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., ET AL.,

Respondents.

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

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FRANCHISE ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL RETAIL FEDERATION, RETAIL INDUSTRY LEADERS ASSOCIATION, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

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INTEREST OF *AMICI CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW") comprises more than 600 member organizations representing millions of employers nationwide. An important function of CDW is to provide a collective voice to its membership on issues of national concern to the business community. CDW regularly advocates for its members on a range

[1] Petitioner and respondents have filed blanket letters of consent to the participation of *amici curiae*. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

of labor issues and files *amicus curiae* briefs in cases of particular importance to its members.

The American Hotel & Lodging Association ("AH&LA") is the only national trade association representing all segments of the lodging industry. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

Associated Builders and Contractors ("ABC") is a trade association representing 22,000 construction and industry-related firms. ABC and its seventy chapters help members win work and deliver that work safely, ethically, and profitably for the betterment of their communities. ABC member contractors employ workers whose training and experience span all of the twenty-plus skilled trades that make up the construction industry.

Established in 1957, the Independent Electrical Contractors ("IEC") is a trade association representing 3,000 members with fifty-six chapters nationwide. Headquartered in Alexandria, Virginia, IEC is the nation's premier trade association representing America's independent electrical and systems contractors.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA works through its government relations and public policy, media relations, and educational programs to protect, enhance, and promote franchising. IFA members include franchise companies in more than

300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, and business development.

The International Foodservice Distributors Association ("IFDA") is the trade organization representing more than 153 members in the foodservice distribution industry. IFDA members operate more than 700 distribution facilities in all fifty States across the United States with annual sales of more than $110 billion. These companies help make the food-away-from-home industry possible, delivering food and other related products to restaurants, institutions, and other foodservice providers.

The National Association of Wholesaler-Distributors ("NAW") is composed of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every State in the United States. NAW members are a constituency at the core of our economy – the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users.

The National Council of Chain Restaurants ("NCCR") is the nation's leading trade association for chain restaurant businesses and a division of the National Retail Federation, the world's largest retail trade group. NCCR's members include large national and regional chain restaurant brands, many of which consist of local multi-unit operators and franchisees. NCCR advocates sound public policy on behalf of chain restaurant operators and regularly

takes particular interest in court cases, like this one, that affect the business operations of its members.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all types and sizes, as well as restaurants and industry partners from the United States and forty-five countries abroad. In the United States, the NRF represents the breadth and diversity of an industry operating more than 3.6 million establishments that support one in four jobs, or 42 million working Americans.

The Retail Industry Leaders Association ("RILA") is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturer facilities, and distribution centers domestically and abroad.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in more than 140 countries, SHRM serves the needs of human resources professionals and advances the interests of the human resources profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India, and the United Arab Emirates.

Because many of *amici*'s members are subject to the National Labor Relations Act ("NLRA"), *amici* have an interest in ensuring that the National Labor

Relations Board (the "Board" or "petitioner") does not issue binding decisions affecting thousands upon thousands of employers without a lawfully constituted quorum.

The court of appeals correctly held that the Board lacked a quorum because three of its five members were unlawfully appointed without the Senate's constitutionally required advice and consent. *Amici* respectfully submit this brief to underscore how unprecedented those appointments were and to explain why the government's sweeping view of the Recess Appointments Clause is unworkable and wrong. *Amici* agree with respondent Noel Canning that the Recess Appointments Clause, as originally and best understood, contemplates neither intra-session recess appointments nor appointments to fill pre-existing vacancies. However, this brief focuses more narrowly on the third question presented in this case and explains why the Constitution does not permit the President to exercise his recess-appointment power when the Senate is convening every three days in pro forma sessions.

STATEMENT

1. The Appointments Clause requires the President to obtain the advice and consent of the Senate before appointing high-ranking public officials. U.S. Const. art. II, § 2, cl. 2. This advice-and-consent requirement places an important constraint on the President's appointment power. The Framers understood that the Senate would be "an excellent check upon a spirit of favoritism in the President." The Federalist No. 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), at 513.

The Recess Appointments Clause immediately follows the Appointments Clause and allows the President "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 recess-appointment power was intended as an "auxiliary method of appointment" in times of genuine necessity. The Federalist No. 67, *supra*, at 455. At the time of the Framing, Congress would often recess for six to nine months at a time, and the Framers understood that important vacancies could occur while the Senate was away. The President therefore was given the power to fill those vacancies "which it might be necessary for the public service to fill without delay." *Ibid.*

2. This case arises from the President's invocation of the Recess Appointments Clause to appoint three members to the Board on January 4, 2012, without the Senate's advice and consent.

Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). By statute, the Board must have three validly appointed members to have a quorum. *Id.* § 153(b). In the absence of a quorum, the Board is powerless to act. *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

On January 3, 2012, the first session of the 112th Congress came to a close. At that time, the commission of one of the Board's members – Craig Becker, a prior recess appointee – expired automatically. The resulting vacancy left the Board with only two members, and thus no quorum.

The next day, the President announced that he "refuse[d] to take 'no' for an answer" from Congress in connection with this and other vacancies. See Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1. The President declared that he was relying on the recess-appointment power unilaterally to appoint Sharon Block, Terence Flynn, and Richard Griffin to the Board. *Ibid.*[2]

The Senate was regularly holding sessions at the time. Between December 17, 2011, and January 23, 2012, the Senate was convening "pro forma"[3] every three days to satisfy its constitutional obligation not to adjourn for more than three days without the consent of the House of Representatives. See U.S. Const. art. I, § 5, cl. 4 (Adjournments Clause). Indeed, on January 3, 2012 – the day before the President made the appointments – the Senate assembled in that fashion to commence the second session of the 112th Congress, pursuant to the Twentieth Amendment. See 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[4]

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[2] The President appointed Richard Cordray to the Consumer Financial Protection Bureau at the same time. Press Release, Office of the Press Secretary, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012).

[3] "Pro forma," in congressional parlance, generally refers to a session of brief duration convened principally to comply with the Adjournments Clause. "[T]he term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself. . . . [A] pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS report).

[4] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall

The Senate's December 17, 2011, scheduling order contemplated that there would be "no business conducted" at these pro forma sessions. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But the Senate did, in fact, conduct business during these sessions: On December 23, 2011, at the President's request, the Senate passed a bill extending the payroll tax cut for two months. *Id*. at S8789 (daily ed. Dec. 23, 2011).

On January 12, 2012, the Office of Legal Counsel issued an opinion declaring that the President's recess appointments were legally defensible. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012) ("OLC Opinion"). The OLC Opinion argued, in principal part, that the President possesses the unilateral power to judge the existence *vel non* of a "real and genuine recess." See *id*. at 5. Thus, notwithstanding the Senate's pro forma sessions, the President could "properly conclude that the Senate [was] unavailable" – and make recess appointments on that basis. *Id*. at 9.

3. On February 8, 2012, the newly constituted Board issued a decision adverse to respondent Noel Canning. Noel Canning petitioned for review of that decision in the United States Court of Appeals for the D.C. Circuit. Noel Canning argued, among other things, that the President's January 4 appointments were unconstitutional because the Senate was not actually in recess when the President purported to exercise his recess-appointment power. Resp. C.A. Br. 29-36. Accordingly, Noel Canning explained, the

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begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2.

Board lacked a quorum of validly appointed members and its order therefore lacked the force of law.

The court of appeals granted the petition and vacated the Board's order. Pet. App. 1a-55a. The court held that the January 4 appointments were unconstitutional for two reasons. *First*, a unanimous court held that the Recess Appointments Clause allows the President to make recess appointments only during the "inter-session" recess between two sessions of Congress.[5] *Second*, a two-judge majority further held that the Recess Appointments Clause extends only to those vacancies that actually "happen," or arise, during the recess in which appointments are to be made.

Because the appointments failed on those grounds, the court of appeals did not squarely address the narrower (and equally dispositive) question whether the President may lawfully make intra-session recess appointments where, as here, the Senate is convening every three days in accordance with the Adjournments Clause. In granting the Board's petition for certiorari, the Court directed the parties to brief and argue that question. See *NLRB* v. *Noel Canning*, 133 S. Ct. 2861 (2013).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the President acted beyond his constitutional authority when he appointed Members Block, Flynn, and

[5] The Third and Fourth Circuits have since joined the D.C. Circuit in holding that the Recess Appointments Clause does not countenance intra-session recess appointments. See *NLRB* v. *Enterprise Leasing Co. Se.*, 722 F.3d 609 (4th Cir. 2013); *NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013).

