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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.,
Respondent.

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

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 4, 2012, pursuant to his authority under the Recess Appointments Clause, President Obama appointed three members to fill vacant seats on the National Labor Relations Board ("NLRB" or "the Board"). These appointments ensured that the NLRB had the quorum necessary to fulfill its statutory obligation to adjudicate charges that employers or unions had engaged in unfair labor practices. Respondent Noel Canning contends, and the court below held, that these

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party 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 other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

appointments were unconstitutional because the Senate was not in "recess" when the President acted or, in the alternative, because the President cannot make recess appointments to fill pre-existing vacancies. These crabbed and erroneous interpretations of the Recess Appointments Clause would undermine the scope of a presidential power that is fundamental to the proper operation of the federal government: the President's ability to make temporary appointments to Executive and Judicial Branch offices when the Senate is unavailable to provide its advice and consent. *Amicus* submits this brief to demonstrate that the Constitution's text, structure, and history all make clear that the Recess Appointments Clause was adopted to ensure that the President could make such temporary appointments. In light of that fundamental purpose, the recess appointments at issue in this case are plainly constitutional.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong Executive Branch headed by a single President. Under the Constitution, this new President would have sole responsibility for executing the nation's laws, but he would be aided in that constitutional obligation by subordinate officers of his choosing. Although the Framers thought the Senate should also generally play a role in the appointments process for those subordinate officers and members of the federal courts, they recognized that the Senate would not be continually in session, and they did not want the President to be disabled from making appointments

while the Senate was in recess. Thus, the Framers drafted the Recess Appointments Clause to give the President the Power to fill vacancies that existed while the Senate was in recess and thus unable to participate in the confirmation process.

By giving the President the power to "fill up all Vacancies that may happen during the Recess of the Senate," the Framers ensured that the President could fill any vacancies that existed when the Senate was unable to perform its advise-and-consent function, whether because it was in a recess between sessions or during a session. This interpretation is consistent with Framing-era understandings of the term "recess," and nothing in the text or history of the Clause compels a contrary result. The court below rested its holding in large part on the rarity of intra-session recess appointments during the Founding period, even though the rarity of such appointments is readily explained by the rarity of such recesses during this period. That fact provides no basis for ignoring the Constitution's text and structure and the longstanding practice subsequent to the Framing period.

Similarly, because the Recess Appointments Clause is intended to ensure that the President can make temporary appointments while the Senate is in recess, what matters is not when the vacancy arose, but whether it existed when the Senate was in recess. The court below pointed to evidence that the literal language of the Clause *could* refer to vacancies that arose during the Senate's recess, but nothing that suggests that this is the *only* possible

meaning. To the contrary, evidence from the Founding suggests that the language could also refer to vacancies that *existed* during the recess, and that interpretation is most consistent with the Constitution's structure and history, as well as long-settled practice.

Finally, because the Recess Appointments Clause was adopted to ensure that the President could fill vacancies when the Senate was unable to perform its advise-and-consent function, the fact that the Senate was holding *pro forma* sessions at which "no business" was to be conducted during the recess at issue did not preclude the President from exercising his recess appointment authority. Because no business was to be conducted at these sessions—indeed they often lasted less than a minute with only one Senator in attendance—the Senate remained unavailable to provide its advice and consent to the President's nominees. Thus, the President was empowered by the Recess Appointments Clause to make temporary appointments to the vacant positions on the NLRB. This Court should uphold the President's exercise of that authority.

ARGUMENT

I. THE TEXT, STRUCTURE, AND HISTORY OF THE CONSTITUTION ALL CONFIRM THAT INTRA-SESSION RECESS APPOINTMENTS TO FILL PRE-EXISTING VACANCIES ARE CONSTITUTIONAL

The Appointments Clause of the Constitution vests the President with the authority to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Immediately following the Appointments Clause, the Recess Appointments Clause vests the President with the "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." *Id.* art. II, § 2, cl. 3.

The Executive Branch has long understood the Recess Appointments Clause to confer the authority necessary to fill vacancies that exist during any recess when the Senate is unavailable to provide its advice and consent, irrespective of when the vacancy first arose. Consistent with that interpretation, Presidents have made hundreds of recess appointments since the nation's Founding to fill vacancies that existed during Senate recesses, regardless of when those vacancies arose. The court below held that this settled understanding was unconstitutional, concluding that the text and

history of the Recess Appointments Clause compelled a far more narrow interpretation of the President's authority under this provision. This is wrong. The crabbed interpretation of the court below is not only inconsistent with settled practice, it is inconsistent with the structure, text, and history of the Constitution.

