in determining whether there is a "Recess of the Senate" is the following:

> "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making

appointments?" 33 Op. Att'y Gen. at 25 ("paraphas[ing] the very language of the Senate Judiciary Committee Report").[1]

The conclusion reached by the court below "that 'the Recess' is limited to intersession recesses," Pet. App. 34a, rests on an understanding of the term "the Recess of the Senate" that is fundamentally at odds with the Executive Branch and Senate's understanding. According to the court of appeals, "'the Recess' . . . [i]s something different than a generic break in proceedings," *id.* at 20a, as the term "refers to a specific state of the legislature," *id.* at 31a, which the Senate can enter only by "conclud[ing] its session[] . . . with an adjournment *sine die*," *id.* at 47a. *See id.* at 50a ("Because the Senate did not adjourn *sine die*, it did not enter 'the Recess' . . . ."). Significantly, the court observed that, on this definition, the Senate can enter into a "momentary intersession recess." *Id.* at 48a n. 2.

The lower court's conclusion that "the Recess," as the term is used in the Recess Appointments Clause, "refers to a specific state of the legislature," Pet. App. 31a, achieved through the adoption of a particular form of adjournment resolution, *id.* at 47a, cannot be

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[1] The relevant language from the 1905 Senate Report is:

"It means, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." S.Rep. No. 4389, at 2 (emphasis omitted).

squared with the expressed understanding of the Executive Branch and the Senate as to the meaning of the phrase "Recess of the Senate." Contrary to the court below, the long-held understanding of the Executive Branch and the Senate is that

> "the test for determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e., whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations," *Recess Appointments*, 41 Op. Att'y Gen. 463, 466-67 (1960).

In sum, the definition of "Recess of the Senate" articulated by both the Senate and the Executive Branch focuses solely on whether the Senate is absent for a lengthy period and thus unavailable to give its advice and consent on nominations. That definition draws no distinction between "intersession" and "intrasession" recesses. Indeed, the Senate and the Executive Branch have both expressly rejected the notion that whether there is a "recess" turns on any such technicality.

B. Neither the terms of the Recess Appointments Clause nor its early applications provide decisive guidance on whether a distinction should be drawn between inter- and intrasession recesses of the Senate. *See NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 226 (3d Cir. 2013) ("[R]ecess had at least two meanings at the time of

ratification: either intersession breaks only or intersession breaks plus long intrasession breaks."); *NLRB v. Enterprise Leasing Co.*, ___ F.3d ___, 2013 WL 3722388, at *36 (4th Cir. 2013) ("[T]he textual evidence is inconclusive."); *id.* at *49 (concurring opinion)("The Constitution does not define 'the Recess,' and we find no discussion of the Recess Appointments Clause at the Constitutional Convention in Philadelphia or the state ratifying conventions."). This absence is due to the fact that the question of whether the President's recess appointment authority extends to intrasession recesses of the Senate was irrelevant until the late nineteenth century. Before the 1860s, the Senate did not take long intrasession breaks. S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 525 (2011). Indeed, the Senate only began regularly taking long intrasession recesses after 1934, when the adoption of the Twentieth Amendment changed the date on which annual sessions of Congress begin. *Id.* at 528-38. *See New Vista*, 719 F.3d at 265-66 n. 25 (dissenting opinion).

Once lengthy intrasession recesses did become common, however, the President and the Senate quickly reached a common understanding that the President had authority to unilaterally fill vacancies during lengthy intrasession breaks. The first long intrasession recesses occurred in the 1860s, and during these breaks President Johnson made several recess appointments, which were found to be within his authority. *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884). In the period since the Twentieth Amendment changed the Senate's schedule, hun-

dreds of intrasession recess appointments have been made by virtually every sitting President with no expression of opposition from the Senate as a body.[2] *See* Henry B. Hogue, *Intrasession Recess Appointments*, Cong. Res. Serv. 3-4 (2004); Henry B. Hogue, et al., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, Cong. Res. Serv. 22-28 (2013); *Nippon Steel Corp. v. International Trade Comm'n*, 239 F.Supp.2d 1367, 1374 n. 13 (Ct. Int'l Trade 2002) (noting "the long history of the practice (since at least 1867) without serious objection by the Senate"). Indeed, "the Comptroller General[,] an officer in the legislative branch," has expressed "his full concurrence in the position taken by the Attorney General in 33 Op. 20." 41 Op. Att'y Gen. at 469 citing *Appointments – Recess Appointments*, 28 Comp. Gen. 30, 35-37 (1948).

