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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF SENATE REPUBLICAN LEADER MITCH MCCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Whether the President lawfully exercised his authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, when he purportedly appointed three individuals to be Members of the National Labor Relations Board on January 4, 2012.

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INTEREST OF *AMICI CURIAE*

Amici curiae are Senate Republican Leader Mitch McConnell and 44 other members of the United States Senate (listed in Appendix B). As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process, which the Executive here sought to circumvent. Particularly given Senate rules and practices providing members of the minority party a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's assertion of a unilateral power to appoint federal officers—which the Framers deliberately withheld—is repudiated. *Amici* also have an unmatched interest in preserving the chamber's constitutional authority to govern its own proceedings, which the Executive also attempted to override. *Amici* therefore have a strong interest in assisting in the Court's full consideration of all issues presented in the case.[1]

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief and consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioner National Labor Relations Board (and Respondent Noel Canning) that this case presents an issue of great importance that warrants this Court's attention. Indeed, the stakes for the separation of powers are much greater than the Executive lets on. The petition's portrayal of the dispute as concerning only the scope of the President's power to fill vacancies when the Senate is absent omits a crucial component of the case: When the President made the purported recess appointments to the Board on January 4, 2012, the Senate was *not* in "the Recess," even by the Executive's own longstanding definition. Quite the contrary, between December 17, 2011, and January 23, 2012, the chamber held regularly scheduled sessions every three days, at which it could (and did) conduct any legislative business it chose, by unanimous consent, up to and including passing legislation. Until now, the Executive itself—including this Administration, in this Court—has agreed that by doing so, the Senate remains in "Session," foreclosing recess appointments.

The petition elides this critical fact, thus distorting the issue the case actually presents and concealing its true implications for the constitutional structure. By purporting to appoint principal officers unilaterally while the Senate was sitting, the President usurped two powers that the Constitution confers explicitly, and exclusively, on the Senate. Article II gives the chamber an absolute veto over appointments, U.S. Const. art. II, § 2, cl. 2, except for inferior officers Congress itself exempts and temporary appointments to fill vacancies that "happen dur-

ing the Recess of the Senate," *id.* art. II, § 2, cl. 3. And Article I vests the Senate alone with authority to prescribe its own rules and procedures. *See id.* art. I, § 5, cl. 2. That includes, *inter alia*, setting its own schedule (with few exceptions)—when and how to hold sessions, and when and for how long to adjourn—and prescribing how the attendance of a quorum will be ascertained (and if needed, compelled, *id.* art. I, § 5, cl. 1). And as this Court has long held, each House's official account of its actions is generally controlling.

By making principal-officer appointments without the Senate's approval—when the chamber decided *not* to "Recess," but instead held regular meetings, as its records attest—the President claimed both of these bedrock Senate powers for himself. Indeed, the Executive has maintained that the President may deem the Senate in a de facto "Recess" whenever in *his* view it is "unavailable" (C.A. Respondent's Br. 61) to confirm his nominees. And the President himself made clear how elastically he interprets 'availability': He admittedly resorted to recess appointments in January 2012 not because the Senate was *unable* to give an answer on nominations, but because he did not like the answer he received.

The petition thus is correct that review of this *case* warrants review by this Court. Whether the President may evade the advice-and-consent protocol at his pleasure and override the chamber's procedural determinations undoubtedly presents an "an important question of federal law" that "should be" definitively "settled by this Court." Sup. Ct. R. 10(c). To be sure, the court of appeals, faithfully adhering to the constitutional text, structure, and history, correctly repudiated the President's power-grab, reject-

ing the Executive's starting premise that intrasession recess appointments to preexisting vacancies are *ever* valid, let alone when no "Recess" by any plausible definition occurred. Only weeks ago, the Third Circuit likewise rejected the Executive's theory. But the Executive's ongoing defiance of the decision below and its inevitable expansion on this latest encroachment make a ruling from *this* Court necessary.

