Nos. 12-1115 & 12-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 760,
Intervenor.

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.

B. Ruling Under Review. References to the rulings at issue appear in the Brief for the National Labor Relations Board.

C. Related Cases. This case has not previously been before this Court or any other court. Related cases are listed in the Brief for the National Labor Relations Board.

Respectfully submitted,

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Date: November 27, 2012

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MISCELLANEOUS:

GLOSSARY

ALJ	Administrative Law Judge
App	Deferred Appendix
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board

STATEMENT OF THE CASE[1]

This case arises out of the 2010 negotiations between Noel Canning and Teamsters Local 760 over a successor collective bargaining agreement. App. A120.[2] At the December 8 bargaining session, the Company and Union negotiators reached agreement on all the terms of a new collective bargaining agreement. App. A121. One element of the agreement was that the covered employees would be allowed to vote to select one of two wage-benefit packages. *Ibid*. On December 15, the employees voted to select one of the packages. App. A122. 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. App. A124. The Company refused to execute the collective bargaining agreement, insisting that the parties had not reached agreement on the alternative wage-benefit packages. *Ibid*.

The Union filed unfair labor practice charges with the National Labor Relations Board alleging that the Company's refusal to execute the agreed-upon contract constituted bad faith bargaining in violation of Section 8(a)(5) of the National Labor Relations Act. App. A120. The NLRB General Counsel concluded that the Union's charges had merit and issued a complaint alleging that

[1] We incorporate the statements of jurisdiction, the issues, the case and the facts contained in the brief for the National Labor Relations Board (pp. 1 – 10).

[2] "App." refers to the deferred appendix.

Noel Canning had violated NLRA § 8(a)(5). *Ibid*.

After hearing two days of testimony, the administrative law judge found that the Company and Union had reached agreement on December 8 and that the Union's draft of the collective bargaining agreement reflected the agreed-upon terms of the contract. App. A124.[3] In so finding, the ALJ relied upon the testimony of Bob Koerner and Mark Weber, who he found "to be highly credible witnesses, with their contemporaneous notes of the December 8 meeting reinforcing their mutually consistent testimony." *Ibid*. The ALJ relied particularly on "Weber's very precise testimony" that stood "unrebutted." *Ibid*. Weber is a long-term Noel Canning employee, who testified that he was present at the negotiations "as a witness just to take down notes basically and then go back to the Plant and tell everybody how it had gone." App. A121. "Weber testified that when an agreement had been reached at that session he wrote down what had been agreed to and went over the terms 'point by point' with Zimmerman [Noel Canning's treasurer] 'right at the very end to make sure that I had everything correct in my mind about the two proposals I was going to take back'" and "that Zimmerman 'agreed with everything' step by step, stating 'that's correct' as Weber reviewed from his notes each component of the 'final two proposals that the Company and Bob [Koerner] had ironed out to take back to the employees for

[3] The Board later identified one error in the Union's draft of the agreement and ordered that that error be corrected. App. A118-A119 & n. 4.

them to decide which of either they wanted to do and accept or not.'" *Ibid*.

Based on the ALJ's factual findings, a three-member panel of the NLRB unanimously concluded that Noel Canning had violated NLRA § 8(a)(5) by "[f]ailing and refusing to bargain with the Union in good faith by refusing to reduce to writing and to execute a collective-bargaining agreement reached with the Union, Teamsters Local 760, embodying the terms agreed to on December 8, 2010, and ratified by the employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the parties' agreement." App. A118. Two members of the NLRB panel – Members Flynn and Block – had been appointed on January 4, 2012 during a Senate recess. The third member – Member Hayes – had been appointed on June 29, 2010 after being confirmed by the Senate.

SUMMARY OF ARGUMENT

I. In challenging the decision of the National Labor Relations Board, Noel Canning has advanced two frivolous statutory arguments. The Company's statutory grounds for refusing to obey the Board's order are so weak and are advanced in such a cursory fashion as to confirm that the Company is merely taking advantage of the asserted lack of an NLRB quorum to delay its compliance with the federal law.