The construction of the term "the Recess of the Senate" long embraced by the Executive Branch and the Senate better achieves the purpose of the Recess Appointments Clause than the construction of that term embraced by the court below. The Recess Appointments Clause indisputably was intended to fulfill the following purpose:

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[2] From time to time, individual Senators have expressed agreement with the interpretation adopted by the court below. For instance, Senator Kennedy submitted a brief in *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir. 2004), arguing that President Bush's recess appointment of Judge Pryor was invalid on this ground. But the Senate itself, which does have the capacity to file briefs in its own name, has never adopted that position. *See* D.C. Cir. Tr. 20-21 (where Judge Griffith describes the mechanism by which the Senate decides to file a brief).

> "that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, *the advice and consent of the Senate cannot be immediately asked*, *because of their recess*, the President shall have the power of filling it by an appointment to continue only until the Senate shall have [had an opportunity to] pass[] upon it." *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632 (1823) (emphasis added).

The President and Senate's construction allows the President to make recess appointments during periods when the Senate's advice and consent cannot be asked and *only during such periods*. "Under the intersession definition," by contrast, the President "could recess appoint . . . officers during intersession breaks that last negligible periods of time." *New Vista*, 719 F.3d at 244. *Accord Enterprise Leasing*, 2013 WL 3722388, at *44 ("[T]he intersession definition . . . allows for a recess appointment during a momentary intersession break."). *See* Pet. App. 48a n. 2 ("momentary intersession recess"). Thus, the construction adopted by the court below would deprive the President of authority to make recess appointments during lengthy periods when the Senate is away and unavailable to consider nominations but would allow him to make such appointments during momentary breaks when the Senate is, as a practical matter, available to give its advice and consent.

This "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress," of making intrasession recess appointments should

"be treated as a gloss on 'executive Power' vested in the President by . . . Art[icle] II." *Youngstown Steel Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (concurring opinion). As Justice Frankfurter aptly observed,

> "[T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjoined. The Constitution is a framework for government. Therefore the way the frame work has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution . . ., but they give meaning to the words of a text or supply them." *Id.* at 610.

For just this reason, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

This is not to say that the practice of the Executive Branch and the Senate with regard to intrasession recess appointments "supplant[s] the Constitution." *Youngstown Steel*, 343 U.S. at 610. But it is most certainly to say that the conclusion reached by the Executive Branch and the Senate regarding the proper interpretation of the Recess Appointments Clause – based on their experience in exercising the appointment authority assigned to those two branches of government by the Constitution – is entitled to respect from the

Judiciary.[3] Moreover, "the way the framework [for recess appointments] has consistently operated" should be viewed as "fairly establish[ing] that it has operated according to its true nature." *Ibid.*

Aside from admittedly inconclusive textual analysis and historical research, the proponents of the "intersession" interpretation of "Recess of the Senate" have advanced two policy reasons for rejecting the Executive Branch and Senate's definition of that term. Neither policy reason is sufficient to justify rejecting the views of the Executive Branch and the Senate on this matter.

The principal policy reason advanced in support of narrowly construing the phrase "Recess of the Senate" is that it serves "to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power." *New Vista*, 719 F.3d at 229. *See also id.* at 235. *Enterprise Leasing*, 2013 WL 3722388, at *49 (concurring opinion) ("maintain[] the separation of powers by cabining the President's unilateral appointments power to limited circumstances"). *See also id.* at *40. There is every indication, however, that the Senate does not need the Judiciary's help in this regard.

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[3] What is at issue here is the weight to accord the President and the Senate's interpretation of the constitutional provisions defining the respective authority of each of those branches of government with regard to appointments. Contrary to the view of the court below, Pet. App. 24a-25a, the situation here is thus at the furthest remove from that addressed in *INS v. Chadha*, 462 U.S. 919, 945 (1983), where the question was whether a potentially "useful 'political invention'" could trump "[e]xplicit and unambiguous provisions of the Constitution."