A. The Constitution's Structure Supports a Robust Interpretation of the Recess Appointments Clause.

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the Articles of Confederation, which had vested executive authority in the Continental Congress, Arts. of Confed. art. IX, §§ 4, 5. *See, e.g.*, The Federalist No. 70 (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, America's Constitution: A Biography 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; *Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."), and, alone among the government offices established by the new Constitution, was required to "be on duty continuously." Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 378 (2005); *see* 12 Op. Att'y Gen. 32, 35 (1866) ("it is of the very essence of executive power that it should always be capable of exercise"). Unlike Congress, which was required only to "assemble at least once in every Year," U.S. Const. art. I, § 4, cl. 2, and could, on consent, adjourn as it saw fit, *id.* art. I, § 5, cl. 4, the President, as designed by the Framers, was always acting to execute the laws. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 135 (Elliot ed. 1836) (contrasting Congress, who "are not to be sitting at all times," with the President who is "perpetually acting for the public"); Amar, America's Constitution, *supra*, at 132 ("While the new Congress would go in and out of session, America itself would always be in session, as would the nation's new presiding officer.").[2]

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[2] The idea that the government would be aided by an independent executive in continual service dated back at least to John Locke's foundational work on governmental structure, *see* John Locke, The Second Treatise of Civil Government § 144 (1690) ("it is necessary there should be a power always

Tellingly, the office of the Vice President was established in large part to ensure that the office of the President would never be vacant and that there would be stability in any unplanned presidential succession. *See* Richard Albert, *The Evolving Vice Presidency*, 78 Temp. L. Rev. 811, 815-23 (2005). Two of the Constitution's 27 amendments also provide additional safeguards against the presidency ever being left vacant. U.S. Const. amend. XX (providing for the selection of a president if the President-elect dies or a new president is not selected before the new term is set to begin); *id.* XXV (establishing procedures to fill the vice-presidency and for determining presidential disability).

To aid the President in fulfilling his responsibility to execute the nation's laws, Article II expressly provided the President with the Power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, and recognized that there would be subordinate Executive Branch officers who would also aid the President in executing the nation's laws. *See Free*

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in being, which should see to the execution of the laws that are made, and remain in force"), but the Framers' interest in "creat[ing] a presidency that, officially, would never sleep" was motivated, at least in part, by "various recesses and quorum failures of the Confederation Congress [that] had compromised America's ability to conduct foreign affairs," Amar, America's Constitution, *supra*, at 132.

Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.' (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)); *Myers*, 272 U.S. at 117 ("the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court"); The Federalist No. 72 (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 719 ("If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical.").

While the Framers provided that the Senate would be able to give its "Advice and Consent" to executive nominations, they made absolutely clear the importance of the President's authority to appoint subordinate Executive Branch officials, as well as Judges of the Supreme Court and other public servants. U.S. Const. art. II, § 2. As this Court has noted, "[b]y vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevent[ed] congressional

encroachment upon the Executive and Judicial Branches." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Framers also believed that vesting the appointment authority in a single individual would tend to produce better appointments than vesting that authority in one or both houses of the legislature. *See id.* ("[t]his disposition was also designed to assure a higher quality of appointments"); The Federalist No. 76 (Alexander Hamilton) ("one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment").

To be sure, the Framers also gave the Senate a role to play to prevent abuses of power, providing that it could offer its advice and consent to any nominations. *See Edmond*, 520 U.S. at 659 (noting that Senate involvement could "curb Executive abuses of the appointment power"). The Framers, however, anticipated that this check would rarely be exercised. *See* The Federalist No. 76 ("It is also not very probable that his nomination would often be overruled."); 3 Joseph Story, Commentaries on the Constitution of the United States § 1526 ("Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office."). Instead, they believed the Senate's advise-and-consent function would make the President "more circumspect, and deliberate in his nominations for office." *Id.* § 1525; *see* The Federalist No. 76 ("The possibility of rejection would be a strong motive to care in proposing."); *see also* Amar, America's Constitution, *supra*, at 192 ("the need to secure the approval of a separate

branch would serve to deter a president from making corrupt or unwise proposals").