Griffin to the Board on January 4, 2012. The Recess Appointments Clause allows the President to fill only those vacancies that arise in recesses between – not during – Senate sessions. Even if the Court were to disagree, the January 4 appointments fail on a more basic level: Because the Senate was regularly holding sessions in January 2012, it was not in *any* form of recess – intra-session or otherwise – when the President purported to exert his recess-appointment power.

The January 4 appointments were quite literally unprecedented. To our knowledge, no President in history has attempted an intra-session recess appointment during such a brief adjournment. This abrupt departure from historical practice conflicts with the purpose of the Recess Appointments Clause and is a serious encroachment on the Senate's advice-and-consent function.

What is worse, the government has consistently defended these appointments on the basis that the President has sole discretion to judge whether the Senate is "functionally" in recess – *even if it is regularly holding sessions*. This functional-recess approach is untenable. For one, it flouts the plain language and original intent of the Recess Appointments Clause. For another, it would afford the President virtually unchecked authority to define the scope of his own recess-appointment power. Such an unwarranted arrogation of power would undermine the careful balance struck by the Framers, for it cannot be left to one branch of government to define its own exceptions to another branch's oversight.

The government offers no colorable argument to the contrary. Its "functional" approach does not

promote inter-branch predictability – it demolishes it. The Senate's plenary power to determine the rules of its own procedures does not vanish simply because the President may deem those rules inconvenient. And the government's functional-recess theory is unmoored from any historical pillar; it is telling that no President – not one – has ever declared a Senate session a nullity in order to avoid the advice-and-consent requirement. In any event, the government's argument fails on its own terms, because the Senate's pro forma sessions are "real" sessions in which the Senate can, routinely does, and in this case *did* perform legislative functions. The judgment of the court of appeals should be affirmed.

ARGUMENT

Amici agree with respondent Noel Canning that the January 4 appointments were unlawful and that the court of appeals' judgment should be affirmed. The court of appeals correctly held that the Recess Appointments Clause, as originally and best understood, contemplates neither intra-session recess appointments nor appointments to fill pre-existing vacancies. But we will not retread that ground here. Rather, this brief focuses on the third question posed by the Court: whether the Recess Appointments Clause vests the Executive with implicit power to declare a functional "recess" when the Senate expressly *declines* to enter a recess and instead convenes every three days in pro forma sessions. The answer to that question is no. The President's disregard for these pro forma sessions – which are Senate sessions in every relevant sense – provides a clear, narrow, and dispositive ground upon which to affirm the judgment below.

A. The Senate Was Not In Recess On January 4, 2012

It has long been settled that the President may not make intra-session recess appointments unless, at a minimum, the Senate has "adjourn[ed] for more than three days" under the Adjournments Clause. See U.S. Const. art. I, § 5, cl. 4. The government concedes as much: "[T]he Executive has long understood that such short intra-session breaks – which do not genuinely render the Senate unavailable to provide advice and consent – are effectively *de minimis* and do not trigger the President's recess-appointment authority." Pet. Br. 18; see also OLC Opinion, *supra*, at 9 n.13.

This baseline principle has deep roots. Attorney General Daugherty – perhaps the most oft-cited authority for the practice of intra-session recess appointments – confirmed long ago that the Adjournments Clause is a structural constraint on the Recess Appointments Clause. See *Executive Power – Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). He declared that if the Senate has not adjourned for more than three days, then "no one . . . would for a moment contend that the Senate is not in session." *Ibid.*

It is sensible to read these Clauses together, because they turn on the same basic fact of the Senate's availability. The Adjournments Clause was intended to prevent one house of Congress from unilaterally disabling itself (at the expense of the other) "without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 368 (Jonathan Elliott ed., 2d ed. 1836) (Virginia convention) (remarks of James

Madison). Similarly, the Recess Appointments Clause – at a time of extended recesses and limited communication – guarded against "public inconveniences"[6] by allowing the President to fill vacancies that were "necessary for the public service to fill without delay." The Federalist No. 67, *supra*, at 455.

Because the Framers considered three-day breaks *de minimis* periods of congressional unavailability under the Adjournments Clause, the appointment-by-necessity rationale of the Recess Appointments Clause would likewise be out of place during such brief adjournments. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 419-21 (2005) (explaining why the Clauses should be read together). Even the United States has urged that it would make "eminent sense" to "apply the three-day rule explicitly set forth in the Adjournment Clause" in construing the Recess Appointments Clause. Reply Brief for Intervenor United States at 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc).[7] Similarly, this Court has employed the Adjournments Clause's three-day rule to construe other constitutional provisions that hinge on congressional availability. See *Wright* v. *United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

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[6] See 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 135 (remarks of Archibald Maclaine).

