

**Nos. 12-1161, 12-1214**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CENTER FOR SOCIAL CHANGE, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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Petitioner/Cross-Respondent	)	Nos. 12-1161, 12-1214
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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-72211
	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties, Intervenors, and Amici:*** Center for Social Change, Inc. (“CSC”) is the petitioner/cross-respondent before this Court. The Board is the respondent/cross-petitioner before this Court. CSC and the Service Employees International Union, Local 500 (“the Union”) appeared before the Board in Case 05-RC-065270. CSC and the Board’s General Counsel appeared before the Board in Case 05-CA-072211. The National Right to Work Legal Defense Foundation, Inc., filed an amicus brief in support of CSC.

B. ***Ruling Under Review:*** The case involves CSC’s petition to review and the Board’s cross-application for enforcement of a Decision and Order the Board issued on March 29, 2012, reported at 358 NLRB No. 24, as well as the Board’s

underlying unpublished Order in Case 05-RC-065270, issued on November 18, 2011.

C. ***Related Cases:*** The ruling under review has not previously been before this Court or any other court. In the following cases filed in this Circuit, however, parties have raised the recess appointments issue in their preliminary issue statements, and the Court has set a briefing schedule:

*Noel Canning v. NLRB*, D.C. Circuit No. 12-1115,

*Sands Bethworks Gaming, LLC v. NLRB*, D.C. Circuit No. 12-1240, and

*Milum Textile Services Co. v. NLRB*, D.C. Circuit Nos. 12-1235, 12-1275.

Further, in the following cases, parties have raised the recess appointments issue in their preliminary issue statements, but the Court has not yet set a briefing schedule:

*Independence Residences, Inc. v. NLRB*, D.C. Circuit No. 12-1239,

*Meredith Corp. v. NLRB*, D.C. Circuit No. 12-1287,

*Aerotek, Inc. v. NLRB*, D.C. Circuit No. 12-1271, and

*Kimberly Stewart v. NLRB*, D.C. Circuit No. 12-1338.

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Dated at Washington, DC  
this 12th day of September, 2012

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Center for Social Change, Inc. (“CSC”) to review, and on the cross-application to enforce, an Order of the National Labor Relations Board (“the Board”). The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”).

The Board's Decision and Order issued on March 29, 2012, and is reported at 358 NLRB No. 24. (A. 145-48.)<sup>1</sup>

The Court has jurisdiction to review that final order under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). On April 3, 2012, CSC filed its petition for review and, on April 24, the Board filed its cross-application for enforcement. Both were timely as Section 10(e) and (f) imposes no time limit on such filings. The National Right to Work Legal Defense Foundation, Inc. ("NRW") is participating as amicus curiae in support of CSC.

Because the Board's Order in the unfair labor practice proceeding is based, in part, on findings made in the representation proceeding (Case 05-RC-065270), the record in the latter proceeding is part of the record before this Court in accord with Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). However, Section 9(d) authorizes review of the Board's actions in the representation proceeding only for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair labor practice order. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

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<sup>1</sup> "A." references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## **STATEMENT OF THE ISSUES**

1. Whether 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.
2. Whether the Board's Acting General Counsel lawfully held office at the time he directed issuance of the complaint in this case.
3. Whether the Board reasonably found that CSC violated Section 8(a)(5) and (1) of Act by refusing to bargain with the Union. This issue involves the subsidiary question of whether the Board acted within its discretion in ordering a mail-ballot election.

## **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are found in the Addendum to this brief.

## **STATEMENT OF THE CASE**

The Board found (A. 145-48) that CSC violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Service Employees International Union, Local 500 ("the Union") as the certified bargaining representative of CSC's employees. CSC does not dispute its refusal to bargain; rather, it contests the Board's determination in the underlying

representation case that the election giving rise to the Union's certification would be conducted by mail ballot. CSC also contends that the Acting General Counsel lacked the authority to issue the complaint in this case and that the Board lacked a quorum to issue its Decision and Order. If the Court rejects CSC's challenges to the validity of the Board's Order and upholds the Board's exercise of discretion in ordering a mail-ballot election, the Order is entitled to full enforcement. The Board's findings in the representation and unfair labor practice proceedings, as well as its Conclusions and Order, are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Representation Proceeding**

CSC, a not-for-profit corporation headquartered in Elkridge, Maryland, provides in-patient residential services for adults and children, adult day care services, and employment programs for individuals with developmental disabilities. CSC operates 33 group homes across Baltimore and Howard Counties, Maryland. (A. 95, 102; 77.)

On September 23, 2011, the Union filed with the Board a petition for a representation election among CSC's 229 regular, part-time, and on-call direct care associates, job coaches, and maintenance employees. (A. 68, 46.) Employees work at least 24 different shifts to cover CSC's around-the-clock operations and

work part-time, full-time, and weekend schedules. Some work second and third jobs, attend school, or commute on public transportation. (A. 102; 30-32, 43, 81.)

The Board's Regional Director ordered a pre-election hearing to resolve all representation issues. At the October 7 hearing, the parties stipulated to all issues, except whether the Board should conduct a manual or mail-ballot election. (A. 8-9.) CSC proposed that a manual election be held at its headquarters at 6600 Amberton Drive in Elkridge and its training facility at 9300 Liberty Road in Randallstown, Maryland. (A. 102.) It proposed that the Board conduct polling at both locations simultaneously, on Sunday, October 30, from 9:00 p.m. until midnight and on Monday, October 31, from 3:00 p.m. until midnight. (A. 102; 46-47, 58, 81.) The Union proposed a mail ballot, arguing that "employees may have difficulty getting to a polling site due to the large number of worksites, variety of shifts, and range of personal difficulties such as a lack of personal transportation, additional jobs, school, and family responsibilities." (A. 102.) The parties filed post-hearing briefs on the issue.

On October 13, the Board's Regional Director issued a Decision and Direction of Election, which resolved all representation issues except how the Board would conduct the election and noted that a separate election arrangements letter would address that issue. (A. 94, 96.) On October 18, the Regional Director issued an election arrangements letter directing that a mail-ballot election be

conducted by mailing ballots to eligible employees on Friday, November 4, at 4:45 p.m., and counting returned ballots on November 21 at 3:00 p.m. (A. 101-04.)

On October 27, CSC requested review of the Regional Director's decision to conduct the election by mail ballot. (A. 105-26.) On November 18, the Board, treating CSC's request for review as special permission to appeal, determined that CSC had failed to show that the Regional Director had abused his discretion in ordering a mail-ballot election and denied the appeal. (A. 126.) On November 21, the Regional Director tallied the ballots and found that of the 229 eligible voters, 135 cast ballots: 103 in favor of the Union and 6 against. There were also 26 challenged ballots and 2 void ballots, numbers insufficient to affect the election's result. CSC did not file with the Board any objection to conduct affecting the election. On December 1, the Board certified the Union as the employees' collective-bargaining representative. (A. 127-28.)

### **B. The Unfair Labor Practice Proceeding**

On December 16, the Union requested that CSC begin collective bargaining, but CSC refused. (A. 131, 141.) On January 9, 2012, the Union filed an unfair labor practice charge alleging that the CSC's refusal to bargain was unlawful. On January 18, after an investigation, the Acting General Counsel issued a complaint alleging that CSC's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A. 129, 130-33.) In its answer, CSC stated that its admitted refusal to bargain was

to challenge the Board's mail-ballot determination, as well as the Acting General Counsel's authority to issue the complaint. (A. 138, 141.)

On February 3, the Acting General Counsel filed with the Board a motion for summary judgment, and the Board subsequently issued a notice to show cause why the motion should not be granted. (A. 145.) CSC responded that summary judgment was inappropriate because the Regional Director had abused his discretion in ordering a mail-ballot election and the Acting General Counsel lacked authority to issue the complaint. For the first time, CSC also argued that a hearing was needed to determine whether the mail-ballot election disenfranchised eligible employees, and challenged the President's January 4, 2012 recess appointments of Members Richard Griffin, Terence Flynn, and Sharon Block. (A. 145-46.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Chairman Pearce and Members Hayes, Griffin, Flynn, and Block) issued its Decision and Order granting the Acting General Counsel's motion for summary judgment and finding that the Center's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. 145-48.) The Board declined to determine the merits of CSC's challenges to the President's recess appointments and the Acting General Counsel's authority based on the well-settled presumption of regularity that applies to the official acts of public officers in the absence of clear evidence to the

contrary.<sup>2</sup> (A. 145, citing cases.) The Board found that CSC's failure to file objections to the election precluded CSC from raising the claim that a hearing was needed to determine whether the mail-ballot election disenfranchised eligible voters. (A. 146.) Lastly, the Board found that the issue of whether the Regional Director abused his discretion in ordering a mail-ballot election had been fully litigated in the underlying representation proceeding, and that CSC did not produce any newly discovered evidence or show any special circumstances that would require the Board to reexamine that determination. (A. 146.)