But the Framers did not want the Senate's role to make appointments impossible during the periods when the Senate would be unavailable to provide its advice and consent. Thus, they provided that the President, who would remain continually in service, could make temporary appointments even when the Senate was not available to perform its advice-and-consent function. *See* 4 Debates in the Several State Conventions, *supra*, at 135 (observing that "[t]his power can be vested nowhere but in the executive . . . ; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences"). As Attorney General Wirt explained in 1823, "the President *alone* cannot make a *permanent appointment* to those offices . . . but 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 passed upon it; or, in the language of the constitution, till the end of the next session." 1 Op. Att'y Gen. 631, 632 (1823).

In other words, the Recess Appointments Clause operates as a critical "supplement" to the Appointments Clause, ensuring that the Senate does not need to stay in session continuously and

that the President will be able to fill any vacancies during recesses. As Alexander Hamilton described it in *The Federalist*, "[t]he ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," the Recess Appointments Clause created an "auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (Alexander Hamilton); *see id.* (noting that it "might be necessary for the public service to fill [vacancies] without delay"); Story, *supra*, § 1551 ("There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess . . . . The former course would have been at once burthensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security.").[3]

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[3] According to the Fourth Circuit, the "necessary implication" of Hamilton's statement that the joint appointment power could only be ""exercised during the session of the Senate"" was that "recess appointments would be necessary, and thus permissible, only outside the session of the Senate." *N.L.R.B. v. Enter. Leasing Co.*, 722 F.3d 609, 648-49 (4th Cir. 2013). But the point of Hamilton's statement is that the joint power can only be exercised *when the Senate is available*; when the Senate is *not* available, the President is authorized to make temporary appointments without the Senate's advice and consent.

Accordingly, the Recess Appointments Clause, properly understood, was designed to confer on the President the power to ensure that vacancies in the Executive and Judicial Branches could be filled even when the Senate was not available to provide its advice and consent. The Third and Fourth Circuits concluded otherwise. According to these courts, the purpose of the Recess Appointments Clause was just the opposite: to limit the President's appointment power. *See NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 229 (3rd Cir. 2013) ("a crucial aspect of the Clause's purpose [was] to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power"); *Enter. Leasing Co.*, 722 F.3d at 634 ("the Recess Appointments Clause was designed to prevent the President from unilaterally exercising appointment power"). This makes no sense. The Recess Appointments Clause was an affirmative grant of "unilateral appointment power" to the President; he would not have had that power at all were it not for the Recess Appointments Clause. Thus, although the Clause did put limits on the scope of that power, those limits were plainly not the principal reason the Framers adopted the Clause.

In sum, the scope of the Recess Appointments Clause must be understood in the context of the purpose it was intended to serve. Limiting the President's exercise of that authority to inter-session recesses or to vacancies that arose during the recess would undermine the ability of the Clause to serve its purpose in the constitutional

structure. Nothing in the Constitution's text or history compels a contrary result, as the next two sections show.

B. The Text and History of the Recess Appointments Clause Confirm That the President's Authority Is Not Limited to Inter-Session Recesses.

As noted above, the Recess Appointments Clause gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The Clause plainly does not distinguish between inter-session and intra-session recesses. Instead, it simply uses the term "Recess," which would have been understood at the time of the Framing to refer to any "[r]emission or suspension" of the Senate's activities. 2 Samuel Johnson, A Dictionary of the English Language 1650 (1755).

Indeed, it would have been odd for the Framers to distinguish between inter-session and intra-session recesses, given the functional purpose the Recess Appointments Clause was intended to serve. As discussed above, the Recess Appointments Clause was intended to ensure that the President could appoint public officials for temporary periods when the Senate was unable to perform its advice-and-consent function, *see* 1 Op. Att'y Gen. at 632 ("The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."), and the Senate is no more available to provide its advice and consent during an intra-

session recess than during an inter-session one. Further, there is no reason to think that the need to fill vacancies in important government positions would be any greater during inter-session recesses than during intra-session ones. *Id.*[4]