[7] CDW pointed out this change in position in its *amicus curiae* brief in support of certiorari. See Br. of the Coalition for a Democratic Workplace as *Amicus Curiae* in Support of Certiorari at 10. The government has failed to explain (or even acknowledge) it.

Prior administrations have long hewn to this principle. To our knowledge, no President in history has attempted an intra-session recess appointment when the Senate has not adjourned for more than three days under the Adjournments Clause. In the last thirty years, the shortest intra-session recess during which a recess appointment was made was ten days. See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions*, at 3 (2012).

Thus, although not squarely addressed by the court of appeals, the January 4 appointments were quite literally unprecedented. The Senate never obtained – did not even seek – the House's consent to adjourn for more than three days. As a consequence, the Senate was constitutionally required to (and did) convene every three days. When the appointments were made, the Senate was not in "recess" as that term has ever been understood. That should settle the matter.

B. The President May Not Unilaterally Declare A Session Of Congress To Be A "Functional" Recess

The government does not quarrel with much of the above. It concedes that, under any credible authority, a three-day break cannot trigger the President's recess-appointment power. See Pet. Br. 44-46. Nonetheless, the government contends that, despite convening every three days, the Senate was not *really* holding sessions at the time of the appointments. The government asks this Court to endorse a "functional" recess theory under which the President, applying abstract factors, can decide whether a Senate session bears sufficient

"hallmarks" of a recess such that the President may invoke his own appointment power. See *id.* at 47-51.

The court of appeals correctly rejected this breathtaking proposition, which is divorced from the constitutional text, lacks any meaningful limiting principle, and represents an abrupt departure from centuries of practice. See Pet App. 29a-30a. This Court should do likewise.

1. The Government's Functional-Recess Approach Is Flawed And Unworkable

The government advocates a "functional" approach to assessing whether a Senate session is actually a recess in disguise. Conspicuously absent from the government's brief is any discussion of *who* should possess this singular power to judge whether a "session" is really a "recess." But the assumption inherent in the government's brief, which it has made explicit elsewhere, is that the President's view of the matter is exclusive and inviolate. See OLC Opinion, *supra*, at 13 ("[T]he President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause."). This view of the Recess Appointments Clause is untenable and wrong.

a. As a threshold matter, the government's functional-recess approach flouts the bright-line rule explained above: Any intra-session recess appointment requires, at a minimum, that the Senate adjourn for more than three days under the Adjournments Clause. The Senate never did that. Indeed, because the Senate never obtained the House's consent, it could not lawfully adjourn for more than three days. How could the Senate be in a

twenty-day recess when the Constitution commands that it *not* be?

The government offers two responses. *First*, it suggests that the "better view" is that pro forma sessions actually "do not comply with the Adjournment Clause." Pet. Br. 59-60. In other words, the Senate *did* adjourn for more than three days – it just did so unconstitutionally. *Id.* at 59-61. This argument is contradicted by more than a century of congressional practice. Congress has consistently and without challenge convened pro forma sessions to satisfy the Adjournments Clause since the 1850s. See, *e.g.*, Cong. Globe, 33rd Cong., 1st Sess. 1347 (June 8, 1854) (Senate resolution scheduling pro forma sessions); 5 Cong. Rec. 333, 337-38 (1876) (same); 71 Cong. Rec. 3045 at 3228-29 (1929) (House resolution scheduling pro forma sessions); 96 Cong. Rec. 16,980 (1950) (Senate resolution scheduling pro forma sessions); *ibid.* at 17,020 (1950) (same); *id.* at 17,022 (1950) (same); 98 Cong. Rec. 3998-99 (1952) (same); 126 Cong. Rec. 2574 (1980) (same); 127 Cong. Rec. 190 (1981) (same). This "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).[8]

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[8] This should not be confused with the government's argument that historical practice supports its view of the Recess Appointments Clause. See Pet. Br. 21-28. Although intra-session recess appointments have occurred with some frequency in the last century, the practice was expressly disavowed by the Framers. See Pet. App. 20a-23a. The use of pro forma sessions does not have a similarly fractured history. There is no evidence that the Framers contemplated two types of sessions – some "real" for constitutional purposes, and others not.