The Board ordered CSC to cease and desist from failing and refusing to bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 147.) Affirmatively, the Order directs CSC to bargain with the Union upon request, embody any understanding reached in a signed agreement, post copies of a remedial notice, and distribute the notice electronically, if appropriate. (A. 147.)

### **SUMMARY OF ARGUMENT**

1. CSC challenges the Board's authority to issue its March 29, 2012 Order, contending that the President lacked authority to make recess appointments

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<sup>2</sup> Members Flynn and Hayes agreed that the Board should not reach the merits of the Center's arguments concerning the Acting General Counsel's authority and the recess appointments, but would not have relied on the presumption of regularity. (A. 145 n.2.)

of three of the five Board Members acting at the time of that order. CSC's claim is mistaken.

The President made these recess appointments on January 4, 2012, during a 20-day period in which the Senate had declared itself closed for business—a period that is unquestionably a “Recess of the Senate” within the meaning of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. The term “Recess of the Senate” has a well-understood meaning long employed by both the Legislative and Executive Branches: the term refers to a break from the Senate's usual business, whether that break occurs in the middle of an annual congressional Session, or after the end of such a Session. The available evidence demonstrates that the Senate as a body regarded its 20-day January break to be functionally indistinguishable from other breaks at which the Senate is indisputably away on recess.

CSC is incorrect that the Senate opined that it was not away on recess within the meaning of that Clause. Even if the Senate had so opined, however, CSC is incorrect that the Senate can transform a 20-day recess into a series of short non-recess periods—thereby unilaterally blocking the President from exercising his constitutional authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designates “*pro forma* sessions only, with no business conducted.” Moreover, CSC's position would

upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments—it eliminates Senators’ choice between staying in session to conduct business, including providing advice and consent on presidential nominations, or leaving the Capitol to return to their respective States with the assurance that no business will be conducted in their absence, allowing the President to make recess appointments of limited duration.

2. In June 2010, the President lawfully appointed Acting General Counsel Solomon under the Federal Vacancies Reform Act (“FVRA”), which authorizes the President to fill certain vacancies pending Senate confirmation. Fewer than 210 days later, the President submitted to the Senate Mr. Solomon’s nomination to serve as the Board’s General Counsel. Because the President submitted the nomination within the FVRA’s time limitation, and Mr. Solomon’s appointment otherwise satisfied the statutory requirements, Mr. Solomon lawfully held office when he directed issuance of the complaint in this case. CSC’s assertion that the President may only appoint individuals to serve as the Board’s Acting General Counsel under Section 3(d) of the Act is at odds with the clear language and intent of the FVRA.

3. CSC admits its refusal to bargain but contends that the election should be set aside because the Board abused its discretion in directing a mail-ballot election. The Board, however, acted well within its discretion in assessing the

circumstances of this case and applying settled principles to determine that the election be conducted by mail ballot. The Board reasonably determined a mail ballot would most effectively enhance the employees' opportunity to vote and efficiently use Board resources because the employees were "scattered" both geographically and across shifts by working 24 different schedules in 33 locations. CSC fails to show that the Board abused its discretion, misstates the standard for ordering a mail-ballot election, and relies on inapposite cases. Also baseless is CSC's claim that the Act does not authorize mail-ballot elections—a position the Board has roundly rejected for decades and that is contrary to this Court's precedent.

## **ARGUMENT**

### **I. MEMBERS GRIFFIN, BLOCK AND FLYNN HELD VALID RECESS APPOINTMENTS WHEN THE BOARD ISSUED ITS MARCH 29, 2012 ORDER**

CSC first challenges (Br. 15-23) the March 29, 2012 Order on the ground that three of the five Board Members in office at that time were not lawfully appointed to their posts under the Recess Appointments Clause. That argument is meritless.

On January 3, 2012, the first day of its current annual Session, the Senate adjourned itself and remained closed for business for nearly three weeks, until January 23. Under the terms of the Senate's own adjournment order, it could not

provide advice or consent on Presidential nominations during that 20-day period.<sup>3</sup> Messages from the President were neither laid before the Senate nor considered. The Senate considered no bills and passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in business with periodic *pro forma* sessions, it ordered that “no business” would be conducted at those times, which involved only a single Senator and lasted for literally seconds.

At the start of this lengthy Senate absence, the Board’s membership fell below the statutorily mandated quorum with the end of Craig Becker’s recess appointment term at noon on January 3, 2012, leaving the Board unable to carry out significant portions of its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President exercised his constitutional power to fill vacancies “during the Recess of the Senate,” U.S. Const. art. II, § 2, cl. 3, by appointing three members to the Board.

These recess appointments were valid because the Senate was plainly in “Recess” at the time under any reasonable understanding of the term. CSC’s argument to the contrary is rooted in a serious misunderstanding of the meaning and purpose of the Recess Appointments Clause, one that—if adopted by this

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<sup>3</sup> The President had nominated Terence Flynn to be a Board Member in January 2011. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). Sharon Block and Richard Griffin’s nominations were submitted in December 2011. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

Court—would substantially alter the longstanding balance of constitutional powers between the President and the Senate.

**A. Under the Well-Established Understanding of the Recess Appointments Clause, the Senate Was Away on Recess Between January 3 and January 23**

1. The Recess Appointments Clause confers on the President 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.” U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution’s careful balancing of powers required of a functioning democracy. The Framers gave the President and Senate shared roles in the ordinary appointment process, *id.* art. II, § 2, cl. 2, but they also acknowledged the practical reality that the Senate could not (and should not) be “oblig[ated] . . . to be continually in session for the appointment of officers.” *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).<sup>4</sup> The Framers balanced the President’s power of appointment, the Senate’s advice and consent role, and the infeasibility and undesirability of the Senate remaining perpetually in session, by allowing the President to make appointments of limited duration when the Senate is away on recess. The provision for recess

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<sup>4</sup> 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

appointments thereby frees Senators to return home to their constituents and families rather than maintain “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.<sup>5</sup> This balance reflected the Framers’ understanding that the President alone is “perpetually acting for the public,” even in Congress’s absence, because the Constitution obligates the President at all times to “take Care that the Laws be faithfully executed.”<sup>6</sup>

The importance of recess appointments is demonstrated by the frequency with which they have been employed. Since the Founding, Presidents have made hundreds of recess appointments in a wide variety of circumstances: during intersession and intrasession recesses, during long recesses and comparatively short ones, at the beginning and in the final days of recesses, and to fill vacancies that arose before or during the recesses. Even as Senate recesses have become comparatively short, Presidents have continued to invoke the Recess Appointments Clause with regularity, confirming the Clause as a critical part of the Constitution’s allocation of powers.

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<sup>5</sup> 3 Elliot’s Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining undesirability of requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers”).

<sup>6</sup> 4 Elliot’s Debates 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments . . . can be vested nowhere but in the executive”); U.S. Const. art II, § 3.

Consistent with the firm foundation of recess appointments in historical practice, courts regularly interpret the President's recess appointment power broadly. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (recess appointment power extends to an intrasession recess of eleven days, to vacancies that arose before the recess, and to Article III appointments); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (recess appointment power extends to vacancies that arose before the recess and to Article III appointments); *United States v. Allocco*, 305 F.2d 704, 705-06 (2d Cir. 1962) (same).

2. CSC's argument that the Senate was not away on recess on January 4 rests on a basic misconception of the meaning of "Recess." The Supreme Court has repeatedly stressed that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931). Accordingly, the meaning of a constitutional term necessarily "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the Founding, like today, the term “recess” was used in common parlance to mean a “[r]emission or suspension of business or procedure,” II N. Webster, *An American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706). The plain meaning of the term “Recess” as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as those periods when Senators would return to their respective States as the Framers anticipated.

The settled understandings of the Executive and Legislative Branches of the term “Recess” are consistent with that plain meaning. The Executive Branch has long and consistently maintained the view that the Clause is implicated when the Senate is not open to conduct business and thus unable to provide advice and consent on Presidential nominations. Attorney General Daugherty explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is actually present and open for business:

[T]he 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. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

The Legislative Branch has long maintained a similar view of the President's recess appointment power. In a seminal report issued over a century ago, the Senate Judiciary Committee expressed an understanding of the term "Recess" that, like the Executive Branch's understanding, looks to whether the Senate is closed for its usual business:

It was evidently intended by the framers of the Constitution that [the word "recess"] 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, . . . 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. . . . Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). Attorney General Daugherty relied on this 1905 Senate definition in 1921, 33 Op. Att'y Gen. at 24, and the Senate's parliamentary precedents continue to cite this report as an authoritative source "on what constitutes a 'Recess of the Senate.'" See Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992).