The court below rested much of its argument to the contrary on the supposed significance of the Clause's use of the definite article "the," rather than one of the indefinite articles, "a" or "an." Pet. App. 19a (explaining that the difference between "'the Recess'" and "'a recess'" is "not an insignificant distinction" and "[i]n the end it makes all the difference"). According to the court, "that definite article suggests specificity," and because "[i]t is universally accepted that 'Session' [in the Clause] refers to the usually two or sometimes three sessions per Congress," "'the Recess' should be taken to mean only times when the Senate is not in

[4] The court below rejected a "functional approach" to defining the meaning of the Recess Appointments Clause, preferring the "clarity of the intersession interpretation." Pet. App. 28a. But far from offering enhanced "clarity," the approach taken by the court below leads to the absurd result that the President could make recess appointments during an inter-session recess, no matter how short, but not during a lengthy intra-session recess. *See* Alexander M. Wolf, Note, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 Fordham L. Rev. 2055, 2076 (2013) (recounting President Theodore Roosevelt's appointment of 160 officials during the "'infinitesimal fraction of a second,' when a session is first gaveled in, 'which is the recess between the two sessions'"). This cannot have been what the Framers had in mind when they structured the presidential appointment powers.

one of those sessions." *Id.* at 20a. This is plainly wrong.

To start, "a" and "an" can also suggest specificity (as in, "I interviewed an applicant yesterday whom I liked very much"), and "the" can also refer to a class of things, Pet. Br. 16-17. As the Government has noted, "the Constitution directs the Senate to choose a temporary President of the Senate 'in *the Absence* of the Vice President,'" a directive that does not apply to any specific type of absence. *Id.* One cannot imagine that that phrase would mean anything different had the Framers provided for a temporary President of the Senate "during an Absence of the Vice President." Moreover, the court below offers no reason to conclude from the choice of a definite article that the specific recesses the Framers had in mind were inter-session recesses, rather than (for example) those recesses when the Senate was functionally unable to perform its advise-and-consent function.

The Third and Fourth Circuits ultimately agreed with the court below, but relied on somewhat different textual grounds in doing so. *See New Vista*, 719 F.3d at 245 (rejecting the textual analysis of the court below); *see also Enter. Leasing Co.*, 722 F.3d at 648 (describing the "textual evidence" cited by the court below as "inconclusive"). For example, both courts concluded that recess appointments can only be validly made during an inter-session recess because, in part, "nothing in the Constitution establishes the necessary length of an intrasession break that would constitute a recess." *New Vista*, 719 F.3d at

234; *see Enter. Leasing Co.*, 722 F.3d at 644. But the Constitution also does not establish a "necessary length" for inter-session recesses, even though they can be infinitesimally short. Instead of establishing a bright-line rule that would define the length of a "Recess," the Framers made the inquiry a functional one, *viz.*, whether the Senate was unavailable to provide its advice and consent. *See supra* at 11-13.[5]

These courts also emphasized that recess appointments last until the "End of [the Senate's] next Session." *New Vista*, 719 F.3d at 234; *Enter. Leasing Co.*, 722 F.3d at 644. But that does not mean that the term "recess" only refers to inter-session recesses. Because the Framers anticipated that the President would be able to make recess appointments whenever the Senate was unable to provide its advice and consent, be it because of an

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[5] The Court need not determine in this case whether there is any minimum duration that is constitutionally required to trigger the President's recess appointment authority because the recess here was plainly long enough, as long-settled Executive Branch practice reflects, *see Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, 2012 WL 168645, at *5 & n.9 (Jan. 6, 2012) ("The last five Presidents have all made appointments during intrasession recesses of fourteen days or fewer."); *see* Pet. Br. 45. This functional definition also answers the Fourth Circuit's concern that "[t]he Framers would not have contemplated any need to set aside 'the ordinary power of appointments' during short breaks." *Enter. Leasing Co.*, 722 F.3d at 649 (internal citation omitted). No one would think that the Senate is unavailable to provide its advice and consent simply because it adjourns for the weekend or takes a "short break[]."

intra-session recess or an inter-session one, they needed to ensure that the temporal limit in the Clause would accommodate both situations.[6]

Beyond the textual evidence, the court below also placed tremendous significance on the putative lack of intra-session recess appointments in the period immediately after the Framing, explaining that "it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare." Pet. App. 23a-24a; *see id.* at 24a ("early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage").

