

Nos. 12-1973 & 12-1984

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOUGLAS RICHARDS, et al.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO

Intervenor

JOHN LUGO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.

Intervenors

ON PETITIONS FOR REVIEW OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that Petitioners lack standing to petition this Court for review of the Board's Orders. If the Court agrees, it need not reach the merits of the Petitioners' challenge to the Board's remedy, or their argument that the President's recess appointments to the Board on January 4, 2012, were invalid.

If the Court entertains the petitions for review, oral argument would be appropriate because Petitioners have challenged the constitutionality of the President's Article II recess appointment power. The Board requests that the parties each be given 20 minutes.

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**ON PETITIONS FOR REVIEW OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

Petitioners' jurisdictional statement is neither complete nor correct. This consolidated case is before the Court on petitions for review of two Orders of the National Labor Relations Board ("the Board") filed by individuals who were charging parties before the Board and granted relief under the Board's Orders. John Lugo seeks review of the Order that issued on August 10, 2011, and is reported at 357 NLRB No. 45. (SA. 29-37).¹ Douglas Richards, Ronald Echegaray, and David Yost seek review of the Order that issued on August 16, 2011, and is reported at 357 NLRB No. 48. (SA. 1-22). The Board had subject matter jurisdiction over the cases under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act").

The Board's Orders are final with respect to all parties, and the unfair labor practices occurred in East Peoria, Illinois and Goshen, Indiana, respectively. Therefore, the Court has jurisdiction over these review proceedings under Section 10(f) of the Act, if it determines that Petitioners have standing as "person[s] aggrieved" by the Board's Orders. *See* 29 U.S.C. §160(f). The petitions for

¹ "SA." references are to the Short Appendix attached to Petitioners' brief. "A." references are to the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

review, which were filed on April 23 and 24, 2012, were timely because the Act imposes no time limits on review proceedings. The two Unions against which the Board's Orders were issued—United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (“USW”), and International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”)—have intervened on the Board's behalf in their respective cases.²

STATEMENT OF ISSUES

1. Whether the petitions for review should be dismissed because Petitioners are not aggrieved by the Board's Orders. If the Court finds no aggrievement, the remaining issues need not be reached.
2. Whether the Board acted within its broad remedial discretion in ordering the same remedies it issued in the lead case of *International Association of Machinists and Aerospace Workers*, 355 NLRB No. 174 (2010) (“L-3”).
3. 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 The Unions have not challenged the Board's Orders.

STATEMENT OF THE CASE

The Act expressly allows collective-bargaining agreements to contain union-security clauses that require employees to become union members as a condition of employment. 29 U.S.C. § 158(a)(3). Employees who choose not to join the union can satisfy the membership requirement by paying an amount equal to the union's initiation fees and dues. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). Employees who object to paying for any union activities that are not directly related to its duties as their collective-bargaining representative are entitled to pay reduced fees. *Communication Workers v. Beck*, 487 U.S. 735, 745 (1988). Unions must provide fair procedures for employees to obtain *Beck* objector status. *California Saw & Knife Works*, 320 NLRB 224, 230 (1995), *enforced sub. nom.* *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). The Board's standard for determining whether those procedures may include a requirement that objectors annually renew their *Beck* objections is set forth in *L-3*, 355 NLRB No. 174, 2010 WL 3446130, at *1.

Petitioners are *Beck* objectors who filed charges claiming that the Unions' annual renewal requirements were unlawful. The Board's General Counsel issued complaints alleging that those requirements violated Section 8(b)(1)(A) of the Act. After administrative law judges issued recommended decisions, the Board found in each case that the annual renewal requirement violated the Act. As a remedy, the

Board issued Orders consistent with its order in *L-3*, directing the Unions to rescind their existing annual renewal requirements, notify the relevant nonmember employees of that rescission, and recognize Petitioners as continuing objectors. In August 2011, Petitioners filed motions for reconsideration arguing that the Board should order nationwide make-whole relief for other, unnamed employees who were subject to the unlawful annual renewal requirements. In January 2012, Petitioners filed motions to disqualify three Board members whom the President had seated on the Board by recess appointment. On April 28, the Board denied the motions for reconsideration and disqualification.