The Board, however, fails to mention this central aspect of the dispute; one cannot tell from the petition that the Senate's powers are implicated at all. The Board instead tenders two abstract questions decoupled from the actual appointments invalidated below and their context. Those two questions indeed warrant this Court's attention, but only as *part* of the Court's plenary review of the appointments' legality—not in artificial isolation from the rest of the case. The Board's attempt to divide and circumscribe the issues is illogical, and ultimately futile. As the Third Circuit's ruling illustrates, one cannot interpret "the Recess of the Senate" without confronting whether it includes *any* break in Senate business when the President expects his nominees will not be confirmed with alacrity, as the Executive evidently believes, or instead has some fixed meaning, which prevents the recess-appointments exception from swallowing the rule. In any event, Noel Canning and *amici* would be entitled to urge affirmance of the judgment below on any basis supported by the record; the Board's incomplete framing of the issue thus serves only to confuse and mislead.

Moreover, confining the Court's focus, as the Board proposes, to the issues the petition identifies would be counterproductive. Even a ruling for the

Board on both questions it tenders could not save the appointments; they still would be unlawful, and at minimum the "constitutional cloud" (Pet. 31) would hover over this and other agencies for months or years more. A decision that the President *cannot* unilaterally declare the Senate in "Recess" against its will, in contrast, could render resolution of those broader questions unnecessary here.

Amici therefore agree that the Court should decide the validity of the January 2012 appointments. But it should consider that question in its entirety, with all antecedent and subsidiary issues on the table, unconstrained by the Board's selective presentation of the dispute.

ARGUMENT

I. THE VALIDITY OF THE PURPORTED RECESS APPOINTMENTS TO THE BOARD PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. There is no dispute that the purported January 2012 recess appointments to the Board present a momentous constitutional question. The President's claimed authority to name principal federal officers without the Senate's consent while the chamber has declared itself in session has no basis in the Constitution, and if credited would severely and irreparably undermine the separation of powers.

1. The Framers, understandably wary of potential "'manipulation of official appointments'" by the Executive, *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), deliberately withheld from the President the ability to appoint officers unilaterally—save for certain inferior officers, and then only with Congress's blessing. *See* The Federalist No. 76, at 455-56 (A. Hamilton) (Clinton Rossiter ed., 2003).

Requiring the Senate's approval of appointments, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (citations omitted; second alteration in original). The Framers accordingly gave the Senate not merely a voice regarding appointments, but an absolute veto, making its "Advice and Consent" a condition precedent to a commission. U.S. Const. art. II, § 2, cl. 2.

The President bypassed that advice-and-consent protocol in making the purported January 2012 appointments to the Board, wielding the very unilateral appointment power that the Framers withheld. He invoked as authority the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, but its text and purpose contradict his claim. The President's power under that Clause is entirely conditional; it arises *only if* the Senate itself chooses to end its "Session" and begin its "Recess," thus rendering itself unavailable to act on appointments. *Ibid.* The appointments here, however, were not made—and the vacancies they filled did not "happen"—during "the Recess of the Senate," but instead during a period while the Senate repeatedly held public sessions. Since it first asserted power to make intrasession recess appointments, the Executive has maintained that *at minimum* the chamber is not in "the Recess" when it has adjourned within a "Session" for three days or fewer—reflecting the Constitution's provision that such short breaks do not require even the House's consent, *id.* art. I, § 5, cl. 4. *See Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25

(1921).[2] This Administration reiterated that view three years ago in this Court, Respondent's Letter Br. 3, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457) (Senate "may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period"), and concedes as much even now, Pet. 21.

When the President purportedly made the January 2012 appointments to preexisting Board vacancies, the Senate had done just that: From December 17, 2011, until January 23, 2012, it held scheduled sessions every three business days—including on January 3 and 6, one day before and two days after the January 4 appointments, respectively.[3] Even by the Executive's long-held definition of "the Recess of the Senate," therefore, the Senate was not in "Recess" when the putative appointments (or the vacancies they supposedly filled) occurred. The appointments thus cannot be justified by the Senate's supposed inability to act. Indeed, the President himself justified another recess appointment allegedly made on January 4 not on the ground that the Senate was

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[2] *See also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, slip op. at 9 n.13 (Jan. 6, 2012), http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf ("2012 OLC Opinion") (all Internet materials last visited May 24, 2013) (noting Executive's prior recognition of three-day limitation); *cf.* Reply Brief for Intervenor United States 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424), 2004 WL 3589822, at *21 ("[I]t would make eminent sense, in constructing any *de minimis* exception from otherwise applicable constitutional rules for 'recess,' to apply the three-day rule explicitly set forth in the Adjournment Clause.").