In the first place, the drafters of the Constitution protected the Senate's prerogatives by providing that recess appointments can last no longer than a full session of Congress. The temporary nature of such appointments creates a powerful incentive for Presidents to seek confirmation of their nominees to full terms. Precisely because he "has no assured tenure beyond the next session of the Senate," a recess appointee will feel constrained to carry out his functions "with one eye over his shoulder on Congress." *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (*en banc*) (dissenting opinion) (quotation marks and citation omitted). That is obviously an undesirable state of affairs for a President who wishes to staff the Executive Branch with officers who will vigorously advance the administration's program.

What is more, the Congress has taken steps to protect the Senate's prerogatives by enacting the Pay Act. *See* 5 U.S.C. § 5503. This statute provides that recess appointees will not be paid for their services, except in three sets of circumstances where it would have been very difficult to procure the advice and consent of the Senate in filling the vacancy. *Id.* § 5503(a). And, the statute further provides that where vacancies are filled by permitted recess appointments, the Senate must be promptly presented with a nominee for its consideration. *Id.* § 5503(b).

Finally, and most importantly, the "intersession" interpretation is, in fact, particularly ill-suited to protecting the Senate's interests in this regard. This is so, because that interpretation "allows for a recess appointment during a momentary intersession

break," *Enterprise Leasing*, 2013 WL 3722388, at *44, Pet. App. at 48a n.2, and would thus permit the President to make recess appointments even on days when the Senate is sitting and unquestionably available to give its advice and consent.

The authors of the 1905 Senate Report would not have agreed that allowing the President to make recess appointments during "intersession breaks that last negligible periods of time," *New Vista*, 719 F.3d at 244, "preserve[s] the Senate's advice and consent power," *id.* at 229. It was exactly that sort of thing that the Senate Report meant to preclude by declaring that the term "recess," within the meaning of the Recess Appointments Clause, does *not* include any period "when the Senate is in position to receive a nomination by the President, and, therefore, to exercise its function of advice and consent." S. Rep. No. 4389, at 3. The course of events that generated the 1905 Senate Report makes this crystal clear.

In 1901, Attorney General Knox advised President Roosevelt that "[t]he interval between the[] two sessions [of Congress] is *the* recess" during which the President could make appointments pursuant to the Recess Appointments Clause. *President – Appointment of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 604 (1901) (emphasis in original).[4] Acting on this advice, President Roosevelt made a large number of appointments during the moment

[4] By contrast, Attorney General Knox opined, "[a]ny intermediate temporary adjournment is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* at 601 (emphasis in original).

between the end of the first session and the beginning of the second session of the 58th Congress on December 7, 1903. *See* 38 Cong. Rec. 1438-39 (1904) (listing the recess appointments to military positions). *See also* Vivian S. Chu, *Recess Appointments: A Legal Overview*, Cong. Res. Serv. 8 (2011).[5] President Roosevelt treated the brief period between the two sessions as a "recess" during which he had power to make recess appointments.

Four days after President Roosevelt made these recess appointments, Senator Tillman submitted a resolution calling upon the Senate Judiciary Committee to report on "[w]hat constitutes a 'recess of the Senate'" for purposes of the Recess Appointments Clause. 38 Cong. Rec. 113 (1903). The Senate Judiciary Committee issued its report on March 2, 1905. S. Rep. No. 4389, 58th Cong., 3d Sess. (1905), reprinted in 39 Cong. Rec. 3823-24 (1905). Rejecting the interpretation on which President Roosevelt acted, the Senate Report concluded that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." *Id.* at 1. The Senate continues to treat the 1905 Report as the definitive statement of "what constitutes a 'recess of the Senate'" within the meaning of the Recess Appointments Clause. Floyd M. Riddick

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[5] At noon on that date, the President pro tempore of the Senate adjourned the first (extra) session of the 58th Congress sine die, left the chair, went down to the floor and returned with the Chaplain, who began the second session of that Congress with a prayer. *See* 38 Cong. Rec. 1605 (1904) (recollecting the events).

& Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* 1084 (1992).