3. The Senate's 20-day break between January 3 and January 23, 2012, fits squarely within this well-established understanding of the term "Recess." By its

own order, the Senate provided that it would not conduct business during this entire period.<sup>7</sup> That order freed virtually all the Senators from any duty of attendance and allowed them to leave the Capitol without concern that the Senate would conduct business in their absence. And it precluded any action by the Senate on Presidential nominations for the duration of the 20-day period, including the pending nominations to the Board.

That the Senate was effectively closed for business throughout this extended period is further underscored by the fact that messages from the President and the House of Representatives sent to the Senate during this period were not laid before the Senate or entered into the Congressional Record until January 23, 2012, when the Senate returned from its recess. *See* 158 Cong. Rec. S37 (daily ed. Jan. 23,

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<sup>7</sup> The relevant text of the Senate order provided as follows:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the balance of the First Session of the 112th Congress. *Id.* On January 3, 2012, the First Session of the 112th Congress ended and the Second Session began, per the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of this transition. In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

2012) (message from the President “received during adjournment of the Senate on January 12, 2012”). The Senate also specifically identified January 23, 2012 as the next date it would vote on a pending nomination. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

Given the Senate’s declared and actual break from business over this 20-day period, the President plainly possessed the authority to exercise his recess appointment power.<sup>8</sup>

4. CSC does not claim that the Senate was conducting regular business at any point during the January break. Nor does it suggest that a 20-day break in business is too short to constitute a recess for the President to exercise his recess appointment power. Instead, CSC mistakenly suggests (Br. 16-19, 22-23) that intermittent and fleeting *pro forma* sessions, with no business conducted, preclude the possibility that this 20-day period was a “Recess of the Senate,” because such sessions transformed this period into a series three-day breaks. CSC’s logic fails,

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<sup>8</sup> CSC cites in passing (Br. 16) *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). *Sampson* involved the Pocket Veto Clause, not the Recess Appointments Clause, and the government has argued (in briefing in *Burke v. Barnes*, 479 U.S. 361 (1987)) that that decision was incorrect. But even if correct and relevant, it is consistent with our position. *Sampson* held that a brief intrasession adjournment did not “prevent [the] Return” of a disapproved bill, and thus did not trigger the Pocket Veto Clause, because the originating House took affirmative steps to enable the President to return the bill during the adjournment. See *Sampson*, 511 F.2d at 437-40 & n.26. Here, in contrast, the Senate ordered that no business would be conducted from January 3 to 23, thus preventing the President from making appointments with the Senate’s advice and consent during that period.

however, because the *pro forma* sessions were nothing like regular working Senate sessions. Instead, they were (as the name implies) technical formalities whose principal function was to allow the Senate to cease business for 20 days.<sup>9</sup>

The activity on January 6 was typical of these *pro forma* sessions. A virtually empty Senate Chamber was gavelled into *pro forma* session by Senator Jim Webb of Virginia. The Senate did not say a prayer or recite the Pledge of Allegiance, which characterize a regular daily Senate session.<sup>10</sup> Instead, an assistant bill clerk read a two-sentence letter directing Senator Webb to “perform the duties of the Chair.” So appointed, Senator Webb immediately adjourned the Senate until January 10, 2012. The day’s “session” lasted 29 seconds. As far as the video of that session reveals, no other Senator was present. *See* 158 Cong. Rec.

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<sup>9</sup> Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, 2012, that three-day break would support the President’s recess appointments in the unique circumstances of this case. That three-day break was not akin to a long-weekend recess between Senate working sessions. Rather, that recess was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity.

<sup>10</sup> *Compare* 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) *with* 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); *see also id.* at S8783-84 (daily ed. Dec. 17, 2011) (making clear that “the prayer and pledge” would be required only during the January 23, 2012, session).

S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, <http://www.youtube.com/watch?v=teEtsd1wd4c>.<sup>11</sup>

The mere fact that *pro forma* sessions occurred does not alter the central fact that the Senate broke from business for a continuous 20-day period. In general, when the Senate wants to take a break from regular business over an extended period of time—that is, to be away on recess—it follows a process in which the two Houses of Congress pass a concurrent resolution of adjournment, which authorizes the Senate to cease business over that period of time.<sup>12</sup> Since 2007, however, the Senate has used *pro forma* sessions to allow for recesses from business during times when it historically would have obtained a concurrent adjournment resolution, like the winter and summer holidays.<sup>13</sup>

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<sup>11</sup> *See also* 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (29-second *pro forma* session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

<sup>12</sup> Congress regards this process as satisfying the Adjournment Clause, which provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” U.S. Const., art. I, § 5, cl. 4; *see* John Sullivan, *Constitution, Jefferson’s Manual and Rules of the House of Representatives of the United States*, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011); *see also infra* at pp. 29-31.

<sup>13</sup> The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when they were unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate’s *regular* use of *pro forma* sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued periodically since. *See* 148 Cong. Rec. 21,138

Whatever the reasons for this procedural innovation, the change does not alter the Recess Appointments Clause analysis. For purposes of determining if the Senate is in recess, the orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions: both allow the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. The only difference is that one Senator remains in the Capitol to gavel in and out the *pro forma* sessions, but no other Senator need attend and “no business [is] conducted.” That difference does not affect whether the Senate is away on “Recess” as the term has long been understood. The core inquiry remains focused on whether “the members of the Senate owe ... [a] 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* S. Rep. No. 58-4389, at 2.

Under this well-established standard the Senate was away on recess from January 3 to January 23. The *pro forma* sessions were part and parcel of the Senate’s 20-day recess—its ongoing “suspension” of the Senate’s usual “business or procedure”—not an interruption of that recess. To conclude otherwise would “give the word ‘recess’ a technical and not a practical construction,” would

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(Oct. 17, 2002); *see generally* Congressional Directory for the 112th Congress 536-38 (2011) [hereinafter “Congressional Directory”].

“disregard substance for form,” 33 Op. Att’y Gen. at 22, and would be contrary to the Supreme Court’s admonition to exclude “secret or technical meanings that would not have been known to ordinary citizens in the founding generation” when interpreting constitutional terms. *Heller*, 554 U.S. at 577.

### **B. CSC’s Countervailing Arguments Are Meritless**

1. CSC urges (Br. 16; NRW Br. 7-8) that the Senate “declared itself to be in session” because it engaged in *pro forma* sessions. Based on that view of the Senate’s actions, CSC asserts (Br. 17; NRW Br. 8) that under the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, the President lacked the power to second-guess the Senate’s determination that it was not in recess.

The Senate’s decision to engage in *pro forma* sessions, however, does not amount to a Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no contemporaneous rule or resolution expressing the view of the Senate that it was not away on recess, and the only formal statement from the Senate was its order that there would be “no business conducted” during its *pro forma* sessions.<sup>14</sup>

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<sup>14</sup> Individual Senators’ *post hoc* statements that the *pro forma* sessions precluded recess appointments do not constitute a Senate determination on that score. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those “authorized to represent their respective Houses of Congress”); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate’s interest in litigation as *amicus curiae* only upon a resolution adopted by the Senate).

Moreover, by relying on the Rules of Proceedings Clause (Br. 16-17), CSC misapprehends the relevance of that provision. That Clause provides the Senate with the authority to “determine the Rules of its Proceedings,” that is, to establish rules governing the Senate’s internal processes. *See INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (the Clause provides each House with “the power to act alone in determining specified internal matters,” and “only empowers Congress to bind itself”). The Supreme Court has made clear that Congress “may not by its rules ignore constitutional restraints.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).<sup>15</sup> Thus, although Congress may generally “determine the Rules of its Proceedings,” that constitutional provision does not control in this case, which concerns the President’s appointment power, not just matters internal to the Legislative Branch.

CSC’s reliance on the Rules of Proceedings Clause is particularly misplaced because the President’s own determination that the Senate is in “Recess” is owed a measure of deference. *See Evans*, 387 F.3d at 1222 (noting that “when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional”); *Allocco*,

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<sup>15</sup> Congressional rules are thus subject to judicial review when they affect interests outside of the Legislative Branch. *See United States v. Smith*, 286 U.S. 6, 33 (1932) (“As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.”); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (“Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.”).