[3] 157 Cong. Rec. S8783, 8783-84 (Dec. 17, 2011); 158 Cong. Rec. S1 (Jan. 3, 2012); 158 Cong. Rec. S3 (Jan. 6, 2012).

unavailable, but to circumvent Senate opposition: In his own words, he "refuse[d] to take no for an answer."[4]

2. The Executive sidestepped the Senate's explicit determination *not* to "Recess" from December 17, 2011, to January 23, 2012, by declaring that the sessions it held did not count, and the chamber was therefore in the midst of a "20-day recess."[5] Pet. 6; *see* 2012 OLC Opinion at 9-23; C.A. Respondent's Br. 11-12, 23, 31, 34-48. But the Constitution gives the *Senate*, not the President, the final say on when it is and is not in session. By disregarding the Senate's determination, the Executive seized for itself the chamber's authority to prescribe and administer its own procedures.

a. Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court has long held, the choice of each chamber's rules and procedures is for the members of that House alone. Unless a procedure flouts the Constitution or "fundamental rights," or is incompatible with reason, the Senate's discretion is "absolute." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). And the Senate's interpretations of rules and procedures it has adopted deserve "great weight." *United States* v. *Smith*, 286 U.S. 6, 33 (1932).

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[4] 2012 Daily Comp. Pres. Docs. No. 00003, at 3 (Jan. 4, 2012).

[5] The Executive contends that there were "two adjacent intrasession recesses," one before January 3 and one after, on the puzzling theory that the Senate's Second Session of the 112th Congress automatically began on January 3 by operation of law under the Twentieth Amendment *whether or not* the chamber met that day. C.A. Respondent's Br. 31 n.11.

As the earliest commentators understood, that authority includes—subject to few limitations—how and when to hold sessions and when to adjourn. *See*, *e.g.*, Thomas Jefferson, *Opinion on the Constitutionality of the Residence Bill* (July 15, 1790), *reprinted in* 17 *The Papers of Thomas Jefferson* 194, 195 (1965). Indeed, even the "humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (1833). The only external constraints on the Senate's schedule are modest and specifically enumerated: It must meet once a year on January 3 (or another date Congress chooses), U.S. Const. amend. XX, § 2, and when called into special session by the President, *id.* art. II, § 3. And once convened, the Senate cannot adjourn for more than three days (or to another place) without the House's consent. *Id.* art. I, § 5, cl. 4. Only if the House and Senate disagree does the President play any role in adjournments. *See id.* art. II, § 3; *id.* art. I, § 7, cl. 3 (excluding adjournment resolutions from presentment requirement).

As this Court has long recognized, moreover, the Senate not only may prescribe when it will meet, but *also* has the final word regarding whether it has done so. Congress's official record of its activities is generally not open to debate. Either chamber's representation that it passed a bill, for example—through the attestation of its presiding officer who signed it—is controlling. *See Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 670-80 (1892). The other branches have even *less* basis to question whether a scheduled Senate meeting actually occurred, or whether a quorum attended. Article I empowers each chamber to establish procedures for determin-

ing whether a quorum is present and, if necessary, to compel absent members' attendance. *See Ballin*, 144 U.S. at 5-6; U.S. Const. art. I, § 5, cl. 1. Unless those procedures exceed other constitutional limits or are utterly irrational, they, like "all matters of method[,] are open to the determination of the house," whose authority is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. The Executive's conjecture that "some other way would be better, more accurate or even more just" is entirely irrelevant. *Ibid.*