The government points, however, to an 1876 Senate debate in which it claims that Senator Roscoe Conkling objected to the use of pro forma sessions to satisfy the Adjournments Clause. The government misreads the historical record. The original proposal, offered by Senator Henry Bowen Anthony, was to issue a single order that would prospectively specify all of the dates on which the Senate would convene over the holidays, each session three days after the last. See 5 Cong. Rec. 334 (1876). Senator Conkling objected to that approach, but his objection was resolved through a change that he himself described as "so very simple": instead of setting all of the dates prospectively, the Senate would "adjourn[] for three days with a general understanding among Senators that they are not to expect each other to attend at the next meeting and that at that time, there will be doubtless somebody here to move an adjournment from day to day." *Id.* at 336 (Sen. Conkling). This small change is hardly the grand repudiation of pro forma sessions that the government claims. See, *e.g.*, *ibid.* (Sen. Morrill) ("It seems to me that we are spending time upon a matter that we do not practically differ at all about."). In fact, rather than showing historical disapproval of pro forma sessions, the 1876 debate demonstrates just how deeply rooted they are.

Significantly, the Senate has also used pro forma sessions to satisfy the Twentieth Amendment, which requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. Congress has, on numerous occasions, convened pro forma to comply with that "assembl[y]" requirement. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979); H.R. Con. Res. 260, 102d Cong.,

105 Stat. 2446 (1991); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This practice has likewise gone unchallenged for decades, and even the OLC Opinion defending the lawfulness of the January 4 appointments acknowledged that the Senate's pro forma session on January 3, 2012, acted to "begin the second session of the 112th Congress." See OLC Opinion, *supra*, at 1. The Senate's longstanding use of pro forma sessions to "assemble" under the Twentieth Amendment is strong evidence that such sessions also satisfy the Adjournments Clause.[9]

Second, the government posits that a pro forma session might satisfy the Adjournments Clause, yet not interrupt a recess under the Recess Appointments Clause, because the Clauses serve different functions. Whereas the Adjournments Clause "is principally related to [the Senate's] internal matters," the government contends, "the Recess Appointments Clause . . . allocates power between the Senate and the Executive." Pet. Br. 60.

The government is wrong. For starters, this argument is circular: The government simply relies on one assumed conclusion (the Adjournments Clause concerns only Congress) to support another (the Adjournments Clause cannot affect the President's appointment power). In any event, the

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[9] Pro forma sessions are treated just like any other sessions for statutory purposes, as well. The Congressional Research Service has identified twenty-two statutes in which various time periods are computed based on days that Congress is "in session." 158 Cong. Rec. S5954-55 (daily ed. Aug. 2, 2012) (CRS report). Both the President and Congress take pro forma sessions into account when performing those calculations. *Ibid.*

argument requires one to accept that the Senate could be in "session" for one constitutional provision while simultaneously in "recess" for another. The Constitution supports no such dissonance. The Senate is either constitutionally available, or it isn't. There is no reason to presume that the Framers more abhorred unfilled vacancies than they did "the evils which might result from the want of a proper concert and good understanding between the houses." See 1 St. George Tucker, *Blackstone's Commentaries* Note D, at 206 (1803) (describing original intent of Adjournments Clause).

In short, the Senate has long used pro forma sessions to fulfill its constitutional mandate. See Noel Canning Br. at 52 and App'x B (providing an "illustrative list" of dozens of occasions on which the Senate has used pro forma sessions to satisfy its constitutional obligations between 1949 and 2013). Notwithstanding this, the government contends – for the first time, so far as we can tell – that pro forma sessions are shams. That is wrong as a constitutional matter and, unless one believes that the Senate (with the complicity of the House and the President) has been routinely violating the Adjournments Clause and the Twentieth Amendment, is squarely at odds with decades upon decades of historical practice.

b. The functional-recess approach is also dangerously unworkable. The Adjournments Clause has long stood as a bright-line limit on intra-session recess appointments. Casting aside that barrier would afford the President virtually unbounded authority to declare the Senate in recess. If the touchstone is simply whether *the President* concludes that the Senate, though holding sessions, is

"unavailable to perform its advise-and-consent function," OLC Opinion, *supra*, at 23, then nothing would preclude the President from declaring a de facto "recess" in any number of situations. Suppose, for example, that the Senate is engaged in lengthy debate or, in the President's view, simply taking too long to consider a nomination. Separation of powers principles do not evaporate in times of protracted political debate or even genuine impasse – to the contrary, that is often when such principles are most important.