I. STATEMENT OF FACTS

A. *Lugo*

Since 1992, IBEW maintained a procedure for nonmember employees to request status as *Beck* objectors and receive a proportional reduction of their dues. Among other specifics, the procedure required objecting employees to renew their objections annually each November for them to remain effective the following calendar year. (SA. 29, 34; A. 257.) When an objection was filed, IBEW sent the objector an advance refund equal to the total reduction in dues owed for the upcoming calendar year. (SA. 29, 34-35; A. 143, 257.)

Lugo worked for 14 years as a journeyman electrician and IBEW member, and obtained employment with various employers through the union hiring hall.

On June 8, 2007, while working at Oberlander Electric Company, Inc. in East Peoria, Illinois, he resigned his union membership and filed a *Beck* objection requesting that his objection be treated as “permanent and continuing [in] nature.” (SA. 30, 35; A. 259.) In turn, IBEW paid Lugo for the appropriate amounts of his advance per capita dues from June 8 to November 2007, and enclosed materials including an annual renewal reminder. (SA. 30, 35; A. 274.)

On June 10, 2008, Lugo filed a charge with the Board claiming that the IBEW’s annual renewal requirement was unlawful. After an investigation, the Board’s General Counsel issued a complaint on August 28 alleging that the IBEW’s requirement violated Section 8(b)(1)(A) of the Act. (SA. 30, 34; A. 188.) After a hearing, the administrative law judge issued a recommended decision on December 19 finding the requirement unlawful as alleged. Regarding the remedy, Lugo had argued that IBEW should be required to reimburse all dues collected from *Beck* objectors who did not annually renew their objections. Rejecting that contention, the judge noted there was no “evidence that [IBEW] has actually collected full dues from *Beck* objectors who failed to annually renew their objections,” and that the General Counsel did not request such a remedy. (SA. 36.) IBEW and Lugo filed exceptions with the Board.

B. Richards

USW maintained a procedure for nonmember employees to file *Beck* objections and receive a proportional dues reduction. Under the USW procedure, objectors were required to renew their objections annually, within 30 days of the anniversary of their date of hire. When an objection was filed, USW sent *Beck* objectors advance dues deduction checks on a quarterly basis. (SA. 1, 8, 10; A. 88, 90.)

In 2008, Richards was employed by Cequent Towing Products in Goshen, Indiana, and Echegaray and Yost were employed by Chemtura Corporation in Morgantown, West Virginia. All three employees were USW unit members and their employers had union-security clauses in their collective-bargaining agreements. Yost on June 11, Echegaray on August 26, and Richards on November 7, each notified USW in writing within his specified 30-day window period that he sought *Beck* objector status, and each requested that his objection be considered “permanent and continuing in nature.” (SA. 1, 8; 94, 96, 98.) In response, USW notified each of them of its annual renewal requirement and that his objection would expire in one year unless renewed. Over the course of the year, USW sent all three employees advance dues deduction checks. (SA. 1, 8; A. 105-36.)

Based on charges filed by Richards, Echegaray, and Yost, the Board's General Counsel issued a consolidated complaint on May 8, 2009, alleging that USW's annual renewal requirement violated Section 8(b)(1)(A) of the Act. (SA. 12-19.) After a hearing, the administrative law judge found that USW's annual renewal procedure did not violate the Act and recommended that the Board dismiss the complaint. (SA. 6-22.) The charging parties filed exceptions with the Board.

II. THE BOARD'S CONCLUSIONS AND ORDERS

On August 10, 2011, the Board (Chairman Liebman and Members Becker, Pearce, and Hayes; Member Hayes, concurring; Member Pearce, dissenting) issued its decision in the *Lugo* case, finding that the IBEW's annual renewal procedure violated Section 8(b)(1)(A) of the Act. (SA. 29.) On August 16, 2011, the Board (Chairman Liebman and Members Becker, Pearce, and Hayes; Member Hayes, concurring in part and dissenting in part; Member Pearce, dissenting in part) issued its decision in the *Richards* case, in disagreement with the administrative law judge, finding that the USW's annual renewal procedure similarly violated Section 8(b)(1)(A). (SA. 1.)