305 F.2d at 713 (before making a recess appointment, “the President must in the first instance decide whether he acts in accordance with his constitutional powers”). An officer of the Legislative Branch has acknowledged such deference. *See In re John D. Dingell*, B-201035, 1980 WL 14539, at 3 (Comp. Gen. Dec. 4, 1980) (opinion affirming President’s authority to make recess appointments during an intrasession recess, relying on Attorney General’s opinion that “the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate.”) (citing 33 Op. Att’y Gen. 20 (1921)).<sup>16</sup>

Even assuming the Senate had made the formal determination that CSC posits, such a determination would upend the long-standing balance of powers

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<sup>16</sup> This legislative view has long historical roots. In 1814, Senators from opposing political parties agreed that the President Madison was owed deference in his exercise of the recess appointment power. *See* 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (observing that the Recess Appointments Clause “delegates to the President *exclusively* the power to fill up *all* vacancies which happen during the recess of the Senate” and that “where a discretionary power is granted to do a particular act, in the happening of certain events, that the party to whom the power is delegated is necessarily constituted the judge whether the events have happened, and whether it is proper to exercise the authority with which he is clothed”); 26 Annals of Cong. 707-08 (April 1, 1814) (Sen. Horsey) (“[S]o far as respects the exercise of the qualified power of appointment, lodged by the Constitution with the Executive, . . . the Senate have no right to meddle with it.”). These Senators’ view prevailed against a movement to censure the President’s use of his recess appointment authority. *See* Irving Brant, *JAMES MADISON: COMMANDER IN CHIEF 1812-1836*, at 242-43 (1961) (explaining that the effort to censure the President “collapsed when [Horsey] cited seventeen diplomatic offices created and filled by former Executives while the Senate was in recess”).

between the Senate and the President in this area. The Supreme Court has repeatedly condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted).

Accepting CSC’s position, however, would do just that, by allowing the Senate to effectively eliminate the President’s recess appointment power. The relevant balance of powers is founded on the well-established understanding that the Constitution requires the Senate to make a choice between two mutually exclusive options: either the Senate can remain “continually in session for the appointment of officers,” *Federalist No. 67*, and serve its function of advice and consent, or it can “suspen[d] . . . business,” II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct such business of the Senate during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This view is evidenced by past compromises between the Senate and the President over recess appointments.<sup>17</sup> For example, in 2004, the political branches reached a

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<sup>17</sup> *See generally* Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 253-55 (2008) (describing various political confrontations over recess appointments culminating in negotiated agreements between the Senate and the President regarding recess appointments).

compromise “allowing confirmation of dozens of President Bush’s judicial nominees” in exchange for the President’s “agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away.” Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004. These political accommodations allowed both branches to vindicate their respective institutional prerogatives: they gave the President assurance that the Senate would act on his nominees, while freeing the Senators to cease business and return to their respective States without losing the opportunity to give “advice and consent” on Presidential nominees.

Under CSC’s view, however, the Senate would have had little, if any, incentive to so compromise with the President, because the Senate always possessed the unilateral authority to divest the President of his recess appointment power through the simple expedient of holding fleeting *pro forma* sessions over any period of time. Indeed, under CSC’s logic, early Presidents would have been precluded from making recess appointments during the Senators’ months-long absences from Washington if only the Senate had one of its Members gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the fact that the Senate had never even arguably assumed before 2007—when it began using *pro forma* session during absences that it historically would

have taken per a concurrent resolution—that it had the power to simultaneously be in session for Recess Appointments Clause purposes and officially away for purposes of conducting business “suggests an assumed *absence* of such power.” *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, Senatorial “prolonged reticence” to assert that the President’s recess appointment power could be so easily nullified “would be amazing if such [an ability] were not understood to be constitutionally proscribed.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

The separation-of-powers concerns raised by CSC’s position are illustrated by the facts here. If, as CSC urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominees, the Board would have been unable to carry out significant portions of its mission during the Senate’s entire absence. Such a result would undermine the constitutional balance of powers, which ensures that all Branches can carry out their constitutional duties, including the President’s duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3.

In contrast, giving effect to the President’s recess appointments here leaves the established balance of constitutional powers unaltered. The President’s recess appointments are only temporary; recess commissions granted by the President “shall expire at the End of [the Senate’s] next Session.” U.S. Const. art. II, § 2,

cl. 3. The Senate retains authority to vote up or down the Board nominations, which remain pending before it. More broadly, the Senate still has the choice between remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President's recess appointment power, or ceasing to conduct business and leaving the Capitol to return home with the knowledge that the President may make temporary appointments during that absence. This Court should decline the CSC's suggestion to eliminate that long-established constitutional trade-off.

Indeed, since the recess appointments at issue here, the Senate and the President have resumed the traditional means of using the political process to reach inter-branch accommodation regarding nominations. In April 2012, the Senate agreed "to approve a slate of nominees" while the President "promis[ed] not to use his recess powers." Stephen Dinan, *The Washington Times*, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of bargain that the political branches have often struck, and reflects the balance of powers that has long characterized inter-branch relations. This Court should not upset that balance.

2. CSC's reliance on two other constitutional provisions is equally misplaced. First, CSC misconstrues (Br. 18-19; NRW Br. 12-13) the relevance here of the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4. That Clause provides that "[n]either House, during the Session of Congress, shall, without Consent of the

other, adjourn for more than three days.” U.S. Const. art. I, § 5, cl. 4. CSC argues (Br. 18) that because the House of Representatives did not expressly consent to the Senate’s adjournment for more than three days during the January break, “the Senate cannot be said to have been in recess during the relevant time period.” It argues further (Br. 19; NRW Br. at 13) that a decision upholding the recess appointments here would be tantamount to a determination that the Senate violated the Adjournment Clause.

This Court, however, is not presented with the question whether the Senate complied with the Adjournment Clause and need not decide that issue. CSC provides no basis (Br. 18) in the text or structure of the Constitution for equating Article I’s Adjournment Clause with Article II’s Recess Appointments Clause. Thus, as with any other constitutional provision, the requirements of each Clause must be interpreted based on their separate text, history, and purpose.

Moreover, the Adjournment Clause relates primarily, if not exclusively, to the internal operations and obligations of the Legislative Branch. In that setting, the view of the Senate and the House as to whether *pro forma* sessions satisfy the requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violations

of that Clause.<sup>18</sup> In contrast, as explained, the Recess Appointments Clause defines the scope of a Presidential power, and that Clause’s interpretation has ramifications that extend far beyond the Legislative Branch. As discussed above, the text, purpose, and established historical understandings of the Recess Appointments Clause compel the conclusion that the *pro forma* sessions did not eliminate the President’s recess appointment power, whatever the effect those sessions may or may not have had with respect to other constitutional provisions.

Second, CSC mistakenly invokes (Br. 18; NRW Br. 12-13) the Twentieth Amendment. The Twentieth Amendment provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting “shall begin at noon

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<sup>18</sup> The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick’s Senate Procedure, Adjournment at 15 (noting that “in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it”). If this Court were forced to confront whether the Senate’s *pro forma* sessions satisfied the Adjournment Clause—which, as explained, it is not—there are grounds for concluding that the sessions may not comply with that Clause. The central purpose of the Adjournment Clause is to ensure the Houses’ simultaneous presence in the Capitol to do business. *See, e.g.*, Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (“It was necessary therefore to keep [each house of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will.”). The Senate’s use of *pro forma* sessions at which no business is conducted, to allow virtually all of its Members to be away from the Capitol for an extended period of time, is in some tension with that purpose.

on the 3d day of January, unless they shall by law appoint a different date.” *See* U.S. Const., amend. XX, § 2. CSC suggests that because both Houses held *pro forma* sessions on January 3, 2012, in an effort to comply with this provision, such sessions must interrupt the 20-day recess under the Recess Appointments Clause.