In short, it could not be more clear that the Senate has concluded – and wisely so – that the technical interpretation of the phrase "the Recess of the Senate" disserves the Senate's ability to give its advice and consent on nominations.

The other policy reason advanced in favor of the technical construction is that it provides "standards" that "are judicially manageable." *New Vista Nursing*, 719 F.3d at 217. *See* Pet. App. 28a ("favor[ing] the clarity of the intersession interpretation"); *Enterprise Leasing*, 2013 WL 3722388,, at *39 ("[T]he unavailable-for-business definition offers no durational guideposts.") & *50 (concurring opinion) ("a more judicially manageable interpretation of 'the Recess'"). Finding a "judicially manageable" interpretation is not a weighty consideration, however, since there have been few occasions when judicial supervision has been needed. The appointment process has been assigned to the President and the Senate. *See* Alexander Hamilton, *The Federalist No. 76* ("The Appointing Power of the Executive."). And, the President and the Senate have concluded that the practical construction offers the most manageable standard for their purposes. *See*, *e.g.*, *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272-73 (1989). Those are the two branches of government directly assigned responsibility for the appointment process, and their views on what is the most manageable standard for carrying out their constitutionally assigned responsibilities is entitled to great weight.

This Court should embrace the Executive Branch and Senate's construction of the phrase "the Recess of the Senate." On that understanding, a "Recess of the Senate" occurs whenever the Senate's "adjournment [is] of such duration that the members of the Senate owe no duty of attendance" with the result that "the Senate [is] absent so that it can not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen at 25, paraphrasing S. Rep. No. 4389.

II. THE PRESIDENT HAS THE POWER TO FILL UP ALL VACANCIES DURING THE RECESS OF THE SENATE, REGARDLESS OF WHEN THOSE VACANCIES FIRST AROSE.

The second interpretative question presented by this case is whether the President may fill vacancies that first occur prior to the recess in question. Consistent with the text of the Recess Appointments Clause, the common understanding of the President and the Senate has long been that the President may fill such vacancies.

The critical textual question in this regard is the application of the prepositional phrase "during the Recess of the Senate." Grammatically speaking, that phrase can be read to describe the period during which the President possesses the power to fill vacancies, i.e., that phrase can be understood to modify "shall have Power." Or that prepositional phrase can be read to describe when the vacancies that may be so filled must arise, i.e., that phrase can be understood to modify "all Vacancies that may hap-

pen." Prior to the decision below, the universally accepted interpretation was that the President has the power to unilaterally fill vacancies only "during the Recess of the Senate" but that during that period the President has the power to fill up all existing vacancies.

This interpretation of the Recess Appointments Clause was articulated nearly two hundred years ago by Attorney General Wirt in an opinion concluding that the recess appointment power of the President extends to filling vacancies that first occurred prior to the Senate beginning its recess. *See* 1 Op. Att'y Gen. at 632. Attorney General Wirt set forth the common sense of this interpretation as follows:

> "In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act." 1 Op. Att'y Gen. at 633.

As the Eleventh Circuit observed, Congress has expressed its agreement with this interpretation of the Recess Appointments Clause by passing a law addressed to the "salary requirements for officers appointed to fill a vacancy that existed while [the] Senate was in session." *Evans*, 387 F.3d at 1226 (describing 5 U.S.C. § 5503). *See also Appointments – Recess Appointments*, 28 Comp. Gen. at 33 (interpreting the Pay Act to "permit the payment of persons appointed to fill offices requiring Senatorial

confirmation during periods while the Senate was not in session, if nominations had been submitted during the session of the Senate and not acted upon"). And other than the court below, every federal court addressing the question has also expressed agreement with this interpretation. *See Evans*, 387 F.3d at 1226-27; *Woodley*, 751 F.2d at 1012-13; *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962).

The majority below attributed great significance to the fact that, during the three month period between the first and second session of the first Congress, President Washington made four recess appointments to fill vacancies that had been created when appointees who had been nominated and confirmed near the end of the first session later declined their appointments. Pet. App. 38a-39a. The majority asserted that this episode indicates that President Washington engaged in a "convoluted process" to ensure that vacancies would arise during the recess. *Id.* at 39a. And, the lesson the majority drew from this was that President Washington understood his recess appointment authority to extend only to vacancies that first occurred during a recess. *Ibid.* The historical truth refutes rather than supports that hypothesis.