In both cases, the Board relied on the standards for analyzing annual renewal procedures set forth in *L-3*, which issued while the cases were pending before the Board. (SA. 1, 29.) The Board's Orders require IBEW and USW to rescind those requirements, notify nonmember employees subject to union-security clauses of

that rescission, and recognize the charging parties as continuing objectors. The Orders also require the Unions to post remedial notices, and if appropriate, to distribute them electronically. (SA. 4-5, 32.)

On August 24 and 29, 2011, respectively, the charging parties in *Lugo* and *Richards* filed motions for reconsideration. While those motions were pending before the Board, the charging parties filed motions to disqualify three Board members whom the President had seated on the Board by recess appointment. On April 18, 2012, the Board denied the motions.

SUMMARY OF ARGUMENT

1. The threshold issue in this case is whether Petitioners, who have not demonstrated any personal loss from the Board's remedial Orders, have standing to contest the Board's Orders. Indeed, Petitioners, perhaps because they actually benefit from the Board's Orders, have utterly abdicated their burden of demonstrating an injury-in-fact. Accordingly, their petitions must be dismissed.

2. In any event, the Board acted within its broad remedial discretion. Its remedies are fully consistent with those the Board ordered in its lead case on annual renewal requirements, *L-3*—a case that Petitioners do not challenge. Petitioners' reliance on cases prior to *L-3*, not involving annual renewal requirements, do not advance their argument. Thus, Petitioners have failed to provide any ground to disturb the Board's remedies.

3. Petitioners challenge the Board's authority to issue its April 18, 2012, Orders, contending that the Board lacked a quorum because the President's recess appointments of three of the five Board Members acting at the time of those orders were invalid. Petitioners' 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 constitutes 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. And here, the Senate as a body regarded its 20-day January break to be functionally indistinguishable from other breaks at which the Senate is indisputably on recess.

Petitioners are incorrect that the Senate opined that it was not on recess within the meaning of that Clause. Even if the Senate had so opined, however, the Senate could not transform a 20-day recess into a series of short non-recess periods—thereby unilaterally blocking the President from exercising his constitutional appointment 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, Petitioners’ position would frustrate the constitutional design ensuring a mechanism for filling offices. It would also 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 with the assurance that no business will be conducted in their absence, thereby allowing the President to make recess appointments of limited duration.

ARGUMENT

Before the Court, Petitioners have failed to demonstrate that they are “person[s] aggrieved” by the Board’s Orders under Section 10(f) of the Act or that they have suffered any injury required for Article III standing. Therefore, the petitions for review must be dismissed. In any event, the Board acted well within its broad remedial discretion in ordering the remedies in these cases, and the Board had a proper quorum at the time it issued the orders denying the Petitioners’ motions.

I. THE COURT SHOULD DISMISS THE PETITIONS FOR REVIEW BECAUSE PETITIONERS ARE NOT AGGRIEVED BY THE BOARD’S ORDERS

Section 10(f) of the Act provides that “[a]ny 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” 29 U.S.C. § 160(f). To be “aggrieved” within the meaning of Section 10(f), a party must demonstrate that the Board’s order has resulted in a loss or injury in fact. *See Harrison Steel Castings, Co. v. NLRB*, 923 F.2d 542, 545 (7th Cir. 1991); *Oil, Chem. & Atomic Workers v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982). A party may not seek review of a Board order “merely because it is a party to the proceeding in which the decision is made.” *Harrison Steel*, 923 F.2d at 545; *see Int’l Union, UAW v. Scofield*, 382 U.S. 205, 210 (1965). Rather, to seek review, a party “must be aggrieved by a final remedial order of the Board; dissatisfaction with certain Board findings and conclusions is not enough.” *Harrison Steel*, 923 F.2d at 545 (citing *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697, 698 (5th Cir. 1964)).

Section 10(f)’s aggrievement requirement is equivalent to the “injury in fact” requirement necessary to establish justiciability under Article III of the Constitution. *See Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (a person may not seek court review of a Board order unless he has suffered “an ‘adverse effect in fact’” from that order). A party demonstrates Article III standing by showing: “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed

to merely speculative, that the injury will be redressed by a favorable decision.”

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000).