However, this argument again inappropriately equates two separate constitutional provisions. Like the Adjournment Clause, the Twentieth Amendment relates primarily to the internal operations and obligations of the Legislative Branch, and in that context, any congressional determination about the effects of the *pro forma* session might hold more sway than it would here, where the interbranch balance of powers are implicated. In any event, the relevant recess here began at the end of the January 3 *pro forma* session, continuing until January 23. Accordingly, the question of whether the *pro forma* session held on January 3 satisfied the Twentieth Amendment’s assembly requirement is not squarely presented in this case.<sup>19</sup>

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<sup>19</sup> It is likewise irrelevant that the Legislative and Executive Branches regard the 2nd Session of the 112th Congress as starting at noon on January 3, 2012. As noted, the Twentieth Amendment requires the annual “meeting” of Congress to “begin at noon on the 3d day of January,” unless a different date is set by a duly enacted law presented for the President’s signature. The term “meeting” refers to the annual Session of Congress, and applies whether or not Congress in fact “assemble[s]” on this date—to hold otherwise would vitiate the Twentieth Amendment’s requirements by allowing Congress to reschedule the starting date of its annual “meeting” through its unilateral action rather than by law as the Amendment requires. Congress routinely enacts legislation to vary the date of its first meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945),

3. CSC further urges (Br. 18; NRW Br. 11) that the Senate was not in recess during its January break because it had previously passed legislation by unanimous consent during a December session originally intended to be a *pro forma* session. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend temporarily the payroll tax cut). That fact, however, does not alter the character of the January 2012 recess, during which the Senate passed no legislation. Thus, this Court need not address whether the actual passage of legislation would interrupt an ongoing recess.

In any event, CSC's reliance on the mere theoretical possibility that the Senate *could* have passed legislation (though only by unanimous consent<sup>20</sup>) provides no basis for distinguishing the January 2012 recess from any other recess and would place virtually *any* recess outside the scope of the Recess Appointments Clause. Concurrent resolutions of adjournment typically allow Congress to reconvene before a recess's scheduled end if the public interest warrants it, and the

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although it did not do so at this time. Thus, the fact that the 1st Session of the 112th Congress ended (and the 2nd Session of that Congress began) at noon on January 3, 2012, does not depend a *pro forma* session. Rather, the switch from one Session to the next occurred by simple operation of the Twentieth Amendment.

<sup>20</sup> Because the Senate had, in its December 17th order, provided by unanimous consent that there would be “no business conducted” during the *pro forma* sessions, it could conduct business only if it agreed to do so by unanimous consent. *See* Walter Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (Jason B. Cattler & Charles M. Rice, eds. 2008).

Senate has previously exercised that authority to pass legislation during what were undisputedly Recesses of the Senate. *See, e.g.*, 156 Cong. Rec. S6995-99 (daily ed. Aug. 12, 2010) (recalling the Senate during a recess scheduled by concurrent resolution<sup>21</sup> to pass border security legislation by unanimous consent). That possibility, however, does not alter the fact that the Senate has gone away on recess. Indeed, before the recess appointment at issue in *Evans*, the Senate adjourned per a resolution expressly providing for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004); 150 Cong. Rec. 2145 (2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that recess appointment. *Evans*, 387 F.3d at 1221-22.

4. CSC is also mistaken (Br. 19-23) that the Recess Appointments Clause permits recess appointments only during *intersession* recesses—*i.e.*, those occurring after the formal end of an annual congressional Session—and that because the Senate was in an *intrasession* recess on January 4, the President’s appointments to the Board that day were invalid.<sup>22</sup>

This argument is contradicted by the Constitution’s text, judicial precedent, and the longstanding interpretations of the Executive and Legislative Branches.

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<sup>21</sup> 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010).

<sup>22</sup> The formal end of an annual congressional Session is marked by a specific type of adjournment resolution, calling for adjournment “sine die” (without day). *See* Deschler’s Precedents of the House of Representatives, H. Doc. 94-661, vol. I, § 2, at 8.

“[T]he text of the Constitution does not differentiate expressly between inter- and intrasession recesses for the Recess Appointments Clause.” *Evans*, 387 F.3d at 1224. CSC’s sole textual basis (Br. 19-20) for asserting that the Clause is limited to intersession recesses is the Clause’s reference to “the Recess,” rather than “a recess.” That reading is flawed at several levels. First, CSC’s reliance (Br. 19) on the supposed “singular construction” used in the Clause is misplaced. That phrase can clearly refer to multiple recesses, since each Congress generally includes two intersession recesses (one after each Session), and many Congresses—including each of the first five Congresses—have taken even more. Congressional Directory, *supra* at 522 (2011).

CSC’s grammatical argument also runs headlong into the fact that, during the Framing, phrases such as “during the recess” and “in the recess” were often used to refer to recesses generally, whether during or after the end of the session.<sup>23</sup> CSC is similarly mistaken (Br. 20) in relying on the capitalization of “Recess,”

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<sup>23</sup> For example, Article I refers to the power of the state Executive to “make Temporary Appointments” of Senators “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State.” U.S. Const. art. I, § 3, cl. 3. In the Founding era, some state legislatures regularly took extended breaks, *i.e.*, intrasession recesses, during their own annual sessions. *See, e.g.*, N.J. Legis. Council Journal, 10th Sess., 1st Sitting 31 (1785). At least one Senator was appointed during such a break. *See* 8 Annals of Cong. 2197 (Dec. 19, 1798) (noting that Franklin Davenport, “appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature . . . took his seat in the Senate”); N.J. Legis. Council Journal, 23rd Sess. 21-22 (1798-99) (documenting an intrasession recess between November 8, 1798 and January 16, 1799).

since “nearly every noun in the Constitution is capitalized.” Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 413 n.166 (2005).

Accordingly, as the Eleventh Circuit explained, “the Framers’ use of the term ‘the’ [does not] unambiguously point[] to the single recess that comes at the end of a Session.” *Evans*, 387 F.3d at 1224. “Instead . . . ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate’s acts of recessing, that is, taking a break.” *Id.* at 1224-25. Thus, it is unsurprising that every court to address this question has refused to confine the President’s recess appointment powers to intersession recesses. *See id.* at 1224-26; *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1375 n.13 (Ct. Int’l Trade 2002) (concluding that the power extends to intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (Ct. Cl. 1884) (same).

The Executive Branch has long interpreted the Clause to permit intrasession recess appointments, and such a longstanding interpretation, in which Congress has acquiesced, is highly significant in judicial interpretations of the Constitution. *See Evans*, 387 F.3d at 1226; *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 688-90 (1929). Presidents have routinely made recess appointments during intrasession recesses. *See* Henry B. Hogue, Cong.

Research Serv., *Intrasession Recess Appointments* 3-4 (identifying 285 intrasession recess appointments made between 1867 and 2004).<sup>24</sup> This practice originated in the nineteenth century and has continued regularly since 1921, when Attorney General Daugherty concluded that the President could make appointments during an intrasession recess. *See* 33 Op. Att’y Gen. 20 (1921). Invoking the Senate Judiciary Committee’s own interpretation of “recess,” and the Clause’s purpose of enabling Presidents to keep offices filled, Attorney General Daugherty reasoned that the Constitution permits recess appointments unless “in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” *Id.* at 21-24 (citing S. Rep. No. 58-4389 (1905)). Subsequent executive precedent uniformly follows, and legislative precedent acquiesces in the Daugherty opinion on this point. *See, e.g.*, 41 Op. Att’y Gen. 463, 466-68 (1960); 20 Op. O.L.C. 124, 161 (1996) (noting repeated, consistent reliance on the Daugherty opinion); *see also Appointments – Recess Appointments*, 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, relying upon the Daugherty opinion and subsequent widespread adoption thereof).

Indeed, were CSC’s view to prevail, the President could be unable to make recess appointments during a majority of the time the Senate is in recess. For

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<sup>24</sup> Before the Civil War, intrasession recesses were relatively infrequent. *See* Congressional Directory, *supra* at 522-25. During Congress’s first lengthy intrasession recess, in 1867, President Johnson made at least fourteen known recess appointments. *See* Hogue, *Intrasession Recess Appointments*, *supra* at 5.

decades, the Senate’s time in intrasession recesses has routinely exceeded that in intersession recess, often by a significant margin. *See* Congressional Directory, *supra* at 530-537; *see also* *Evans*, 387 F.3d at 1226 & n.10 (noting that “an intersession recess might be shorter than an intrasession recess,” that the Senate has taken “zero-day intersession recesses” as well as “intrasession recesses lasting months,” and that “[t]he purpose of the Clause is no less satisfied during an intrasession recess than during a recess of potentially even shorter duration that comes as an intersession break”); 33 Op. Att’y Gen. at 23 (explaining that reading the Constitution to prohibit intrasession recess appointments could lead to “disastrous consequences,” since “the painful and inevitable result will be measurably to prevent the exercise of governmental functions”).

5. Finally, amicus NRW raises an additional argument not pressed by CSC. Amicus argues (NRW Br. 17-23) that because the Board vacancies “did not ‘happen’ during a Senate recess,” the President lacked authority to fill them using his recess appointment authority.<sup>25</sup> This Court, however, “ordinarily do[es] not

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<sup>25</sup> The amicus also points to (NRW Br. 13) a passing reference by the Solicitor General in a letter in a different case principally addressed to other subjects. That reference was in no way aimed at definitively resolving the issue here. The Department of Justice has since conducted a thorough examination of the legal implications of *pro forma* sessions at which no business is conducted. That analysis, building upon analyses of prior Administrations, concludes that such *pro forma* sessions do not interrupt a Senate recess for purposes of the President’s recess appointment power. *See* Dept. of Justice, Office of Legal Counsel,

entertain arguments not raised by parties,” and should decline to do so here.