In late September 1789, during the last days of the first session of the first Congress, President Washington nominated and the Senate confirmed no fewer than ninety-five judges and officers. S. Exec. J., 1st Cong., 1st Sess., 29-35 (1789). When the second session was convened in February 1790, President Washington immediately informed the

Senate that five of the ninety-five nominees confirmed at the very end of the term had declined their appointments. S. Exec. J., 1st Cong., 2d Sess., 38 (1790).[6] President Washington explained to the Senate that he had filled the four district court vacancies by making recess appointments but that he had not filled the vacancy on the Supreme Court left by Robert Harrison's refusal of his appointment. *Ibid.* At the same time, President Washington submitted the nominations of the four individuals he had recess appointed for the Senate's advice and consent. *Ibid.*[7]

The only conclusion that can be drawn from this episode is that President Washington and the Senate were endeavoring – largely with success – to fill

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[6] At the same time, President Washington also informed the Senate that three nominees who had been confirmed as port officers in August 1789 had declined their appointments but that he had not filled these vacancies by making recess appointments. *Ibid.* *See* S. Exec. J., 1st Cong., 1st Sess., at 9-11 (listing the August nominees).

[7] On March 30, 1790, President Washington informed the Senate that a sixth appointee who had been confirmed in September 1789 had declined his position as the United States attorney for Kentucky. S. Exec. J., 1st Cong., 2d Sess., at 42. On September 24, 1796, President Washington finally filled that long-vacant position by making a recess appointment. Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 73 & n. 83 (1978). *See also id.* at 65-72 (detailing Washington's seven attempted and failed appointments to fill the position between 1792 and 1796). President Washington's action in this regard tends to confirm Attorney General Wirt's understanding that pre-existing vacancies could be filled by the President during a recess.

vacancies in the new government with confirmed appointees. There is no indication that the President and the Senate were attempting to manufacture vacancies during the up-coming recess. To the contrary, in correspondence during that recess, President Washington complained that the decisions by a handful of the confirmed nominees to decline their appointments would "have a tendency to bring the Government into discredit" and had "embarrassed" him personally. Letter from George Washington to James McHenry (Nov. 30, 1789) & Letter from George Washington to Edmund Randolph (Nov. 30, 1789), in 30 *The Writings of George Washington* 470 & 472 (John C. Fitzpatrick ed., 1939).

In sum, the long-held view of the Executive and Legislative branches that the President has the power to fill *all* vacancies that exist during a recess of the Senate should be accepted as the correct interpretation of the Recess Appointments Clause.

III. UNDER THE PRESIDENT AND SENATE'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE, THE SENATE WAS IN RECESS ON JANUARY 4, 2012.

In terms of the "essential inquiry" delineated in the 1905 Senate Report and long accepted by the Executive Branch, there was clearly a "Recess of the Senate" when the appointments in question here were made. 33 Op. Att'y Gen. at 25. The appointments were made on January 4, 2012 in the midst of a five week period during which "the members of the

Senate owe[d] no duty of attendance[,] . . . its chamber [was] empty[, and] the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments." *Ibid.*

On December 17, 2011, in preparation for what was referred to as "the upcoming recess or adjournment of the Senate," the Senate adopted by "unanimous consent," "[o]rders [f]or Tuesday, December 20, 2011 [t]hrough Monday, January 23, 2012." 157 Cong. Rec. S8783 (daily ed., Dec. 17, 2011). The unanimous consent orders provided that "when the Senate completes its business today, it [will] adjourn and convene for pro forma sessions only, with no business conducted on the following [specified] dates . . . until 2 p.m. on Monday, January 23," when, "following the prayer and pledge" and other opening formalities, "the Senate [would] be in a period of morning business until 4 p.m. . . . and that following morning business, the Senate [would] proceed to executive session." *Id.* at S8783-84.