II. The asserted occasion for delaying enforcement of the National Labor Relations Act is the appointment of two of the Board members deciding this case

on January 4, 2012, when the President reasonably determined the Senate to be in recess. As the circumstances of this case amply demonstrate, the President's authority to appoint federal officials while the Senate is in recess is a crucial aspect of his responsibility to see that the federal laws are faithfully executed. The meaning of the term "recess" as used in the Recess Appointments Clause has been settled for over a century. The Senate is in "recess" under this accepted understanding whenever it has suspended its proceedings in such a manner and for a sufficient period of time that its members are released from their duty of attendance and are thus free to be absent from the Senate chamber.

On January 4, 2012, the Senate was in the midst of a recess established by the unanimous consent agreement adopted by that body on December 17, 2011. That unanimous consent agreement provided that the Senate would adjourn on that date and not resume normal proceedings until January 23, 2012. During the period covered by the unanimous consent agreement, the Senate would meet for pro forma sessions only with no business conducted. The unanimous consent agreement precluded the Senate from conducting any business during that period without the consent of every single Senator. By precluding the conduct of any business without unanimous consent, the agreement freed Senators of their duty to attend and, as a result, no Senator other than the designated chair was obligated to attend any of the pro forma sessions. That extended period – during which the

Senators were freed of their duty of attendance and during which the Senate chamber was empty and the Senate unavailable to offer its advice and consent on appointments – was a "recess" within the meaning of the Recess Appointments Clause.

ARGUMENT

I. NOEL CANNING'S STATUTORY CHALLENGES TO THE NLRB'S DECISION ARE FRIVOLOUS.[4]

Noel Canning asserts two separate statutory grounds for refusing to comply with the Board's order. Each is frivolous.

A. Noel Canning's first – and presumably principal – statutory argument on review is the following: "Given the importance of the principle of freedom of contract in labor law, the Board was wrong to disregard fundamental principles of Washington law [regarding the enforcement of verbal contracts] and enforce a contract that is plainly invalid under those principles – an outcome directly contrary to the reasonable expectations of the bargaining parties." Pet. Br. 73-74 (quotation marks and citation omitted).

Whatever may be provided by the State of Washington's statute of frauds with respect to the enforcement of contracts at common law, the National Labor Relations Act provides that "[i]t shall be a unfair labor practice for an employer . . .

[4] For the reasons stated in the brief for the NLRB (pp. 14 – 23), the Chamber of Commerce lacks standing to intervene in this case.

to refuse to bargain collectively with the representative of his employees" and that the duty "to bargain collectively" entails "the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. §§ 158(a)(5) & 158(d). Thus, as the ALJ pointed out, "[u]nder Federal law, it is clear that the verbal agreement reached here is valid and enforceable." App. A124, citing *H.J. Heinz v. NLRB*, 311 U.S. 514, 525-26 (1941).

The clarity of the federal law in this regard perhaps explains the Company's failure to reassert its state law statute of frauds argument in taking exceptions to the ALJ's recommended decision. The fact that the Company did not raise the point before the Board makes its argument to this Court completely inexcusable, since the argument is not only patently without merit but is barred by NLRA § 10(e) which states that "[n]o objection that has not been urged before the Board . . . shall be considered by the court" in a challenge to enforcement of the Board's decision. 29 U.S.C. § 160(e).

B. The Company's fall-back argument that the Board's decision is not supported by substantial evidence is based on a challenge to the credibility of only one of the two witnesses relied upon by the ALJ. Pet. Br. 74-77. Ignoring altogether the "very precise testimony" of Mark Weber that went "unrebutted," App. A124, Noel Canning attempts to impeach the testimony of Bob Koerner, App. A121, through reference to the affidavit he gave to the NLRB Region during

its investigation of the Union's charges.