The burden of proof to establish standing rests with the party seeking review. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); accord *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). A party seeking review “must substantiate its standing with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561; accord *Apex*, 572 F.3d at 443. In cases like the instant one, the stage for petitioner to prove standing “will be with the opening brief,” and absent good cause shown, no further opportunity will be provided. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (explaining rationales for why requiring a petitioner to establish standing at the outset of its case is “the most fair and orderly process”); see *IBT v. TSA*, 429 F.3d 1130, 1134 (D.C. Cir. 2005) (same).

Petitioners have not established that they are “person[s] aggrieved” under Section 10(f) of the Act or suffered any injury as a result of the Board’s Orders. Petitioners’ bald assertion (Br. 2) in their jurisdictional statement that they are “aggrieved” is insufficient. At a minimum, the jurisdictional statement must provide “a concise recitation of the basis upon which it claims standing,” and not a conclusory statement. *Sierra Club*, 292 F.3d at 901; see Fed. R. App. P. 28(a)(4) (jurisdictional statement must “stat[e] relevant facts establishing jurisdiction”).

Petitioners' further statement (Br. 47) in a section heading that "THE REMEDIES HARM PETITIONERS," again lacks any substantiation.

The Board's remedial order in both cases *benefit* Petitioners by requiring the Unions to rescind their unlawful annual renewal requirements and provide Petitioners with continuing objector status. Although the Board did not require the Unions to reimburse Petitioners for overpaid dues, the record does not show, and Petitioners make no claim, that they, in fact, were owed any unreimbursed union dues. As shown, the Unions recognized Petitioners as *Beck* objectors upon their filing objections, and paid them advance dues deduction checks. Despite Petitioners' repeated rhetorical assertions (Br. 3, 47, 49, 50, 54, 55)—that they did not get "retrospective refund relief" or "retroactive" relief or were not "restored to the position they would have been but for the union's illegal conduct"—they fail to show (or even claim) that they were ever treated as nonobjectors. Accordingly, they have failed to demonstrate an "injury in fact" that is "concrete and particularized." *Friends of the Earth*, 528 U.S. at 180-81.³

³ Petitioners' passing reference (Br. 8) to mailing expenses in their statement of facts is insufficient to show injury. In addition to being, at best, only summarily raised and therefore waived (*see AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000) (an issue merely "alluded to . . . in the statement of facts" is waived)), Petitioners never presented the issue of mailing expenses to the Board, which raises a jurisdictional bar against the Court's considering the claim, *see* 29 U.S.C. § 160(e) ("[n]o objection that has not been urged before the Board... shall be considered by the court"); *Cast North America (Trucking), Ltd. v. NLRB*, 207 F.3d 994, 1000 (7th Cir. 2000). In similar circumstances, the Second Circuit

Petitioners cite cases that do not further their position. Apparently attempting to imply, without showing, that they have standing to challenge the Board's quorum and the President's recess appointments, they assert that "private parties who are adversely affected by such *ultra vires* agency action are entitled to judicial review" (Br. 12-13). However, the cases they cite do not support that broad proposition, because in both of the cited cases, parties appealed from adverse orders finding them in violation of the law. *See Ryder v. United States*, 515 U.S. 177, 179 (1995) (Coast Guard member challenged status of two judges on military court that convicted him); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (PAC found in violation of campaign finance laws challenged FEC composition on appeal). As shown, here, Petitioners were not adversely affected by the Board's Orders.

Moreover, because Petitioners do not have standing as persons aggrieved by the Board's Orders and have suffered no injury to support Article III standing, they cannot gain standing by asserting that relief is needed for others. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("[i]n the ordinary case, a party is denied standing to assert the rights of third persons"); *Warth v.*

refused to entertain an identical argument. *See Gally v. NLRB*, Amended Summary Order, 2012 WL 2849683, at *1 (2d Cir. Sept. 10, 2012) (dismissing petition for review as moot where general exceptions to judge's failure to issue remedy to all *Beck* objectors whose objections were treated as having expired were insufficient to preserve a claim for expenses).