The separation of powers "is a prophylactic device" that "establish[es] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The government's approach is barely a line in the sand. How robust must a session be to constitute a "real" session? Will thirty Senators for sixty minutes suffice? Sixty Senators for thirty minutes? What if all Senators are in attendance, but they take up little or no business? The government purports to offer some additional characteristics of a "functional" recess – no prayer or Pledge of Allegiance, for instance, see Pet. Br. 50 – but this ad hoc list, plainly tailored to the circumstances of this case, will prove unhelpful in future cases arising under different facts. More importantly, these disparate factors were created out of whole cloth and have nothing to do with the text or purpose of the Recess Appointments Clause. The Framers envisioned the recess-appointment power as "nothing more than a supplement" to the standard advice-and-consent method. The Federalist No. 67, *supra*, at 409. They surely did not intend for the President to pick and choose, on a case-by-case basis,

which characteristics (or lack thereof) render a legislative session sufficiently mundane to justify resort to that auxiliary appointment method.

The government claims that its functional approach is necessary to promote predictability. See Pet. Br. 51 (quoting *United States* v. *Smith*, 286 U.S. 6, 35-36 (1932), for the proposition that the President should not be subjected to the "'uncertainty and confusion'" of attempting to decipher Senate communications). But it is the government's approach that would breed uncertainty. If the difference between a "session" and a "recess" were a shifting landscape of multifactor tests crafted and applied by the President, then the Senate could never be certain whether its conduct might be taken as a sign of its "unavailability" – whether it was out of chambers for the weekend or for lunch, or even if it was "in session and [the President was] merely displeased with its inaction." Pet. App. 30a; cf. *Smith*, 286 U.S. at 35 ("It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that *each branch* be able to rely upon definite and formal notice of action by another.") (emphasis added). There is no sufficient limiting principle to the government's position. The court of appeals rightly observed that the functional-recess test would "eviscerate the Constitution's separation of powers." Pet. App. 29a.

Not only that, but the government's approach is hopelessly backward-looking. It will never be clear *ex ante* whether the Senate has entered a "functional" recess because that determination depends on the nature and quality of sessions yet to

occur. The government relies on the assertion that "no work was done, no messages were laid before the Senate, and its members were dispersed" between January 3, 2012 and January 23, 2012, to justify recess appointments that were made on *January 4, 2012*. Pet. Br. 47. If the Senate *did* conduct business on January 5, 2012, could anyone dispute that the Senate was not in recess – even a "functional" one – for more than 48 hours? A bright-line approach grounded in the Adjournments Clause avoids such chaotic guesswork.

c. History and practice likewise militate against the government's position. As far as we can determine, no President has ever attempted an intra-session recess appointment unless the Senate has adjourned for more than three days with the House's consent. Such "prolonged reticence would be amazing if [the practice] were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230. In fact, only once in history has a President attempted an *inter*-session recess appointment under those circumstances. And that incident is a case study for why "high walls and clear distinctions," *id.* at 239 – not boundless executive discretion – are necessary in this area:

When the clock struck noon on December 7, 1903, President Theodore Roosevelt made 160 recess appointments during what he deemed a "constructive recess" in the few moments between the first and second sessions of the 58th Congress. See Hogue, *supra*, at 10. The tactic was widely condemned by Congress. In a 1905 report discussing the incident, the Senate Judiciary Committee lamented that "[t]he theory of 'constructive recess' constitutes a heavy draft upon the imagination." S. Rep. No. 4389, 58th

Cong., 3d Sess. 2 (1905), *reprinted in* 39 Cong. Rec. 3823 (1905). In words especially befitting the present case, the Committee admonished that

> the Framers [in drafting the Recess Appointments Clause] were providing against a real danger to the public interest, not an imaginary one. *They had in mind a period of time during which it would be harmful if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.*

Ibid. (emphasis added).

d. If there were any doubt whether the Senate was "really" in session, the benefit of that doubt lies firmly and exclusively with the Senate. The Constitution grants Congress plenary power to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, this Court has confirmed that "all matters of method [of proceeding] are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). Part and parcel of that power is the Senate's ability to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." *Id.* at 6; see Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, cl. 1-4, Doc. 14 (stating that "[e]ach house of Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting").