But there is a simple explanation for that fact that says nothing at all about the constitutionality of such appointments, or how they would have been viewed by the Founding generation. There were few intra-session recess

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[6] The Fourth Circuit also contrasts the use of the term "[a]djournment" in other provisions of the Constitution with the use of the term "Recess" in the Recess Appointments Clause. It concludes that the term recess must "refer[] to a particular sort of adjournment, the break between sessions of the Senate," *Enter. Leasing Co.*, 722 F.3d at 648, but it offers no reason why this would be so. Given the purpose of the Recess Appointments Clause, it makes far more sense to conclude that the "particular sort of adjournment" to which the term "the Recess" refers is one that is, as noted above, long enough that the Senate is functionally unavailable to provide its advice and consent.

appointments during this early period because, as the court below acknowledged, there were few intra-session recesses during this period. And there were none of any significant length. *See* Pet. App. 24a ("it is true that intrasession recesses of significant length may have been far less common in those early days than today"). As Edward Hartnett explains, the early Congresses were characterized by very long inter-session recesses and "occasional intrasession recesses lasting about a week or so in December or early January, typically spanning the Christmas and New Year holidays." Hartnett, *supra*, at 408; T.J. Halstead, Congressional Research Service, RL33009, *Recess Appointments: A Legal Overview* (July 26, 2005) (noting that Congress "took few intrasession recesses, other than brief holiday recesses, until the advent of the modern era"); Peter Strauss, *The Pre-Session Recess*, 126 Harv. L. Rev. F. 130, 131 (2013) ("[i]n the travel circumstances of the time, short recesses were not likely").[7]

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[7] According to the Third Circuit, there is "no reason to discount the" relevance of the early history just because "intrasession breaks were generally no longer than two weeks" because "modern practice has shown[] [that] it is sometimes in the interest of presidents to make recess appointments during breaks as short as two weeks." *New Vista*, 719 F.3d at 639. But given the speed with which modern Presidents must often react to events (and the fact that early intra-session recesses occurred over holidays), it is utterly unsurprising that early presidents saw less need than modern presidents to make recess appointments during intra-session recesses of similar length.

But now the Senate frequently takes lengthy intra-session recesses. Indeed, the change in presidential use of the recess appointment authority corresponds almost exactly with the change in the Senate's recess practices. As noted above, the court below emphasized the absence of intra-session recess appointments "for at least 80 years after the ratification of the Constitution." Pet. App. 23a. But, as Hartnett points out, "[t]he first time that Congress took an extended intrasession recess was during the Presidency of Andrew Johnson," roughly 80 years after the Constitution was ratified. Hartnett, *supra*, at 408. Given that early intra-session recesses were exceedingly rare and always short, and that they generally occurred over holidays when little, if any, government business would have been conducted, it is utterly unsurprising that the early presidents saw little need to make intra-session recess appointments.

According to the court below, the presidential recess appointments power, expressly granted in the text of the Constitution and repeatedly exercised by numerous Presidents, should now be effectively eliminated because the conditions under which it could be exercised rarely, if ever, arose during the Founding period. That cannot be right. *Cf. Boumediene v. Bush*, 553 U.S. 723, 752 (2008) (concluding that the Court should not "infer too much, one way or the other, from the lack of historical evidence on point" when the relevant historical period did not reveal "cases with close parallels to this one"). The text, history, and structure of the Constitution all support the settled

view that the President may make recess appointments during those intra-session recesses when the Senate is unavailable to provide its advice and consent.

C. The Text and History of the Recess Appointments Clause Confirm That the President's Recess Appointment Authority Extends to All Vacancies That Exist During a Recess.

As noted above, 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." U.S. Const. art. II, § 2, cl. 3. Consistent with the Clause's purpose to enable the President to ensure the smooth functioning of government by continuing to fill vacancies when the Senate is unable to provide its advice and consent, "both the courts and the Executive Branch have consistently construed the recess clause as giving the President the authority to fill all vacancies that exist while the Senate is in recess," regardless of when the vacancy arose. *United States v. Woodley*, 751 F.2d 1008, 1013 (9th Cir. 1985); *see* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 576-77 n.16 (2012) (noting that "[s]ince [1823], the overwhelming mass of actual practice has supported the" position that the President may make recess appointments to any position that is vacant during the Senate's recess).