That deeply rooted principle refutes the Executive's claim that the President could deem the Senate adjourned when he made the January 4, 2012, appointments. The Senate itself determined that it would meet on the record on January 3, 6, and other days, 157 Cong. Rec. at S8783-84, and its records confirm that it did so, *see*, *e.g.*, 158 Cong. Rec. at S1, S3; S. Journal, 112th Cong., 2d Sess. 1-2 (2012). Whether a quorum was present was, under *Ballin*, 144 U.S. at 5, for the Senate alone to determine, and no determination was made that one was lacking. The President thus was powerless to proclaim the Senate's sessions nullities. By doing so, he claimed for himself the authority to dictate Senate procedure and to supplant the Senate's account of its actions with his own.

b. Even if the Senate's own determination that it was in session were not controlling, the Executive had no basis to question it here. The only ground it has ever asserted to impugn the validity of the December 2011–January 2012 sessions is that the order scheduling them labeled them "pro forma . . . with no business conducted." 157 Cong. Rec. at S8783; *see* C.A. Respondent's Br. 35-47; 2012 OLC Opinion at 9-

23. But that description bears only on the Senate's *intentions* whether to do business, not its *ability* to do so. Notwithstanding that proviso, adopted by unanimous consent, under Senate Rules the chamber nevertheless could choose, by the same unanimous-consent procedure, to conduct business, even "without notice." Senate Rule V(1), *Senate Manual*, S. Doc. No. 112-1, at 5 (2011). That is hardly extraordinary; unanimous consent is the method by which *most* Senate business is done, including passing laws and confirming nominees. Any doubt that the Senate could act during its pro forma sessions, moreover, was eliminated by the fact that in the five months before the January 4 appointments, the chamber twice *passed legislation* by unanimous consent (that the President signed into law) during identical pro forma meetings—once in the same series of sessions as the January 3 and 6 meetings, at the President's own urging.[6] *See NLRB* v. *New Vista Nursing & Rehab.*, __ F.3d __, 2013 WL 2099742, at *19 (3d Cir. May 16, 2013).[7]

The Executive itself, in fact, has long accepted pro forma sessions as equivalent to any other. Such sessions historically have been used by both Houses

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[6] *See* 157 Cong. Rec. S5297 (Aug. 5, 2011) (passing Public Law No. 112-27, 125 Stat. 270 (2011)); 157 Cong. Rec. S8789 (Dec. 23, 2011) (passing Public Law No. 112-78, 125 Stat. 1280 (2011)); *see also* 2011 Daily Comp. Pres. Docs. No. 00962, at 1-2 (Dec. 22, 2011) (urging Senate, which had already commenced pro forma sessions, to pass Public Law No. 112-78).

[7] As *New Vista* explained, the Executive's argument for disregarding pro forma sessions also proves too much: It would allow recess appointments even during "day-to-day adjournments," "eviscerat[ing] the divided-powers framework the two Appointments Clauses establish." 2013 WL 2099742, at *19-20.

to satisfy other constitutional provisions—including the Adjournments Clause, U.S. Const. art. I, § 5, cl. 4, which forbids either house from "adjourn[ing] for more than three days" without the other chamber's consent, and the Twentieth Amendment, which requires each House to meet at least once a year on January 3, *id.* amend. XX, § 2.[8] The Executive has never questioned those practices. And it has accepted pro forma sessions as valid when it suits its interests—for example, in applying federal statutes that measure Congress's time to override executive action by Senate session days.[9] Indeed, until now, it has recognized pro forma sessions as valid for purposes of the Recess Appointments Clause *itself*. In 2010, it represented to this Court that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Respondent's Letter Br. 3, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457)—*including* periods in which it held only pro forma sessions for weeks on end, *see* Joint Comm. on Printing, 112th Cong., *2011-2012 Congressional Directory* 537 (2011).

3. The January 2012 appointments thus doubly intrude on Senate prerogatives and arrogate to the Executive powers the Framers reserved to the chamber. Such unprecedented self-aggrandizement, if allowed to stand, would radically reshape the constitutional structure and irrevocably upset the careful balance the Framers struck.

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[8] *See* 2012 OLC Opinion at 18-19 & n.25; Christopher M. Davis, Cong. Research Service, *Memorandum: Certain Questions Related to Pro Forma Sessions of the Senate* (2012), *reprinted in* 158 Cong. Rec. S5954, S5955 (Aug. 2, 2012).