Courts will not second-guess a determination by Congress that it has duly assembled. Even the judicial inquiry into whether a bill was lawfully

passed is a narrow one: if Congress says that it was, then that settles the matter. See *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892). This principle is firmly grounded in the separation of powers and the "respect due to a coordinate branch of the government." *Id.* at 673. It would flout that principle for the President to cross-examine (and conclusively judge) whether the Senate is "functionally" in recess when that body declares itself to be in session.

The government protests that pro forma sessions should not receive such deference because, it claims, the Senate cannot disable the President from making recess appointments by falsely declaring itself in session when it is actually unable to fulfill its advice-and-consent function. See Pet Br. 61-63. Even if that were true, it is beside the point. Pro forma sessions are not the hollow exercises that the government portrays them to be. As explained below, the Senate *can* provide advice and consent during pro forma sessions, just as it can (and did here) fulfill other core legislative functions. Surely it is within the Senate's broad rulemaking power to declare itself in session at a time when it could, and proximate to this instance did, pass legislation.

More importantly, the power to consent necessarily includes the power to withhold consent. That the Senate declines to consent to a particular presidential nomination, or wishes to delay action on such nomination until it has had time to consider it in more depth,[10] does not mean that it is trampling

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[10] The President had nominated two of the three January 4 appointees only three weeks before he declared that he would not "take 'no' for an answer," *supra* p. 7, and purported to exercise his recess-appointment power. The Senate never had a

on the President's constitutional powers – it means that the Senate is exercising its own. The Framers intended for the Appointments Clause to engender negotiation, compromise, and shared responsibility between the President and the Senate. See *Edmond* v. *United States*, 520 U.S. 651, 660 (1997) ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."). That the Senate does not promptly accede to the President's desired appointments is not the sign of a broken system; it is the hallmark of a system at work.[11]

The Recess Appointments Clause was "carefully devised" to not "in the slightest degree chang[e] the policy of the Constitution, that [] appointments are only to be made with the participation of the Senate." S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905). The Senate can abrogate (or eliminate) the President's recess-appointment power by choosing to remain "perpetually in session . . . for the appointment of

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chance to give "no" for an answer. As of January 4, the Senate had not even received the nominees' committee questionnaires or their background checks. See Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012).

[11] In fact, in July 2013 the Senate and President reached a compromise on the appointments at issue in this appeal. The Senate confirmed one of the January 4 recess appointees, Richard Cordray, as director of the Consumer Financial Protection Bureau and confirmed two nominees to the National Labor Relations Board. See Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1.

officers." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1557, at 416 (3d ed. 1833). That is precisely what the Senate did when it elected, consistent with its rules, to remain in session between December 17, 2011, and January 23, 2012. It is neither remarkable nor troubling that the President's "auxiliary" appointment power was rendered unnecessary as a consequence.

2. The Senate Was Not In A "Functional" Recess

Even if the Recess Appointments Clause justified the session-by-session assessment the government urges, the January 4 appointments are invalid. The Senate's pro forma sessions were real sessions – not metaphysical ones. The Senate was not in a "functional" recess.

Most fundamentally, the Senate was capable of performing legislative functions and providing consultation during its pro forma sessions. This is not post hoc speculation – the Senate actually *passed legislation* during the period in question. At the Senate's December 23, 2011, pro forma session, the Senate passed by unanimous consent the Temporary Payroll Tax Cut Continuation Act of 2011. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). The President later signed that bill into law. In fact, the bill was passed at the *President*'s urging – belying any claim that the Senate was incapable of acting on presidential requests (or nominations) during this period. *Contra* Pet. Br. 49 (defending appointments on ground that Senate's pro forma sessions rendered it "unable as a body to 'receive communications from the President or participate as a body in making appointments'" (quoting S. Rep. No. 4389, at 2 (1905))).

The government attempts to downplay the significance of this fact by claiming that the "relevant" recess actually began on January 3, 2012 – *not* December 17, 2011 – when the Senate convened pro forma to begin the Second Session of the 112th Congress in accordance with the Twentieth Amendment. Pet. Br. 47-48. This temporal gerrymandering is awkward, to say the least, and happens also to be contradicted by the plain language of the Twentieth Amendment. See Noel Canning Br. 56-57. But it is also rather beside the point. Whether the government thinks the Senate passed a law during *this* "functional" recess, or the "functional" recess immediately preceding it, the point remains that the Senate could pass a law (or provide advice and consent) at *any* pro forma session. That the government must resort to logical origami to explain away the Senate's passage of a law twelve days before the January 4 appointments, during a pro forma session indistinguishable from the one held on January 4, only underscores the malleability of its approach.