One sentence in Mr. Koerner's affidavit stated, "I told Roger that I was voting the contract on Wednesday and that I would vote the contract that we TA'd [tentatively agreed to] during the December 8 meeting noting different from that TA." App. A122 n. 8 (ALJ's alterations omitted). The ALJ observed that "noting" was most likely intended to be "nothing," as in "nothing different from that [agreed upon]" was submitted to the employees for a vote. *Ibid*. Noel Canning seizes upon this obvious typographical error to argue that the nonsensical phrase "noting different from that TA" should be understood to mean that a "'different contract' . . . from any supposed agreement" was submitted to the membership for a vote. Pet. Br. 75. Thus read, the affidavit would be inconsistent with Mr. Koerner's testimony regarding what he presented to the membership for a vote but not inconsistent with his testimony regarding the agreement reached between the parties on December 8.

This Court "do[es] not reverse the Board's adoption of an ALJ's credibility determinations unless, unlike here, those determinations are hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quotation marks and citations omitted). "Patently unsupportable" aptly describes the Noel Canning's substantial evidence argument. The Company ignores altogether the testimony of the principal witness

relied upon by the ALJ and the Board and advances an implausible interpretation of a prior statement made by a different witness in an effort to put that witness's credibility in issue.

* * *

The sum and substance of the matter is that Noel Canning has literally no basis for challenging the Board's decision on the merits. Rather, the Company is simply taking advantage of the controversy over the recess appointments to delay complying with the completely uncontroversial order issued by a unanimous NLRB panel in this case.

II. THE NLRB PANEL THAT DECIDED THIS CASE WAS PROPERLY CONSTITUTED AND THUS THE COMPANY MUST OBEY THE BOARD'S ORDER.

Noel Canning asserts that the NLRB panel that decided this case was not properly constituted because two of the three panel members were appointed by the President pursuant to his authority under the Recess Appointments Clause at a time when the Company maintains the Senate was not in recess. Pet. Br. 29-73. The President reasonably determined that the Senate was in recess on January 4, 2012 when he appointed the two NLRB members in question. The appointments were, therefore, valid and the panel that decided this case was properly constituted.

A. 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. "[T]he main purpose of the Recess Appointments Clause [is] to enable the President to fill vacancies to assure the proper functioning of our government" during periods when the Senate is absent and thus unavailable to give its "Advice and Consent" on Presidential appointments. *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (*en banc*).

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. ___, 130 S.Ct. 3138 (2010), the Supreme Court recently emphasized the importance of the President's appointment powers in his exercise of executive authority. The Court's analysis began by observing that "Article II vests '[t]he executive Power . . . in a President of the United States of America,' who must 'take Care that the Laws be faithfully executed.' Art. II, § 1, cl. 1; *id*., § 3," and that, "'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.' 1 Annals of Cong. 461 (1789)." 130 S.Ct. at 3146 & 3151. It followed for the *Free Enterprise Fund* Court that the Appointments Clause must be interpreted in a manner that does *not* "contravene[] the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Id*. at 3147 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

Anticipating the *Free Enterprise Fund* analysis by a century and a half,

Attorney General Stanbery placed the proper interpretation of the Recess Appointments Clause in the context of the President's obligation to faithfully execute the laws:

> "It is in the arrangement of executive power that we encounter this question. First of all, it is the President who is made the recipient of this power. . . . Now, it is of the very essence of executive power that it should always be capable of exercise. The legislative power and the judicial power come into play at intervals . . . ; but always and everywhere the power to execute the law is, or ought to be, in full exercise. The President must take care at all times that the laws be faithfully executed. There is no point of time in which the power to enforce or execute the laws may not be required, and there should not be any point of time or interval in which that power is dormant or incapable of acting." *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32, 35-36 (1866).

And, the lesson he drew from that imperative was:

> "The true theory of the Constitution in this particular seems to me to be this: that as to the executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such

vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone." *Id*. at 38.