Seldin, 422 U.S. 490, 499 (1975) (same); *Patrick Quick v. NLRB*, 245 F.3d 231, 251-52 (3d Cir. 2001) (employee who did not personally pay expenses was not aggrieved by the Board’s refusal to award those expenses to the party that paid them); *Cieklinski v. NLRB*, 224 F. App’x 727, 728 (9th Cir. 2007) (charging parties lacked standing to challenge a Board order setting aside an award of damages to unidentified others). Accordingly, Petitioners’ contention that the Board abused its discretion in failing to order a remedy for other, unnamed *Beck* objectors cannot serve to fill the void of no standing, and the Court has no jurisdictional basis to reach Petitioners’ substantive challenges.

Petitioners also cannot show the requisite Article III standing element that a favorable decision by the Court is likely to provide them redress. *See Friends of the Earth*, 528 U.S. at 180-81 (for standing, it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision”). The relief Petitioners seek (Br. 56) is an order from the Court reversing either the Board’s remedial Orders, or reversing the orders denying reconsideration and remanding for redecision. In either circumstance, even if the sought-after nationwide remedy for other unnamed *Beck* objectors were entered, Petitioners have failed to show they would receive any additional redress.

In sum, Petitioners lack standing to challenge the Board’s Orders, and the petitions for review must be dismissed. Although the Court has no jurisdiction to

reach the substantive issues raised by Petitioners, full responses are provided in the following sections.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DEVISING THE REMEDIES FOR THE UNIONS' ANNUAL RENEWAL REQUIREMENT VIOLATIONS

Even if the Court finds that Petitioners have standing, the Board acted within its broad remedial discretion in ordering (SA. 4, 32) only prospective—not retroactive—relief for the violations. The Board's remedies are identical to those it issued for the same violations in the lead case of *L-3*, 355 NLRB No. 174, 2010 WL 3446130, at *10-*11. In wrongly contending (Br. 47-56) that the Board should have ordered a nationwide make-whole remedy for all *Beck* objectors subject to the Unions' annual renewal policies, a remedy not provided in *L-3*, Petitioners fail to recognize the Board's discretion in devising remedies for unfair labor practices and rely on inapposite cases.

The Court “respect[s the Board’s] broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1067 (7th Cir. 1997) (internal marks omitted). Accordingly, the Court reviews “the Board’s decision with deference and will interfere only if the Board’s order reflects an abuse of its discretion.” *Id.*; see *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 480 (7th Cir. 1994) (same). The Board is not required to “order that which a complaining party may regard as

complete relief for every unfair labor practice.” *Shepard v. NLRB*, 459 U.S. 344, 352 (1983) (internal marks omitted). Rather, the party challenging the Board’s choice of remedy “must show that the remedy is clearly inadequate in light of the findings of the Board.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991). The Court therefore “will not disturb the Board’s remedial order ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’” *America’s Best Quality Coatings v. NLRB*, 44 F.3d 516, 520 (7th Cir. 1995) (citation omitted). As shown below, Petitioners, even if they had standing to challenge the Board’s remedies, have presented no basis to disturb the Board’s Orders.

A. A Union Must Provide Fair Procedures for Collecting “Agency Fees” from Nonmember Employees and for Requiring that They Annually Renew Objections to Paying Full Membership Dues

Section 7 of the Act guarantees employees the right to engage in a broad range of concerted activities, including joining labor organizations, for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. That section also grants employees “the right to refrain from any and all 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 [S]ection 8(a)(3)” *Id.* In turn, Section 8(a)(3) specifies that collective-

bargaining agreements may contain “union-security” provisions requiring employees to become union members as a condition of employment. 29 U.S.C. § 158(a)(3).

Employees who choose not to join the union can satisfy the membership requirement by paying an amount equal to the union’s initiation fees and dues. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). However, in *Communication Workers of America v. Beck*, 487 U.S. 735, 752-54 (1988), the Supreme Court held that Section 8(a)(3) does not privilege a union, over the objection of a nonmember employee, to spend dues money collected under a union-security clause on activities unrelated to collective bargaining, contract administration, or grievance adjustment. Rather, nonmember employee objectors (“*Beck* objectors”) may pay only an “agency fee” representing the portion of dues that the union expends on representational activities. *Id.*; accord *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (“*Machinists*”). The Supreme Court in *Beck*, however, left crafting the exact parameters of a union’s responsibilities in collecting and administering agency fees to the Board’s discretion. *Machinists*, 133 F.3d at 1015; *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000).