Any other interpretation would leave the President unable to fill an office, no matter how

important, for nearly a year if the vacancy arose right before the start of a lengthy recess, even an inter-session one. *See* 1 Op. Att'y Gen. at 632 (raising the hypothetical of a vacancy that occurs "on the last day of the Senate's session," so that the President does not even know about it before "the Senate rises" which cannot then be filled even though "the public interests may imperiously demand that it shall be immediately filled"); *id.* at 633 ("whether it arose during the session of the Senate, or during their recess, it equally requires to be filled"); *see also United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962) (noting that limiting recess appointments to vacancies that arose during a recess "would create Executive paralysis and do violence to the orderly functioning of our complex government").

The court below held that the text of the Recess Appointments Clause nonetheless forecloses this understanding because, in large part, it would render "the operative phrase 'that may happen' . . . wholly unnecessary." Pet. App. 36a. Then, having assumed that its "logical analysis" of the language was correct, the court simply sought to determine whether its understanding of the language was "consistent with the understanding of the word contemporaneous with the ratification." *Id.* This analysis is wrong on both counts. To start, as the Government explains, the phrase "that may happen" ensured that a President could not fill up *future* vacancies—for example, ones that had been announced, but not yet occurred—during a recess. Pet. Br. 30-31. Such an action would, of course, be entirely inconsistent with the purpose of the Clause

because the Senate would be available to offer its advice and consent at the point when those vacancies needed to be filled.

Moreover, the text plainly does not compel the conclusion that the court below reached. To the contrary, "[i]n a vacuum, the use of the word *happen* could be interpreted to refer to vacancies that either 'happen to occur' or 'happen to exist' during a recess of the Senate." *Woodley*, 751 F.2d at 1012. In other words, "[a] vacancy in an office . . . can be understood to 'happen' either at the moment that the prior occupant left, or to 'happen' the entire time that the office or room is unoccupied." Hartnett, *supra*, at 383; *see* 12 Op. Att'y Gen. at 34 (1866) ("The subject-matter is a *vacancy*. It implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?" (emphasis in original)). And this was as true at the time the Constitution was drafted as it is today. *See* Thomas Dyche & William Pardon, A New General English Dictionary 376 (1760) (defining "happen" to mean either "to come to pass" or "to be"); *see also* Pet. Br. 30 (quoting 1755 definition of "vacancy" as meaning the "[s]tate of a post or employment when it is unsupplied"). The court below erred in considering only whether its view was consistent with contemporaneous understandings of the word "happen," rather than considering whether its view was the *only one* consistent with those understandings. This was too thin a reed to justify supplanting the long-settled practice under the Recess Appointments Clause.

See Rutan v. Republican Party of Illinois, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (explaining that there is a "role [for] tradition in giving content only to *ambiguous* constitutional text" (emphasis in original)).

The history of the Clause also supports the interpretation that the presidential recess appointments power extends to vacancies that exist during a recess, even if they did not arise during that recess. As the Government notes, "[s]ince the 1820s, the vast majority of Presidents have made recess appointments to fill" pre-existing vacancies, Pet. Br. 35, and "each of [the first four] Presidents made appointments, or expressed views, that were inconsistent with the court of appeals' categorical conclusion that a vacancy cannot be filled if it first arose before that recess," *id.* at 39; *see* Hartnett, *supra*, at 390 ("interpreting the Recess Appointments Clause to permit appointments when the vacancy first arose before the recess is not some later invention, but is older than, for example, *Marbury v. Madison*"). Again, the court below emphasizes that there was some disagreement of opinion on this point during the nation's early history, Pet. App. 38a-41a, but mere disagreement is not enough to carry the day when this interpretation would significantly undermine the purpose of the Clause, as previously discussed. *See supra* at 11-13.