The unanimous consent agreement was a binding commitment not to conduct business between December 17 and January 23, including at the scheduled "pro forma" sessions. This is so, because "in cases in which the Senate has agreed not to conduct business at a pro forma session," it has bound itself not to do so and may conduct business during the covered period only if it "subsequently adopt[s] a second consent agreement which would permit [it to] do so." Christopher M. Davis, Cong. Res. Serv., *Memorandum to Senate Minority Leader* (March 8, 2012), reprinted in 158 Cong. Rec. S5954 (daily ed.,

Aug. 2, 2012).[8] *See Riddick's Senate Procedure*, at 1313 ("A unanimous consent agreement can be set aside by another unanimous consent agreement.").

In this regard, "an order by unanimous consent which specifies that [the covered] series of meetings is to be pro forma and that no legislative business is to be conducted on such days," 158 Cong. Rec. at S5954, is *more restrictive* than the typical concurrent resolution adjourning Congress. The typical adjournment resolution allows the Senate to be recalled by the majority leader or his designee to conduct business in whatever way the Senate sees fit. *See* S. Con. Res. 1, 112th Cong., 1st Sess. (Jan. 5, 2011). In the face of a unanimous consent agreement not to do business, by contrast, the Senate can act *only* by unanimous consent, and thus a single Senator can block it from doing business. For precisely this reason, the *Congressional Directory* – a publication of the Legislative Branch – has consistently characterized such periods of "pro forma sessions" where "no business is conducted" as "recesses." *Congressional Directory*, at 538 n. 2.

By providing that the Senate would "convene for

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[8] The Congressional Research Service memorandum attempts to draw a distinction between situations in which "the Senate has . . . agreed not to conduct business during pro forma sessions," and "a pro forma session" held without such an agreement. *Ibid.* The CRS memorandum suggests that the Senate could "conduct legislative or executive business" at the latter. *Ibid.* Since the Senate *did* agree not to conduct business during the period in question here, the significance of designating sessions as "pro forma" in the absence of an agreement to conduct no business is not an issue in this case.

pro forma sessions only, with no business conducted," 157 Cong. Rec. at S8783, the unanimous consent agreement freed the Senators from their "duty of attendance," with the predictable consequence that "its chamber [was] empty," 33 Op. Att'y Gen. at 25. "Under Senate Rule VI, paragraph 2, Senators are required to attend all sessions of the Senate unless they are excused." *Riddick's Senate Procedure*, at 214. But this rule is enforced only "[w]hen a quorum call is had and a quorum fails to respond." *Ibid.* And the presence of a "quorum" is only relevant to "the valid transaction of business." *New Process Steel v. NLRB*, 560 U.S. ___, 130 S.Ct. 2635, 2642 (2010). Thus, the unanimous consent agreement to "convene for pro forma sessions only, *with no business conducted*," 157 Cong. Rec. at S8783 (emphasis added), provided assurance that there would be no quorum call during the covered period. *See Riddick's Senate Procedure*, at 1042 ("A quorum call is not in order unless business has intervened since a quorum was last established . . . ."). As a result, other than the presence of the acting President pro tempore for less than a minute each session, the Senate chamber was empty during the "pro forma sessions."

From the Senate's "recess or adjournment" on December 17, 2011, 157 Cong. Rec. at S8783, until that body came "back after the long break" on January 23, 2012, 158 Cong. Rec. S13 (daily ed., Jan. 23, 2012), the Senate did not meet in any regular session or – with one exception – conduct any business. The single exception occurred on December 23, 2011, when the Senate, acting by "unanimous consent agreement," adopted a two month extension of

various tax reductions that had been passed by the House, and then returned to being governed by "the previous order." 157 Cong. Rec. S8789-90 (daily ed., Dec. 23, 2011).[9] On every other day covered by the unanimous consent agreement, the pro forma sessions were opened without any of the usual formalities and adjourned only seconds later. *See* 157 Cong. Rec. S8787 (daily ed., Dec. 20, 2011) (35 seconds); *id.* at S8791 (daily ed., Dec. 27, 2011) (30 seconds); *id.* at S8793 (daily ed., Dec. 30, 2011) (32 seconds); 158 Cong. Rec. S1 (daily ed., Jan. 3, 2012) (41 seconds); *id.* at S3 (daily ed., Jan. 6, 2012) (29 seconds); *id.* at S5 (daily ed., Jan. 10, 2012) (28 seconds); *id.* at S7 (daily ed., Jan. 13, 2012) (30 seconds); *id.* at S9 (daily ed., Jan. 17, 2012) (28 seconds); *id.* at S11 (daily ed., Jan. 20, 2012) (29 seconds).