[9] *See* Davis, *Memorandum*, *supra*, at S5955-56.

The practical consequences of that claim, if credited, are equally unsettling. If the President can declare the Senate "unavailable" simply because he does not believe it will swiftly rubber-stamp his nominations—here he waited less than *three weeks* for Senate approval of two nominees before resorting to recess appointments, *see* 157 Cong. Rec. S8691 (Dec. 15, 2011)—then "Advice and Consent" will become a dead letter; he could fill federal offices for up to two years whenever he concludes the Senate is unreceptive, or just too busy. And if he can override Senate procedures and second-guess its account of its actions, there is no telling what mischief he can achieve: He might purport to issue pocket vetoes while the chamber is sitting, for example, or refuse to enforce bills he disapproved because he declines to credit Congress's representation that it enacted the bill over his veto. The stakes of the dispute thus amply justify this Court's review of the legality of the January 2012 appointments.

B. The court of appeals here, of course, did *not* credit the President's claim of power, but instead repudiated the unlawful January 2012 appointments. Pet. App. 17a-52a. In a meticulous, scholarly opinion, the court below scrutinized the relevant constitutional text, the historical record, and the structural implications of the Executive's assertion of authority, concluding that the January 2012 appointments were invalid and that the Board's action giving rise to this case was "void." *Id.* at 52a. And two weeks ago, the Third Circuit reached the same conclusion regarding an earlier recess appointment to the Board, holding that intrasession appointments are unconstitutional and explicitly rejecting the Executive's contention that the President may unilaterally disregard pro forma sessions. *See New Vista*, 2013

WL 2099742, at *11-30. Both courts' holdings are faithful to the Constitution and should not be disturbed. Yet despite the absence of any error to correct, this Court's review is nevertheless appropriate given the Executive's ongoing defiance of the decision below and its inevitable attempts to evade that ruling in the future.

1. The Executive has made clear that it considers the court of appeals' opinion merely advisory—even with respect to the Board itself. Notwithstanding the D.C. Circuit's categorical holding that the purported January 2012 appointments are invalid and that the Board thus lacks the quorum needed to act, *see* Pet. App. 2a, 35a, 52a; *cf. New Process Steel*, 130 S. Ct. at 2644-45, the Board has publicly declared, with the Executive's explicit blessing, that the decision below "applies to only one specific case" and has no bearing on the Board's ability to act in others.[10] The Board also has suggested that it can continue acting in other cases despite the decision below because, even though private parties can seek review of Board actions in the D.C. Circuit, the Board itself can seek enforcement of its orders *else-*

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[10] NLRB, Statement by Chairman Pearce on Recess Appointment Ruling (Jan. 25, 2013), http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling ("Pearce Statement"); White House, Press Briefing by Press Secretary Jay Carney (Jan. 25, 2013), http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013 (D.C. Circuit's decision "does not have any impact . . . on [the Board's] operations or functions, or on the board itself").

where.[11] So long as a single Circuit will entertain its arguments, in other words, the Board evidently is content to bury its head in the sand and pretend that the decision below does not exist. That approach has nothing to support it. The Board cannot fairly benefit from the principle exempting federal agencies from nonmutual estoppel, which exists to foster "development of important questions of law" and ensure that "several courts of appeals" can "explore a difficult question before this Court grants certiorari," *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984), since a central premise of the petition is that a circuit conflict *already* has developed, *see* Pet. 11-12, 23-24, 31.

Nevertheless, on these dubious grounds, the Board has pledged to "continue to . . . issue decisions" and take other actions that by law require a quorum, despite a federal court's determination that it lacks authority to do so.[12] True to its word, in just the two months *since* the court of appeals' mandate issued, *see* C.A. Docket, No. 12-1115 (D.C. Cir. Mar. 20, 2013), the Board has pressed on and issued more than *forty* published decisions (more than *one hundred* altogether).[13] Until this Court rules definitively on the January 2012 appointments, the Board's ultra vires operations undoubtedly will continue.

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[11] *See* Respondent's Opp. 7, 19-21, 27, *In re SFTC, LLC*, No. 13-1048 (D.C. Cir. Apr. 10, 2013); *cf. Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

[12] Pearce Statement, *supra*.