The court below does not meaningfully grapple with that problem. It suggests that "Congress can address this issue" (Pet. App. 44a), but it does not explain why the Framers would

have wanted the President to be able to fill vacancies that arose during a recess, but not ones that arose the day before a recess. Indeed, at the Framing, "[n]ews of vacancies occurring during a session might very well not even [have] reach[ed] the President until after the Congress had risen." Strauss, *supra*, at 131. Nor does the court explain why the Framers would have wanted the constitutionality of recess appointments to turn on when exactly the vacancy arose, a fact that would often have been difficult to determine at the time of the Founding, *see* Hartnett, *supra*, at 397 (noting the "difficulty in ascertaining" when certain vacancies arose), rather than whether it existed at the time of the recess. Only by looking at whether the vacancy existed at the time of the recess is it possible to make sense of the text, history, and purpose of the Recess Appointments Clause.

II. THE SENATE'S *PRO FORMA* SESSIONS DID NOT PRECLUDE THE PRESIDENT FROM EXERCISING HIS RECESS APPOINTMENT AUTHORITY

As just explained, the text, history, and purpose of the Recess Appointments Clause all make clear that the Clause was adopted to ensure that the President could make temporary appointments to Executive and Judicial Branch offices even when the Senate was unavailable to provide its advice and consent. Where, as here, the Senate announces that for over a month it will be holding only *pro forma* sessions, at which "no business [will be] conducted," and the Senate has indicated that it is not available to provide advice

and consent on presidential nominations, the President may exercise his recess appointment authority.

As the Government's brief explains, when the Senate adjourned on December 17, 2011, it agreed by unanimous consent that for the end of the First Session of the Congress and the beginning of the Second Session, it would "convene for pro forma sessions only, *with no business conducted*." Pet. Br. 48 (emphasis added); *see* Pet. App. 91a.[8] It further specified that when it reconvened on January 23, 2013, the Senate would, among other things, conduct "morning business" and hold "executive session." Pet. App. 91a-92a. Thus, by the very terms of the Senate's decision to adjourn, it made clear that it was unavailable to conduct any business, including providing its advice and consent on the President's nominees, during the 20-day period between the Second Session's beginning on January 3, 2012 and its next regular session on January 23.[9] In fact, before adjourning for this

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[8] By operation of the Twentieth Amendment, the Second Session of the Congress began at noon on January 3, 2012. Pet. Br. 48.

[9] On December 23, 2011, during an 85-second session at which two senators were present, the Senate gave its unanimous consent to a payroll tax cut. Jeff VanDam, Note, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 379-80 (2012). This one act does nothing to undermine the constitutionality of the President's recess appointments. As noted above, the Senate had advised the President that "no business" was to be conducted during its recess, and this 85-second session at which only two senators were present hardly gave the

recess, the Senate took "special steps to provide for the appointment of congressional personnel" during the recess, "indicating that the Senate recognize[d] that it [was] not in session during this period for the purpose of making appointments under ordinary procedures." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, 2012 WL 168645, at *3 (Jan. 6, 2012).

The Senate's provision that "no business" was to be conducted during the *pro forma* sessions made sense in light of the fact that such sessions often lasted for less than a minute, *see, e.g.*, 157 Cong. Rec. D1404 (daily ed. Dec. 30, 2011) (pro forma session that lasted from 11:00:02 until 11:00:34 a.m.), and there was often only one Senator present, *id.* S8793 (daily ed. Dec. 30, 2011); *see generally* Pet. Br. 48-49. Senators knew they were free to return to their States and did not need to return for the *pro forma* sessions because, as the Senate order announcing adjournment made clear,

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President reason to think that the Senate was prepared to act on his nominations. Surely, many Senators would have been surprised if the Majority Leader had also asked for unanimous consent for the President's nominees, and they were considered confirmed simply by the lack of objection from any member. Moreover, even if this particular *pro forma* session did interrupt the recess that began on December 23, 2011 (which it did not), *no* business was conducted between the commencement of the Second Session on January 3 and the start of the regular session on January 23.

"no business" would be conducted at those sessions. Thus, during this period, the Senate did not purport to be available to fulfill its advice and consent function, making the use of the President's recess appointment authority appropriate.

To be sure, the Senate has some control over the President's ability to exercise his recess appointment authority. If the Senate chooses to remain continually in session so it can act upon the President's nominees, the Senate would be available to provide its advice and consent and use of the recess appointment authority would be unnecessary. But so long as the Senate has adjourned and advised the President and the public that it will not be conducting any business, the only way for the President to exercise his appointment authority and ensure that important Executive and Judicial Branch offices remain filled is to use his recess appointment authority. The President properly exercised that authority here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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