The Board, with court approval, has found that Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)), which makes it unlawful for a union to “restrain or

coerce . . . employees in the exercise of the rights guaranteed in [Section 7 of the Act],” imposes a duty of fair representation on a union in its role as the exclusive representative of employees for collective-bargaining purposes. *See NLRB v. IBEW, Local 16*, 425 F.3d 1035, 1039-40 (7th Cir. 2005); *accord Vaca v. Sipes*, 386 U.S. 171, 177 (1967). The Board applies the duty of fair representation standard when evaluating union procedures implementing *Beck*. *See California Saw & Knife Works*, 320 NLRB 224, 230 (1995), *enforced sub. nom. Machinists*, 133 F.3d at 1015. As the Board has explained, in designing *Beck* procedures, a union must “balance the interests of potential objectors in easily registering their objection with the interests of the collective-bargaining unit as a whole in having the union secure the resources necessary to vigorously perform its statutory duties without unreasonable administrative burden or costs.” *California Saw*, 320 NLRB at 230.

B. The Board Acted Well Within Its Discretion in Issuing the Same Remedies Issued in Its *L-3* Decision

To remedy the Unions’ violations, the Board ordered remedies identical to those issued in the lead case of *L-3*. Petitioners do not challenge the reasoning of the Board’s *L-3* decision. Rather, they contend only (Br. 47-56) that the Board did not go far enough here, and should have also ordered “make-whole,” or “retrospective” relief for an “untold” number of non-member employees nationwide. Petitioners, however, have failed to demonstrate that the Board

abused its remedial discretion by ordering relief according to its well-reasoned decision in *L-3*.

The Board addressed in *L-3*, for the first time, the legality of a union's annual renewal procedure for *Beck* objectors. There, the Board announced that it would apply the duty of fair representation standard to such requirements (2010 WL 3446130, at *2 n.10), and emphasized that it was “not announcing a per se rule” but instead would evaluate such requirements on a “case-by-case basis.” *Id.* at *1. The Board held that, on that record, the *L-3* unions “had failed to present a legitimate justification for their annual renewal requirement . . . sufficient to justify even the modest burden the requirement imposes on an individual seeking to make an objection.” *Id.*

To remedy that violation, as here, the *L-3* Board ordered the unions to rescind their annual renewal requirement, notify nonmember employees subject to the union-security clause that the requirement had been rescinded, and recognize the charging party as a continuing objector. 2010 WL 3446130, at *10-*11. Prior to *L-3*, the courts had consistently approved of annual renewal requirements, and the Board's General Counsel had issued an Advice Memorandum approving such requirements. *Id.* at *11; *see id.* at *6, *11 nn. 24 & 25 (citing authorities). Accordingly, the Board determined that, “[i]n light of consistent court approval of the requirement under the Act, the lack of any contrary indication by the Board,

and the General Counsel’s previous advice approving the requirement, the [u]nions could reasonably have believed that the requirement was lawful.” *Id.* On that sound basis, the Board declined to give retroactive application to its ruling and did not order make-whole relief. *Id.* at *10 & n.37 (citing well-settled factors the Board applies to determine if retroactive application is appropriate).⁴

The same logic applies here, as in *L-3*, because the Unions could reasonably have believed until the Board’s Orders issued that their renewal policies were lawful based on the weight of prior authority. Thus, the Board’s remedy effectuates the policies of the Act by ordering the Unions’ rescission of the unlawful requirements, notice to all potentially affected employees nationwide, and continuing objector status to the charging parties until they revoke their objections or the Unions implement lawful annual renewal requirements. *See SA. 4, 32; L-3, 2010 WL 3446130, at *10.*

Petitioners’ repeated claim (Br. 48, 49, 55) that the Unions should have been “on notice” that their annual renewal requirements were unlawful, at least as of the date of the August 2010 *L-3* decision, is unfounded. The Board promised in *L-3* to

⁴ The Board balances three factors in determining whether the retroactive application of a Board decision will cause manifest injustice: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application. *See NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990).