*Narragansett Indian Tribe v. Nat’l Indian Gaming Comm’n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). In any event, this construction of the Recess Appointment Clause has been squarely rejected by all three courts of appeals to consider the argument. *See Evans*, 387 F.3d at 1126 (explaining that interpreting “happen” as happen to arise would “contradict[] . . . the purpose of the Recess Appointments Clause”); *Woodley*, 751 F.2d at 1012-13 (noting that such an interpretation “would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes”); *Allocco*, 305 F.2d at 709-15 (concluding such an interpretation of happen was “inconceivable” in light of Framers’ intent and pointing to Executive precedent stretching back to 1823). Moreover, the issue is not even presented here: each of the positions filled here *did* first become vacant during a Senate recess. *Compare* NRW Br. 18 (asserting the relevant vacancies occurred on December 16, 2004, August 27, 2010, and August 27, 2011), *with* Congressional Directory, *supra* at 536-38 (demonstrating the Senate was in recess during each date).<sup>26</sup>

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*Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645 (Jan. 6, 2012).

<sup>26</sup> The amicus asserts (NRW Br. 18) that the Board seat occupied by Board Member Block was “vacated on December 16, 2004,” during a Senate recess that year. In fact, that seat was last held by Craig Becker, a recess appointee whose

## II. THE BOARD'S ACTING GENERAL COUNSEL LAWFULLY HELD OFFICE AT THE TIME HE DIRECTED ISSUANCE OF THE COMPLAINT IN THIS CASE

CSC asserts (Br. 10-11, 23-25) that the Board's Decision and Order is invalid in that the underlying complaint "was *ultra vires* because the Acting General Counsel of the [Board] did not lawfully hold office at the time." (Br. 10.) Specifically, CSC erroneously contends (Br. 24) that Section 3(d) of the Act (29 U.S.C. § 153(d)) is the exclusive means by which the President may appoint an Acting General Counsel and incorrectly posits that such an appointment is impermissible under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et seq. ("FVRA"). A review of the circumstances surrounding the President's appointment of the Board's Acting General Counsel, and the relevant authorities, clearly establishes the validity of the appointment.

Effective June 21, 2010, President Obama appointed career Board attorney Lafe E. Solomon to serve as the Board's Acting General Counsel, following the June 20, 2010 resignation of General Counsel Ronald Meisburg. President Obama expressly based his appointment of Mr. Solomon on "the Constitution and the laws of the United States, including § 3345(a) of title 5, United States Code, as amended

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term ended at the end of the last annual Senate Session on January 3, 2012. *See Members of the NLRB Since 1935*, <http://www.nlr.gov/members-nlr-1935>.

by the [FVRA].”<sup>27</sup> See June 18, 2010 Appointment Memorandum.<sup>28</sup> On January 5, 2011 (198 days after Mr. Solomon’s appointment), the President submitted to the Senate his nomination of Mr. Solomon to serve as the Board’s General Counsel. 157 Cong. Rec. S68 (Jan. 5, 2011). That nomination remains pending before the Senate.

Mr. Solomon’s appointment and nomination were proper under the FVRA. Section 3345 of the FVRA provides that:

(a) [i]f an officer of an Executive agency [] whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate [] resigns . . .

(3) the President [] may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity....”

5 U.S.C. § 3345(a)(3). By its plain terms, the FVRA applies to *all* Executive agency appointments requiring the advice and consent of the Senate (with four enumerated exceptions specified in 5 U.S.C. § 3349c that have no bearing here).

Thus, Section 3345 applies to the Board and authorizes the President to appoint an officer or employee of the Board to serve as the Acting General Counsel.

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<sup>27</sup> Mr. Solomon is the third Acting General Counsel of the Board to be appointed under the FVRA. On December 19, 2000, President Clinton similarly appointed Acting General Counsel Leonard Page, and on July 1, 2005, President Bush appointed Acting General Counsel Arthur F. Rosenfeld. A copy of those appointing memoranda are attached to the Addendum.

<sup>28</sup> The appointment Memorandum is attached to the Addendum.

Further, Mr. Solomon's appointment falls within the FVRA's time limitation, which allows acting officials to serve "for no longer than 210 days after the vacancy occurs," or, absent rejection, withdrawal, or return of a Senate nomination, as long as a first or second Senate nomination is pending.<sup>29</sup> 5 U.S.C. § 3346. Here, Mr. Solomon served as Acting General Counsel for 198 days before his nomination on January 5, 2011. And, because his nomination remains pending before the Senate, the 210-day limitation on appointments under the FVRA is suspended.

Mr. Solomon's appointment is consistent with the FVRA's other requirements. Specifically, under the FVRA, a temporary appointment requires that "during the 365-day period preceding the . . . resignation...of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days and the rate of pay for [such] position...is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule." 5 U.S.C. § 3345(a)(3)(A), (B). At the time of his appointment, Mr. Solomon was a veteran Board employee of 38 years who had served in various positions for both

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<sup>29</sup> With the FVRA, Congress lengthened the time period that appointed officers could serve in acting positions, recognizing that the vetting process had become more protracted. *See* 144 Cong. Rec. S12767 (daily ed., Oct. 21, 1998) ("The clearance process...has become much more complex than it was just a decade ago. Moreover, increasingly adversarial confirmation proceedings have required that background investigations and other steps in the vetting process be more thorough and lengthy.").

the General Counsel and the Board. For the 10 years immediately preceding his appointment, he served as the Board's Director of the Office of Representation Appeals, a Senior Executive Service position. Mr. Solomon therefore satisfied the FVRA's employment, longevity, and pay-grade qualifications when the President appointed him.

CSC incorrectly claims (Br. 23-25) that the President may only make an appointment under Section 3(d) of the Act. 29 U.S.C. § 153(d). Section 3(d), enacted 40 years before the FVRA, authorizes the President to designate an individual to act as General Counsel during a vacancy, but prohibits an Acting General Counsel from serving "for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate." *Id.*

Although Section 3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently-enacted FVRA clearly provides another. The express terms of the FVRA, with four immaterial exceptions, apply to all federal appointments requiring Senate confirmation. 5 U.S.C. § 3345(a). In consequence, Section 3(d) of the Act is no longer the sole means of filling Board General Counsel vacancies, even though 5 U.S.C. § 3347(a)(1)(A) preserves the option of

using Section 3(d).<sup>30</sup> The FVRA’s legislative history confirms congressional intent to provide the President an additional means to fill vacancies. The Senate Report explains the relationship between the FVRA and the 40 specific statutes it retains, including Section 3(d) of the Act, and makes clear that the new statute provided the President with an alternative means of appointment: “Even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the [FVRA] would continue to provide an alternate procedure for temporarily occupying the office.” *See* S. Rep. No. 105-250, 105th Cong. 2d Sess. 16, 17 (1998). Accordingly, the President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and that appointment was lawful.<sup>31</sup>

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<sup>30</sup> The language of Section 3347(a) provides that the FVRA is “the exclusive means” for the President to appoint such an official in an acting capacity “unless— (1) a statutory provision expressly—(A) authorizes the President” to make such an appointment. Given that framework, the FVRA is the exclusive means for appointments only in the absence of independent statutory authority. Where, as here, there is independent statutory authority, the FVRA is not the “exclusive” means, but provides an option.

<sup>31</sup> Courts that have applied the FVRA to the Board, while not considering the same issue raised herein, have found no impropriety in a Deputy General Counsel’s serving as General Counsel temporarily in an acting capacity pursuant to 5 U.S.C. § 3345(a)(1). *See, e.g., Muffley v. Spartan Mining Co.*, 570 F.3d 534, 540 n.1 (4th Cir. 2009), *aff’g Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542 (S.D.W.Va. 2008).

### **III. THE BOARD REASONABLY FOUND THAT CSC VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to refuse to bargain with the duly certified bargaining representative of its employees.<sup>32</sup> CSC does not dispute that it refused to bargain after the Board certified the Union. If, as we show below, the mail-ballot election was proper, and the Court rejects CSC’s challenges to the Acting General Counsel’s authority and the President’s recess appointments, CSC’s refusal to bargain violated Section 8(a)(5) and (1) and the Board’s Order is entitled to enforcement. *See Veritas Health Servs. v. NLRB*, 671 F.3d 1267, 1271 (D.C. Cir. 2012).