Far from there being only a "remote possibility" that the Senate will conduct business in a pro forma session, *contra* Pet. Br. 52, both houses of Congress frequently conduct business in this fashion. For instance, at a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Even more recently, in a pro forma session on September 28, 2012, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). Indeed, according to the Congressional Research Service, the House "regularly permits business on pro forma days, including the introduction and referral of legislation, the filing of committee reports

and co-sponsorship forms, and the receipt and referral of executive communications and Presidential messages." *Id.* at S5954 (Aug. 2, 2012).

The government ignores all of this, and instead touts the fact that the Senate's December 17 scheduling order contemplated that there would be "'no business conducted'" at the sessions in question.[12] Pet. Br. 48 (quoting 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011)). That is true, but irrelevant. The relevant inquiry under the Recess Appointments Clause is whether the Senate is *capable* of acting on appointments – not whether it intends to do so. See *Executive Power – Recess Appointments*, *supra*, at 25 (referring to "a real and genuine recess making it *impossible* for [the President] to receive the advice and consent of the Senate") (emphasis added). Although the government attempts to contest this point, see Pet. Br. 52, its brief repeatedly *adopts* this standard – perhaps because its own multi-factor test is incapable of expression through an articulable rule. See, *e.g.*, *id.* at 45 ("The Senate is in recess when it *cannot* receive communications from the President or participate as a body in the appointment process.") (emphasis added).

As stated above, business can always be conducted in a pro forma session – exactly as it was

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[12] The International Brotherhood of Teamsters asserts that the scheduling order constituted "a binding commitment not to conduct business between December 17 and January 23." Br. for Resp. Int'l Brotherhood of Teamsters at 23. That is wrong. As the union concedes in the very next breath, the scheduling order could be overcome by unanimous consent. See *id.* at 23-24. After all, business *was* conducted during the period in question.

here, just days before the January 4 appointments. The government confuses the Senate's ability to act with its willingness to do so. It would turn the advice-and-consent function on its head if the President could declare a "recess" whenever the Senate stated that it would take no action on a nomination for some period of time.

Nor is it meaningful that the Senate could act only through unanimous consent at its pro forma sessions. *Contra* Pet. Br. 53-55. "The Senate is fundamentally a 'unanimous consent' institution." Walter J. Oleszek, Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate*, at 1 (2008). The vast majority of the Senate's business, *especially* on nominations, is conducted by unanimous consent. Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, at 5 (2012); see generally Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* (2013). In fact, the Senate confirmed an array of presidential nominees by unanimous consent the same day that it scheduled the sessions in question. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011).[13]

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[13] That there was no quorum during the pro forma sessions also does not mean that they were not "real." There is rarely a quorum on the Senate floor; "[a]s any observer of the Senate soon notices, typically only a handful of Senators are present during floor debates." Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate*, at 1 (2013). Where a quorum is actually necessary to act, the Senate compels the attendance of absent members. *Id*. at 4 n.12; see also U.S. Const. art. I, § 5, cl. 1 ("[A] majority of each [House] shall constitute a Quorum to do Business; but a smaller

The government points out that, even when the Senate has adjourned pursuant to the Adjournments Clause, there is always a possibility that the Senate will return early to conduct business. Pet. Br. 52-54. That is true. See, *e.g.*, U.S. Const. art. II, § 3 (empowering the President, "on extraordinary Occasions, [to] convene both Houses, or either of them"). But it does not follow, as the government claims, that there is no way to distinguish a series of pro forma sessions from an extended adjournment (or a "real" recess). The distinction is straightforward: When the Senate is holding pro forma sessions, it is *convening*; when the Senate has adjourned for an extended period of time, it is not.

As the government concedes, there was nothing "distinctive about the pro-forma sessions" that enabled the Senate to pass legislation. Pet. Br. 54. To the contrary, "that result was merely a function of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent." *Ibid.* In other words, the pro forma sessions were Senate sessions like any other, at which the Senate could, and did, conduct business in accordance with its chosen procedures. The Senate routinely uses pro forma sessions to fulfill its constitutional obligations, and there is nothing unique to the Recess Appointments Clause that commands a higher threshold of Senate availability than does the rest of the Constitution. When the Senate has convened as a legislative body – pro forma or otherwise – it is fully capable of

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Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.").

discharging its constitutional mandate. The advice-and-consent function is no exception.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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