treat annual renewal requirements on a “case-by-case” basis. Here, it aptly observed that in each of the instant cases, the Unions “argued that their annual renewal requirement was needed to minimize the risk of unnecessarily paying advance rebates to individuals who are no longer employed in a bargaining unit represented by the Union.” (SA. 27 n.5, 42 n.5.) Although the Board found that this proffered justification was not sufficient to save the Unions’ renewal procedures, the Board noted that it was a factor that would not “necessarily have put the [Unions] in the present case[s] on notice that [their] annual renewal requirement was unlawful,” because such a justification was not present in *L-3*. *Id.* Thus, the Board’s decision not to award retrospective relief was fully justified.

Contrary to Petitioners’ assertion, there was no record basis for the Board to consider ordering any remedy beyond what was ordered in *L-3*. Petitioners make an unfounded claim (Br. 47, 53) that the Unions “flipped” an “untold” number of employees from objector to non-objector status for failing to renew their objections. That claim is not supported by record evidence, despite Petitioners having had an opportunity at the hearings to present such evidence, if indeed it existed. Rather, Petitioners were the *only* employees identified in the records of these cases as continuing objectors. As the administrative law judge aptly noted in rejecting this contention in the *Lugo* case, “there is no evidence that [the Union]

has actually collected full dues from *Beck* objectors who failed to annually renew their objections.” (SA. 36.)

Petitioners also ignore that the Board granted the General Counsel the specific relief that he sought in both complaints. Indeed, it is the General Counsel, and not a charging party before the Board, who “represents the public interest in preventing the interference to interstate commerce caused by unfair labor practices.” *Concrete Materials of Georgia, Inc. v. NLRB*, 440 F.2d 61, 67 (5th Cir. 1971); *see* Section 3(d) of the Act (29 U.S.C. § 153(d)). *Cf. Orce v. NLRB*, 133 F.3d 907 (2d Cir. 1997) (table), 1997 WL 829268, at *2 (rejecting charging party’s requested refund for other employees because case was “not a class action”). Given the state of the record, which was devoid of evidence of any flipped employees, it was hardly unreasonable for the Board to grant the relief that the General Counsel saw fit, even though the charging parties may have desired a broader remedy.

In an attempt to undermine this reasonable result, Petitioners mistakenly cite a litany of cases (Br. 50-53) where the Board has ordered retrospective remedies, arguing that the Board’s failure to do so here contravenes precedent. In addition to ignoring *L-3*’s explanation that retroactive relief would be unfair given the almost-uniform authority previously approving most annual renewal requirements, Petitioners’ contention ignores the basic precept governing the Board’s remedial

choices: the Board tailors its remedies to the facts of the case. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Thus, the Board must “assess the question of appropriate remedy on a case-by-case basis” (*St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 148-49 (D.C. Cir. 1989) (citations omitted)), and did exactly that here, choosing to adhere to the reasonable remedy it devised in *L-3*.

Nor have Petitioners otherwise demonstrated that the Board’s determination should be disturbed. As this Court has explained, it is unlikely to identify “a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision (more precisely, of the statute as authoritatively construed in *Beck*) into a workable system for determining and collecting agency fees.” *Machinists*, 133 F.3d at 1015. The Board’s chosen remedies for *Beck* violations similarly are matters within the Board’s special expertise, and must be upheld absent an abuse of discretion, which Petitioners have failed to show.

III. MEMBERS GRIFFIN, BLOCK AND FLYNN HELD VALID RECESS APPOINTMENTS WHEN THE BOARD ISSUED ITS APRIL 18, 2012, ORDERS

Even assuming Petitioners can establish standing in this case, they are wrong (Br. 18-47) that three of the five Board Members in office at the time of the April

18, 2012, Orders had not been lawfully appointed to their posts under the Recess Appointments Clause.

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.⁵ 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 that involved a single Senator and lasted for literally seconds, it ordered that "no business" would be conducted at those times.

At the start of this lengthy Senate absence, the Board's membership fell below the statutorily mandated quorum when Craig Becker's recess appointment term ended 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

⁵ The President 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).