#### **A. Applicable Principles and Standard of Review**

Congress has entrusted the Board “with a wide degree of discretion” for resolving questions arising during the course of representation proceedings. *NLRB v. A.J. Tower*, 329 U.S. 324, 330 (1946); *Kwik Care Ltd. v. NLRB*, 92 F.3d 1122, 1126 (D.C. Cir. 1996). The scope of judicial review, therefore, is “extremely

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<sup>32</sup> An employer that violates Section 8(a)(5) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of [the Act].” 29 U.S.C. § 158(a)(1); *see Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection . . . .”

limited.” *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987); accord *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996). “The case for [judicial] deference is stron[g], as Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort the employees’ ability to make a free choice.” *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988) (internal quotations omitted).

The Court “must respect the Board’s ‘broad discretion’ to assess representation elections,” *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112-13 (D.C. Cir. 2012), and will uphold the Board’s determination regarding elections absent an abuse of discretion. *U-Haul Co. v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007). The Court will not disturb “a Board’s exercise of discretion ‘unless its action is unreasonable, arbitrary or unsupported by the evidence,” and “must therefore uphold a Board decision if it is rational and in accord with past precedent.” *Desert Hosp. v. NLRB*, 91 F.3d 187, 191 (D.C. Cir. 1999) (internal quotations and citations omitted); accord *Kwik Care*, 92 F.3d at 1126.

Accordingly, a party dissatisfied with the results of a Board-conducted election carries a “heavy burden” in attempting to show that “the election was improper.”

*Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

The Board’s underlying findings of fact, as always, are conclusive if supported by

substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951)).

The Board long ago delegated to its Regional Directors the discretion to determine the arrangements for an election, including the location of the election and whether it should be conducted by manual or mail ballot. *See Kwik Care*, 92 F.3d at 1127; *Halliburton Servs.*, 265 NLRB 1154, 1154 (1982); *Nat'l Van Lines*, 120 NLRB 1343, 1346 (1958). This delegation is premised on the principle that a Regional Director is in the best position to evaluate the “circumstances surrounding working conditions in various industries [that] require an adaptation of established election standards to those peculiar conditions.” *San Diego Gas & Elec.*, 325 NLRB 1143, 1145 (1998). Accordingly, a Regional Director’s case-specific determination regarding election procedures “should not be overturned [absent] a clear abuse of discretion.” *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998); *accord Kwik Care*, 92 F.3d at 1126.

A Regional Director may direct a mail-ballot election when “eligible voters are ‘scattered’ [either] because of their job duties over a wide geographic area” or “their work schedules vary significantly, so that they are not present at a common location at common times.” *San Diego Gas*, 325 NLRB at 1145; *accord Kwik Care*, 92 F.3d at 1126-27. The Board will consider employees “scattered” if they “work in different geographic areas, work in the same areas but travel on the road,

work different shifts, or work combinations of full-time and part-time schedules.” *San Diego Gas*, 325 NLRB at 1145 n.7; accord *Kwik Care*, 92 F.3d at 1126 (upholding mail-ballot election due to scattered location of the job sites and the difficulty many employees might face traveling to the offices for a manual election); *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th Cir. 1978) (“Because the employees involved worked a variety of shifts in scattered locations, a mail ballot was the only practical way to secure votes in a reasonable amount of time, and could best be expected to insure fairness and the broadest participation possible in the vote.”). The Board has explained that “scattered” also applies when “all employees cannot be present at the same place at the same time.” *San Diego Gas*, 325 NLRB at 1145 n.7; accord *London’s Farm Dairy, Inc.*, 323 NLRB 1057, 1057 (1997).

If there is evidence that employees are scattered, the Regional Director may then consider additional concerns, including the parties’ desires and the efficient use of Board resources. *San Diego Gas*, 325 NLRB at 1145. In particular, the consideration of Board resources includes whether a particular voting procedure requires several polling sessions or multiple days and whether the procedure is an efficient use of limited Board resources. *San Diego Gas*, 325 NLRB at 1145 (“efficient and economic use of Board agents is reasonably a concern”).

**B. The Board Acted Within Its Discretion in Ordering a Mail-Ballot Election in this Case**

On the basis of those settled principles, the Board reasonably exercised its discretion in determining (A. 145) that the circumstances here warranted an election by mail ballot. As noted, the Board reviewed and upheld the Regional Director's decision to conduct the election by mail ballot, finding that determination reasonable and consistent with precedent. In making that determination, the Regional Director emphasized that eligible employees "operate[d] from a minimum of thirty-three various locations spread over two counties." (A. 145.) Notably, the two polling sites proposed by the Center were not among these 33 locations. With respect to schedules, "it is undisputed that at least twenty-four different shifts exist for bargaining unit employees and rarely are they all present at a common location at the same time." (A. 145.) Those findings that the employees were scattered, and that thus a mail-ballot election would be warranted, is fully consistent with case law and Board precedent. *See, e.g., Kwik Care*, 92 F.3d at 1126; *J. Ray McDermott*, 571 F.2d at 855; *Odebrecht Contractors*, 326 NLRB 33, 33 (1998) (finding that employees were scattered when their jobsites were located from 8 to 30 miles from one another); *Reynolds Wheels Int'l*, 323 NLRB 1062, 1062 (1997) (finding that employees in a single location were nonetheless scattered because employees worked staggered shifts); *GPS Terminal Servs.*, 326 NLRB 839, 839 (1998) (same).

Moreover, the Regional Director's consideration that Board resources militated in favor of a mail-ballot election was similarly reasonable. Indeed, as he explained, CSC's proposal "would require a minimum of two Board agents working at two polling sites for at least twelve hours each, a majority of which would occur for two days, outside normal business hours." (A. 103); *see, e.g., M & N Mail Serv., Inc.*, 326 NLRB 451, 451 (1998) (finding that mail balloting was preferable where a manual vote would require 2 consecutive days of voting from 4:00 a.m. to 8:30 a.m. and from 3:00 p.m. to 8:00 p.m.). On the basis of these considerations, the Regional Director concluded that "the paramount goal of enhancing the opportunity for all to vote, while at the same time efficiently using the Board's resources, will best be served by conducting a mail-ballot election." (A. 103.) Under these circumstances, the Board acted well within its discretion in ordering a mail-ballot election. (A. 103.)

CSC's attempt (Br. 30-31) to carry its heavy burden of establishing an abuse of discretion by citing Board precedent involving circumstances of greater geographic distances does not mandate a different result.<sup>33</sup> The Board does not require a threshold mileage limit to show that eligible employees are "scattered." Rather, the Board exercises its authority by adopting a flexible approach and has

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<sup>33</sup> CSC notably does not refer the Court to *Odebrecht Contractors*, wherein the Board found that eligible employees were geographically scattered where the employer's jobsites were located, similar to the worksites here, only 8 to 30 miles from each other. 326 NLRB at 33.

determined that “scattered” includes “any situation where all employees cannot be present at the same place at the same time.” *San Diego Gas*, 325 NLRB at 1145. Here, it is undisputed that the 229 employees work at 33 different locations and that CSC proposed 2 polling sites, at which none of the eligible employees worked. That some prior Board cases involved more distance between polling locations is of no consequence.

CSC incorrectly contends (Br. 29-30) that the Regional Director relied on cases that “differed markedly from [the circumstances] in this case.” (Br. 29.) To be clear, the Regional Director cited certain cases for the principle that “a Regional Director has broad discretion in arranging all the details of an election, including whether to conduct an election – in whole or in part – by mail.” (A. 102.) He did not rely on those cases, contrary to CSC’s claim, to find that eligible employees were scattered. Thus, to the extent that CSC claims that the Regional Director’s letter includes cases that do not address mail-ballot elections, that point is irrelevant. The Regional Director relied on appropriate cases to demonstrate that he enjoys wide discretion in determining whether CSC’s employees, who work at 33 different locations, none of which was a proposed polling site, were “scattered.”

CSC erroneously asserts (Br. 31-33) that its “24 hour operation . . . cannot in and of itself establish that shifts at [CSC] were ‘scattered.’” (Br. 31.) The Board did not rely exclusively on CSC’s around-the-clock operation. To the contrary, the

Regional Director considered (A. 102) that the employees work 24 different shifts and work full-time, part-time, and weekends.