[13] *See* NLRB, Board Decisions, http://www.nlrb.gov/cases-decisions/board-decisions; NLRB, Unpublished Board Decisions, http://www.nlrb.gov/cases-decisions/unpublished-board-decisions.

2. Given the Executive's willingness to disregard the decision below even with respect to the agency that was a party to the case, there is little doubt that until its abuses are put to an end once for all by this Court, they will continue and spread to other areas. Any claim by the Executive that the circumstances of the January 2012 appointments are somehow *sui generis*, and that recess appointments will not become commonplace whenever nominees face the slightest opposition, deserves zero credence given the Executive's track record of abandoning limitations on recess appointments that past Administrations have accepted as valid.

Indeed, the only constant in more than two centuries of Executive practice under the Recess Appointments Clause is that *no* limitation on the President's power—however solemnly embraced by his predecessors—will be honored if the Executive later finds it too bothersome to obey.

- The first Attorney General (and Committee of Detail alumnus), Edmund Randolph, forswore recess appointments to fill vacancies that arose before the recess in which the appointments are made, which he concluded were incompatible not only with the text, but also the "Spirit of the Constitution." Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *reprinted in* 24 *The Papers of Thomas Jefferson* 165, 166 (1990). But that barrier was later discarded by Randolph's successors when it proved an impediment to Executive policy. *See Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632-34 (1823).
- For nearly a century *after* abandoning Randolph's well-reasoned view, the Executive (ar-

guably aside from the troubled Andrew Johnson Administration) continued to disavow authority to make intrasession recess appointments. *See President—Appointment of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 603 (1901). But that limitation likewise became optional when it stood in the way. *See* 33 Op. Att'y Gen. at 21-25.

- For another nine decades—continuing not only into this century, but into this Administration—the Executive disclaimed power to make intrasession recess appointments in between Senate meetings scheduled three or fewer days apart, including "pro forma" sessions of the type held in January 2012. *See supra* at 6-7, 11-12. Yet less than two years later, those assurances were abandoned when honoring them proved inconvenient. *See* 2012 OLC Opinion at 9-23; C.A. Respondent's Br. 35-48.

The lesson of history, in short, is that there is *no* line the Executive will not cross. Each generation of Presidents will push the envelope as far as necessary to suit the political expediency of the moment.

The Executive's more specific assurance that it will not rely on recess appointments to evade advice and consent (Pet. 22) and can be trusted to use them responsibly is even less credible. The Board's own account of the massive number of recess appointments made in recent decades during intrasession breaks and to already-extant openings (*see id.* at 11-12, 17-18, 30) is a testament to the crutch that they have become. The Board's claim that "Presidents routinely seek Senate confirmation when filling vacant offices" (*id.* at 22) offers chilling comfort. To be sure, in the past two Administrations, nearly all re-

cess appointees themselves previously were nominated to their posts (usually several months earlier).[14] But that if anything confirms that recess appointments *have* become a means to sidestep Senate confirmation. In any case, the President himself has made clear that he will resort to recess appointments, and indeed *has done so*, precisely to circumvent perceived Senate opposition.[15]

Worst of all, in the absence of a definitive judicial repudiation of its ever-expanding position, the Executive inevitably will seize on the Senate's failure to prevent (by unknown means) further encroachment as *acquiescence* in the President's view of his power. Administrations past to present have twisted even statutes enacted to curtail unlawful appointments and Senate committee reports sharply reproaching the Executive for its recess-appointment abuses into evidence of tacit assent. *See* Pet. 16-17; 2012 OLC Opinion at 7; *Recess Appointments*, 41 Op. Att'y Gen. 463, 466 (1960); 33 Op. Att'y Gen. at 24. Nothing short of a final ruling from this Court will bring the Executive's self-aggrandizement to an end.

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[14] *See* Henry B. Hogue & Maureen Bearden, Cong. Research Service, R42329, *Recess Appointments Made by President Barack Obama* 7 (2012); Henry B. Hogue & Maureen Bearden, Cong. Research Service, RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 3-5 (2008).