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." *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989) (quoting *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921)). *Accord Evans*, 387 F.3d at 1222; *Appointments – Recess Appointments*, 28 Comp. Gen. 30, 36 (1948). The President's determination that there was "a real and genuine recess" of the Senate on January 4, 2012 represents a reasonable application of the long-accepted meaning of the term "recess" to the undisputed facts and circumstances regarding the state of proceedings in the Senate at that time. The President's action in making the recess appointments in question should, therefore, be sustained by this Court.

B. The Executive and Legislative Branches have long agreed that the "most significant" source for interpreting the Recess Appointments Clause "is the report of the Senate Judiciary Committee presented on March 2, 1905, in response to a resolution calling upon it to construe th[at] very clause of the Constitution." 33 Op. Att'y Gen. at 24. *See* Sen. Rep. No. 4389, 58th Cong., 3d Sess. (1905),

reprinted in 39 Cong. Rec. 3823-24 (1905). The 1905 Senate Report was issued pursuant to a 1903 Senate resolution instructing the Committee on the Judiciary "to report what constitutes a 'recess of the Senate,' and what are the powers and limitations of the Executive in making appointments in such cases." 39 Cong. Rec. 3823. The occasion for assigning the Senate Judiciary Committee this task was the action of President Theodore Roosevelt in declaring 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 and then announcing recess appointments of more than 160 federal office holders. Vivian S. Chu, Cong. Res. Serv., *Recess Appointments: A Legal Overview* at 8 (2011).

The 1905 Senate Report rejected the notion that the Recess Appointments Clause contemplated a "constructive recess" during which the President could act unilaterally, observing 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'" and dismissing both concepts as untenable. Sen. Rep. No. 4389 p. 2. Rather, the Senate Report concluded that "the word 'recess'. . . is evidently used in the constitutional provision in its common and popular sense," *id*. at 1:

> "It was evidently intended by the framers of the Constitution that it should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then

> understood it and now understand it. 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." *Id*. at 2 (emphasis omitted).

It was this "practical construction" of "the term 'recess'" that was embraced by Attorney General Daugherty in his influential 1921 opinion:

> "To paraphrase the very language of the Senate Judiciary Committee Report, the essential inquiry, it seems to me, is this: 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. *Accord* 28 Comp. Gen. at 36.

In sum, the Senate is in "recess" within the meaning of the Recess Appointments Clause whenever that body has suspended its proceedings in such a manner and for a sufficient period of time that its members are released from their duty of attendance and are free to be absent from the Senate chamber.

C. In terms of the "essential inquiry" delineated in the 1905 Senate Report,

the Senate was clearly in "recess" when the appointments in question here were made. 33 Op. Att'y Gen. at 25. The appointments were made during a period when "the members of the Senate owe[d] no duty of attendance," when "its chamber [was] empty," and when "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 "the upcoming recess or adjournment of the Senate," the Senate adopted by "unanimous consent," "orders for Tuesday, December 20, 2011 through 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 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." *Ibid*.

The unanimous consent agreement was much more than "the Senate's prediction . . . that it would not conduct business at its pro forma sessions." Pet. Br. 49. It was a binding commitment not to conduct business at those 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 in158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012).[5] *See* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* 1313 (1992) ("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 it 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

[5] 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 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 such an agreement is not an issue in this case.

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, Sessions of Congress, 1st to 112th Congresses, 1789-2011* at 538 n. 2.

By providing that the Senate would "convene for 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 predicable 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* 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, provided assurance that there would be no quorum call during the covered period. *See Riddick's Senate Procedure* 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 designated Chair 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 & S8790 (daily ed. Dec. 23, 2011). 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). Even more to the point, it was only when the Senate returned to business on January 23, 2012 that "the Presiding Officer laid 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.