Further, CSC cites (Br. 31-32) cases that do not advance its claim that the Board abused its discretion in ordering a mail-ballot election. In fact, the cases support the Board's decision here in that they highlight the broad discretion delegated to Regional Directors to finalize the details surrounding representation proceedings. *See Coast N. Am.*, 325 NLRB 980, 981 & n.5 (1998) (upholding the Regional Director's direction of a manual ballot despite a Board majority agreeing that the case would have been appropriate for mail balloting); *Nouveau Elevator*, 326 NLRB at 471 (upholding the Regional Director's direction of a manual ballot despite a Board majority agreeing that the circumstances would have supported a mail-ballot election); *Sutter West Bay Hosps.*, 357 NLRB No. 21, 2011 WL 3269356, at \*3 (2011) (upholding the Regional Director's direction of a mail ballot where manual election would have required several sessions over two or three days); *Reynolds Wheels*, 323 NLRB at 1062 (upholding the Regional Director's direction of a mail-ballot election where eligible voters' shifts would require three days of manual balloting). In short, none of these cases approaches CSC's burden of showing that the Board abused its discretion.

CSC also erroneously relies on (Br. 32-33) *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996). That case predates the Board's

decision in *San Diego Gas*, wherein the Board clarified when it was appropriate to hold a mail-ballot election.<sup>34</sup> 325 NLRB at 1145. Specifically, in *San Diego Gas*, the Board abandoned the “infeasibility” standard and held that mail ballots are appropriate “in circumstances where a manual election might be possible, but would be impractical, or not easily done.” *Id.* at 1145 n.6. Accordingly, CSC’s claim that the Board abused its discretion because “[n]o such infeasibility for [a] manual election was evident in this case,” (Br. 33), is decidedly off the mark.

To be sure, as CSC asserts (Br. 37-39), manual polling is preferred. This general truth, however, is hardly sufficient to establish that the Board abused its discretion in determining that the circumstances of this case warranted a different procedure. CSC’s concern (Br. 38-39) that mail ballots reduce voter participation is unfounded. As the Board has found, because mail-ballot elections often occur where factors exist that would likely inhibit voter participation if there were a manual election, “there is no reason to believe that participation in those particular elections would necessarily have been higher had they been manual elections.”

*San Diego Gas*, 325 NLRB at 1146; *see also Kwik Care*, 92 F.3d at 1126

(expressing skepticism that a manual ballot would have increased voter

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<sup>34</sup> Notably, *Shepard Convention* involved a different challenge. There, the employer argued, and the Court agreed, that the Board had violated its own regulations in invoking its authority to do an interlocutory review of a Regional Director decision without, the Court found, a compelling reason for such review. *Shepard Convention*, 85 F.3d at 674. The Court was therefore not reviewing the Board’s order under the same deferential standard of review that applies here.

participation).

Finally, CSC's general challenge (Br. 33-40) that any mail-ballot election violates the Act is futile. *See, e.g., Kwik Care*, 92 F.3d at 1126. Its related claims (Br. 33-36) that mail ballots are not secret, adversely affect employee free choice, increase the risk of union coercion, and fail to convey the appropriate import of the election must also fail. The Board has long rejected these arguments and "[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." *London's Farm*, 323 NLRB at 1057 (and cases cited therein); *see also NLRB v. Groendyke Transp., Inc.*, 372 F.2d 137, 142 (10th Cir. 1967) ("ballot by mail is an accepted procedure throughout the country as not incompatible with the democratic process of secret balloting. . . . We hold that the use of the mails is not per se an illegal procedure for conducting an election by secret ballot.").

The Board has expressly determined that an election by mail undermines neither its secrecy nor its integrity. *See Fessler & Bowman, Inc.*, 341 NLRB 932, 933 (2004); *San Diego Gas*, 325 NLRB at 1146; *London's Farm*, 323 NLRB at 1058. The Board relies on the election kits accompanying the ballots that "clearly specify the precise procedure for casting and returning the ballot," and on voters' ample opportunity to follow the instructions and to vote in secret since they receive the kits and ballots at their homes. *Fessler*, 341 NLRB at 933. The Board has

observed that abuse in mail-ballot elections is “almost nonexistent” and “in the long history of mail-ballot elections under the Railway Labor Act, the instances of alleged improprieties [] were rare.” *Id.*; *see also San Diego Gas*, 325 NLRB at 1146. Moreover, the Board has embraced the notion that mail ballots preserve the integrity of the process relying on “the widespread use of mail ballots in the political process at all levels of American Government.” *London’s Farm*, 323 NLRB at 1058. In sum, CSC has failed to show that the Board abused its discretion in ordering a mail-ballot election in this case.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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September 2012

# **ADDENDUM**

## STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, et. seq., are excerpted below:

### **Section 3 of the Act (29 U.S.C. § 153): National Labor Relations Board.**

**(d)** [General Counsel; appointment and tenure; powers and duties; vacancy]  
There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

### **Section 7 of the Act (29 U.S.C. § 157): Rights of employees.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

### **Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.**

#### **(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer-

**(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.**

**(c) Hearings on questions affecting commerce; rules and regulations**

- (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
  - (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; or
  - (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.
- (2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) section 160(c) of this title.
- (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who

are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

- (4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.
- (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

**(d) Petition for enforcement or review; transcript**

Whenever an order of the Board made pursuant to section 10(c) section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

**Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.**

**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

**(b) Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable**

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue

and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code section 2072 of title 28.

**(e) Petition to court for enforcement of order; proceedings; review of judgment**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems

just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

**(f) Review of final order of Board on petition to court**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Relevant provisions of the Federal Vacancies Reform Act (“the FVRA”), 5 U.S.C. §§ 3345, et. seq., are excerpted below:

**§ 3345**

- (a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--
- (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
  - (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

- (3)** notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--
- (A)** during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
  - (B)** the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.
- (b)(1)** Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--
- (A)** during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--
    - (i)** did not serve in the position of first assistant to the office of such officer; or
    - (ii)** served in the position of first assistant to the office of such officer for less than 90 days; and
  - (B)** the President submits a nomination of such person to the Senate for appointment to such office.
- (2)** Paragraph (1) shall not apply to any person if--
- (A)** such person is serving as the first assistant to the office of an officer described under subsection (a);
  - (B)** the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and
  - (C)** the Senate has approved the appointment of such person to such office.
- (c)(1)** Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.
- (2)** For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term

of office is an inability to perform the functions and duties of such office.

**§ 3346**

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve--

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

**§ 3347**

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless--

(1) a statutory provision expressly--

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

- (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
- (2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.
- (b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

**§ 3349c**

Sections 3345 through 3349b shall not apply to--

- (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that--
- (A) is composed of multiple members; and
  - (B) governs an independent establishment or Government corporation;
- (2) any commissioner of the Federal Energy Regulatory Commission;
- (3) any member of the Surface Transportation Board; or
- (4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

**2 U.S.C. § 288b(c)**

(c) Intervention or appearance The Counsel shall intervene or appear as amicus curiae under section 288e of this title only when directed to do so by a resolution adopted by the Senate when such intervention or appearance is to be made in the name of the Senate or in the name of an officer, committee, subcommittee, or chairman of a committee or subcommittee of the Senate.

**THE WHITE HOUSE  
WASHINGTON**

June 18, 2010

**MEMORANDUM FOR LAFE E. SOLOMON**

**Director, Office of Representation Appeals,  
National Labor Relations Board**

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of, General Counsel of the National Labor Relations Board, effective June 21, 2010.

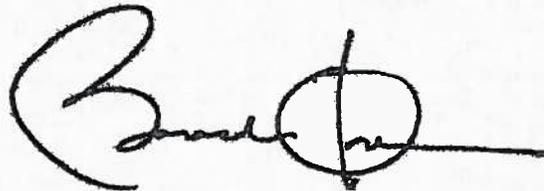
A handwritten signature in black ink, appearing to be "Barack Obama", written in a cursive style. The signature is positioned in the lower center of the page.

Exhibit A

THE WHITE HOUSE  
WASHINGTON  
December 19, 2000

MEMORANDUM FOR LEONARD R. PAGE  
Associate General Counsel, National Labor Relations  
Board

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of General Counsel, National Labor Relations Board.

*William G. Clinton*

THE WHITE HOUSE  
WASHINGTON

July 1, 2005

MEMORANDUM FOR ARTHUR F. ROSENFELD  
Associate General Counsel for Policy and  
Analysis, National Labor Relations Board

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of General Counsel, National Labor Relations Board.

A handwritten signature in black ink, appearing to read "Guzze", is written across the lower half of the page.

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CENTER FOR SOCIAL CHANGE, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1161, 12-1214
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-72211
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,956 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC  
this 12th day of September, 2012

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CENTER FOR SOCIAL CHANGE, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1161, 12-1214
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-72211
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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