[15] 2012 Daily Comp. Pres. Docs. No. 00003, at 3.

II. THIS COURT'S REVIEW OF THE PURPORTED RECESS APPOINTMENTS SHOULD INCLUDE ALL ASPECTS OF THE APPOINTMENTS' VALIDITY.

Although the Board is correct that review of this *case* is appropriate, its characterization of the issue warranting this Court's review is misleadingly incomplete. The question that is squarely implicated by the facts of the case, that was briefed and decided below (*e.g.* Pet. App. 17a), and that merits this Court's attention now is whether the purported January 2012 appointments were lawful exercises of the President's power under the Recess Appointments Clause. Unless the appointments were valid, the Board undisputedly lacked statutory authority, under 29 U.S.C. § 153(b) and *New Process Steel,* 130 S. Ct. at 2644-45, to issue its decision in the underlying labor dispute that is the subject of this litigation. Regardless of one's view of the legality of the January 2012 appointments, the question of their validity undeniably is important and merits review.

A. The Board, however, does *not* ask this Court to decide that fundamental question. Instead, it vainly attempts to confine the Court's focus to two subsidiary, theoretical issues that, even taken together, capture only a part of the constitutional controversy: whether intrasession recess appointments, and recess appointments to preexisting vacancies, can *ever* be valid. Pet. i. And it urges the Court to pass on those abstract propositions *without* deciding whether the appointments at issue were actually lawful—indeed, without any reference to these specific appointments or their context. That approach directly contradicts the Board's position below, where it explicitly framed the only recess-appointments issue in terms of these *particular* appointments. *See*

C.A. Respondent's Br. 2 (stating recess-appointments issue as "[w]hether the President's recess appointments of three Board Members during a 20-day period in which the Senate had declared by order that no business would be conducted occurred within a 'Recess of the Senate' under the Constitution's Recess Appointments Clause").

More importantly, the petition's myopic approach makes no sense. The two issues that the Board frames for review are not in fact discrete constitutional *questions* separate from the validity *vel non* of the January 2012 appointments, but merely reflect two *reasons* why those appointments were unlawful. The ultimate question remains those appointments' legality. By attempting to constrict the Court's inquiry to the two particular grounds of invalidity addressed in the petition, however, the Board elides a critical aspect of that question: whether the President could override the Senate's decisions regarding its own internal procedure, by disregarding both the chamber's determination to meet on a certain day and its official records confirming that it did so. If the President lacked that power (and he did), then the appointments were unconstitutional, and the Board's action was ultra vires, *even if* intrasession appointments to preexisting vacancies could be lawful in other circumstances. The existence of that purported but unprecedented Executive power is thus central to the case. Yet the Board would have the Court bypass that issue altogether.

The Board offers no basis for that blinkered approach, and there is none. Indeed, its suggestion that the Court preemptively split the issue into subsidiary components and consider only *some* of them is illogical, and ultimately futile. Even considering

the Recess Appointments Clause's meaning in the abstract, the question of the President's claimed power to interfere in Senate procedure is unavoidable. The Board's own questions require construing the phrase "the Recess of the Senate." And unless that language refers, as the court below and the Third Circuit correctly held, *only* to intersession adjournments, the Court must discern what *other* breaks the Clause covers. It must confront whether the Clause encompasses interruptions of any length in Senate business, even overnight (or over lunch), or only breaks of some minimum duration, as until now the Executive itself recognized. *See supra* at 6-7. Even more importantly, as the Third Circuit's analysis illustrates, *New Vista*, 2013 WL 2099742, at *17-20, the Court would have to resolve whether, in measuring the length of such adjournments, the Executive can look behind the Senate's attestation that it is in session on certain days because in *his* view it is "unavailable" to act. If the Court's ruling interpreting the Clause is to provide any meaningful guidance to lower courts confronting recess-appointments disputes, addressing these key questions is inescapable. In any case, the Board's attempt to avoid these issues by skewing the questions presented cannot preclude this Court from affirming the judgment below on any basis supported by the record, nor can it prevent Noel Canning, which prevailed below, or its *amici* from urging the Court to do so. *See United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Framing the issue to exclude crucial aspects of the case, in short, achieves nothing but confusion.