Under the "essential inquiry" delineated by the 1905 Senate Report, the Senate was in recess at the time of the appointments in question here. *Ibid*. The "pro forma" sessions held by the Senate during the period of this recess, during which no business could be conducted and during which no Senator other than the chair was called upon to be in attendance, were nothing more than "constructive sessions" of the sort the 1905 Senate Report dismissed as irrelevant to the Recess Appointments Clause. Sen. Rep. No. 4389 p. 2.

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* S. Con. Res. 1, 112th Cong., 1st Sess. (Jan. 11. 2011).[6]

Noel Canning argues that the pro forma sessions are sufficient to meet the Senate's constitutional obligations not to adjourn for more than three days without the consent of the House, art. I, § 5, cl. 4, and to assemble at least once every year on January 3rd, amend. XX, § 2, and therefore must be sufficient to preclude a "recess" within the meaning of the Recess Appointments Clause. Pet. Br. 42-44. But the Company simply takes the premise of that argument as given, and it is questionable whether holding pro forma sessions at which the Senate has bound itself to do nothing would either preclude the Senate from being in adjournment or satisfy its obligation to assemble on January 3rd.[7] Whatever may be the case under the Adjournment and Assembly Clauses, however, it has long been accepted in interpreting the Recess Appointments Clause that "constructive sessions," Sen.

[6] Nor is it of any consequence for purposes of the Recess Appointments Clause that the consent agreement orders declared that "the second session of the 112th Congress [would] convene on Tuesday, January 3, at 12 p.m.," 157 Cong. Rec. at S8783. Even if the January 3rd pro forma session were, on that basis, treated as interrupting the recess, that would merely reduce the total period of recess to the twenty days running between January 3 and January 23, and there is no question that a recess of that duration is sufficient to allow recess appointments. *See Evans*, 387 F.3d at 1224 (finding a "ten- or eleven-day break in the Senate's Session" to be of sufficient duration to permit recess appointments).

[7] The House was aware that the Senate had adjourned 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."). The absence of any protest from that body may be treated as consent to the Senate's action.

Rep. No. 4389 p. 2, of the sort held by the Senate between December 27, 2011 and January 23, 2012 do not count in determining whether the Senate is in "recess."

Indeed, if holding pro forma sessions that no Senator is expected to attend and during which no business can be conducted deprives the President of authority to make recess appointments during a long break in the Senate's proceedings, it is difficult to see why the Senate could not accomplish that deprivation without the pretense of holding pro forma sessions. The Senate could just as well declare itself to be holding "constructive sessions," Sen. Rep. No. 4389 p. 2, that no one, not even the appointed chair, would be expected to attend. It is, of course, inconceivable that the Senate was intended to have the authority to nullify the President's recess appointment authority by simply declaring itself to be in session. But what the Senate did during the period in question here is in substance no different.

In granting the President authority to fill vacancies during a recess of the Senate, "it was the intent of the Framers to keep important offices filled and government functioning." *Evans*, 387 F.3d at 1224. An interpretation of the Recess Appointments Clause that would allow the Senate to deny the President authority to fill vacancies through "the long break," 158 Cong. Rec. at S13, that concluded on January 23, 2012, during which "no business [was] conducted," 157 Cong. Rec. at S8783, in the Senate and no communications from the President

were received, would "contravene[] the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise Fund*, 130 S.Ct. at 3147 (quoting *Morrison*, 487 U.S. at 693).

CONCLUSION

The decision and order of the National Labor Relations Board should be enforced.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Circuit Rule 32(a)(2)(B) because this brief contains 5,166 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in a 14-point type in a Times New Roman font style.

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CERTIFICATE OF SERVICE

I, James B. Coppess, certify that on November 27, 2012, the foregoing Brief for Intervenor International Brotherhood of Teamsters, Local 760 was served on all parties or their counsel of record through the CM/EFC system if they are registered users, or, they are not, by serving a true and correct copy at the addresses listed below:

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