Communications from the President to the Senate made during this period were not placed before the Senate until the recess concluded on January 23. 158 Cong. Rec. S37 (daily ed., Jan. 23, 2012) (receiving a communication dated January 12, 2012). That being so, it was only when the Senate returned to business on January 23, 2012 that "the Presiding Officer laid

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[9] The fact that, acting by unanimous consent, the Senate did override the "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012" to conduct business at the December 27, 2011 session limited to passing an extension of the tax reduction does not make the period in question any less of a recess. The Senate could convene for a day to take exactly the same kind of action during the recess period set by a typical concurrent resolution adjourning both houses of Congress. *See*, *e.g.*, S. Con. Res. 1, 112th Cong., 1st Sess. (Jan. 11. 2011).

before the Senate messages from the President of the United States submitting sundry nominations." *Ibid.* Prior to that date, "the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. at 25.

The Senate itself all but declared that there was a "Recess of the Senate" for the period in question. To begin with, the Senate considers the 1905 report of the Committee on the Judiciary to be the authoritative source for "what constitutes a 'recess of the Senate'" for purposes of defining "what are the powers and limitations of the President in making appointments in such cases." *Riddick's Senate Procedure*, at 1084. By binding itself to "convene for pro forma sessions only, with no business conducted," 157 Cong. Rec. S8783, the Senate guaranteed that its long break would constitute a "recess of the Senate" as that phrase was defined by the 1905 Senate Report.

The authoritative 1905 Senate Report expressly rejects the proposition that the convening of "constructive sessions" is of any relevance in determining whether there is a "Recess of the Senate." S. Rep. No. 4389, at 2. As we have explained, the 1905 Report was commissioned by the Senate in response to President Roosevelt's appointment of a large number of officers during a "constructive recess" between the end of the first session and the immediate beginning of the second session of the 58th Congress at noon on December 7, 1903. The 1905 Report observed that "[i]t would seem quite as natural that there should be a 'constructive session' of Congress

or of the Senate as a 'constructive recess." *Ibid.* And, the Report rejected the notion that either would count in determining whether there was a "Recess of the Senate" on the ground that it was "intended by the framers of the Constitution that it should mean something real, not something imaginary." *Ibid.*

What is more, the Senate would have been aware that periods in which it convenes only "pro forma" sessions are classified as "recesses" by the *Congressional Directory*, a publication of the legislative branch. *Congressional Directory*, at 538 n. 2. And, the resolutions adopted by the Senate to govern various administrative matters during the period in question referred to that period as "the upcoming recess or adjournment of the Senate." 157 Cong. Rec. S8783. *See also* 158 Cong. Rec. S13 (welcoming the Senators "back after the long break").[10]

Against that background, the President's determination that there was "a real and genuine recess" of the Senate during the "long break" in Senate proceedings for the period surrounding the January 4, 2012 appointments represents a reasonable application of the long-accepted definition of a "Recess of the Senate" to the undisputed facts and circumstances regarding the state of proceedings in the Senate at

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[10] The House likewise understood that the Senate was adjourning for the year on Saturday afternoon, December 17, 2011. *See*, *e.g.*, 157 Cong. Rec. H9932 (daily ed., Dec. 19, 2011) ("Over the weekend, . . . Senate liberals led adjournment for recess."); *id.* at H9954 (daily ed., Dec. 20, 2011) ("Saturday afternoon, Senator McConnell gave his consent to allow the Senate to adjourn for the year.").

that time. In exercising his authority to make recess appointments, "the President is necessarily vested with a large, although not unlimited, 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 Op. O.L.C. at 272 (quoting 33 Op. Att'y Gen. at 25). *Accord* 28 Comp. Gen. at 36. That being so, the President's appointments should be sustained by this Court.

CONCLUSION

The decision of the court of appeals should be reversed and the decision of the National Labor Relations Board should be enforced.

Respectfully submitted,

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