B. Even taken at face value, the Board's request that the Court artificially restrict its analysis at the outset to the two issues cherry-picked by the petition

would frustrate rather than facilitate the Court's review. To be sure, the Court could affirm the D.C. Circuit's decision on either of the grounds it articulated, each of which amply suffices to support the judgment. But the Court might instead conclude that the validity of the January 2012 appointments should be resolved on narrower grounds specific to these circumstances—not least of which is that the President was powerless to proclaim the Senate adjourned when it said otherwise. The Board's proposal thus would not sharpen the Court's focus on the key issues, but would achieve the opposite by prematurely taking salient issues off the table before they have even been briefed.

Moreover, limiting the Court's review as the Board urges would undercut the Board's own objective of "remov[ing]" the "constitutional cloud" that hangs over it and other agencies. Pet. 31. While a ruling against the Board on *either* ground articulated by the decision below *or* on the basis that the President cannot disregard Senate sessions would independently invalidate the appointments and compel affirmance, even a ruling for the Board on *both* issues tendered in the petition would not save them. The question whether the President may unilaterally declare the Senate "unavailable" and thus in Recess would remain. Resolving that question, on which the Board has lost in one court of appeals already, inevitably would require further proceedings in the D.C. Circuit and potentially in this Court. The ensuing appellate ping-pong game would prolong the costly uncertainty that already burdens the many individuals, businesses, and others whose cases are or will be pending before the Board (or a reviewing court) or who face the threat of imminent Board action. The shadow cast over the Board—and any other agency

whose head was appointed by the same illegitimate means—would linger for months or years after this Court's decision.[16] That is a great loss, not a gain, for fairness and efficiency. The Court can and should avert that outcome by resolving the validity of the January 2012 appointments now, including *all* of the aspects of that question that are properly presented.

CONCLUSION

The petition for a writ of certiorari should be granted to consider whether the purported January 4, 2012, recess appointments were lawful.

Respectfully submitted.

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[16] For example, the putative Director of the Consumer Financial Protection Bureau also received a recess appointment on January 4, 2012. White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. That agency likewise would remain in limbo.

APPENDIX

APPENDIX A

The Constitution of the United States, Article I, Section 5, Clause 1 provides:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller 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.

The Constitution of the United States, Article I, Section 5, Clause 2 provides:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

The Constitution of the United States, Article I, Section 5, Clause 4 provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The Constitution of the United States, Article I, Section 7, Clause 3 provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The Constitution of the United States, Article II, Section 2, Clause 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution of the United States, Article II, Section 2, Clause 3 provides:

The 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.

The Constitution of the United States, Article II, Section 3 provides:

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Twentieth Amendment to the Constitution of the United States, Section 2 provides:

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

APPENDIX B

The following members of the United States Senate respectfully join the foregoing brief as *amici curiae*:

Senate Republican Leader Mitch McConnell

Senator Lamar Alexander

Senator Kelly Ayotte

Senator John Barrasso

Senator Roy Blunt

Senator John Boozman

Senator Richard Burr

Senator Saxby Chambliss

Senator Daniel Coats

Senator Tom Coburn

Senator Thad Cochran

Senator Susan M. Collins

Senator Bob Corker

Senator John Cornyn

Senator Mike Crapo

Senator Ted Cruz

Senator Michael B. Enzi

Senator Deb Fischer

Senator Jeff Flake

Senator Lindsey Graham

Senator Chuck Grassley
Senator Orrin G. Hatch
Senator Dean Heller
Senator John Hoeven
Senator James M. Inhofe
Senator Johnny Isakson
Senator Mike Johanns
Senator Ron Johnson
Senator Mark Kirk
Senator Mike Lee
Senator John McCain
Senator Jerry Moran
Senator Lisa Murkowski
Senator Rand Paul
Senator Rob Portman
Senator James E. Risch
Senator Pat Roberts
Senator Marco Rubio
Senator Tim Scott
Senator Jeff Sessions
Senator Richard C. Shelby
Senator John Thune
Senator Patrick J. Toomey
Senator David Vitter
Senator Roger F. Wicker