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 appointments were valid because the Senate was plainly in “Recess” at the time under any reasonable understanding of the term. Petitioners’ argument to the contrary is rooted in a misunderstanding of the meaning and purpose of the Recess Appointments Clause that—if adopted by this 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 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 our democracy. The Constitution confers on the President the power to make appointments and, with respect to principal officers, ordinarily conditions such appointments on the advice and consent of the Senate. *Id.* art. II, § 2, cl. 2. But the Framers also created a second appointment process in recognition of 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).⁶ The Framers therefore provided for the President to make appointments of limited duration when the Senate is on recess. The provision for recess appointments frees Senators to return to their constituents (and families) instead of maintaining “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.⁷ This provision reflects the constitutional design and 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.”⁸

2. Petitioners’ argument that the Senate was not on recess on January 4 rests on a misconception of the meaning of “Recess.” The Supreme Court has repeatedly stressed that “[t]he Constitution was written to be understood by the

⁶ 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).

⁷ 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”).

⁸ 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.

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 “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, “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 “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 Branch and the Senate of the term “Recess” are consistent with that plain meaning. The Executive Branch has long maintained the view that the Clause authorizes appointments 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 present and open for business:

[T]he essential inquiry . . . 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 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. . . . [The Recess Appointments Clause’s] 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. Far from “declaring [the Senate] in recess on a whim” (Br. 26), the President properly determined that the Senate’s 20-day break between January 3 and January 23, 2012, fits squarely within the well-established understanding of the term “Recess.” By its own order, the Senate had provided that it would not conduct business during this entire period. The relevant text of the Senate order provided:

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).⁹

⁹ This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the final weeks of the First Session of the 112th Congress. *Id.* On January 3, 2012, that Session 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.

This order freed virtually all 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 opportunity for Senate action on Presidential nominations for the duration of the 20-day period.

That the Senate was closed for business throughout this extended period is further underscored by the fact that messages from the President and the House of Representatives 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, 2012) (message from the President “received during adjournment of the Senate on January 12, 2012”). The Senate also specifically identified January 23 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.¹⁰

¹⁰ Petitioners cite in passing (Br. 21) *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 be conducted

4. Petitioners fail to address the longstanding interpretation of the Constitution’s text by the Senate and Executive Branch. They do not claim that the Senate was conducting regular business at any point during the January break. Nor do they suggest that a 20-day break in business is too short to constitute a recess for purposes of the recess appointment power. Instead, Petitioners mistakenly assert (Br. 19-34) that intermittent and fleeting *pro forma* sessions pursuant to a Senate order that no business be conducted, precluded treating this 20-day period as a “Recess of the Senate” because such sessions transformed this period into a series of three-day breaks. Petitioners’ logic fails, however, because the *pro forma* sessions were nothing like regular working Senate sessions. Instead, they were (as their very name suggests) technical formalities whose principal function was to allow the Senate to cease business for 20 days.¹¹ The *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was

from January 3 to 23, thus preventing the President from making appointments with the Senate’s advice and consent during that period.

¹¹ 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 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.

not done, *i.e.*, that “no business” would be conducted under the Senate’s own prescription.

The activity on January 6 was typical of these *pro forma* sessions. A virtually empty Senate Chamber was gaveled 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.¹² Instead, an assistant bill clerk read a two-sentence letter directing Senator Webb to “perform the duties of the Chair,” and Senator Webb immediately adjourned the Senate until January 10, 2012. The day’s “session” lasted 29 seconds. As far as the video reveals, no other Senator was present. *See* 158 Cong. Rec. S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, <http://www.youtube.com/watch?v=teEtsd1wd4c>.¹³

The mere fact that *pro forma* sessions occurred does not alter the fact that the Senate broke from business for a continuous 20-day period; the *pro forma* sessions were merely the mechanism used to facilitate that break. Historically, when the Senate wanted to take a break from regular business over an extended

¹² 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).

¹³ *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).

period of time—that is, to be on recess—it followed 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.¹⁴ Since 2007, however, the Senate has, instead, regularly used *pro forma* sessions to allow for recesses from business during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.¹⁵

Whatever the reasons for this procedural innovation, the change does not alter the application of the Recess Appointments Clause. For purposes of determining if the Senate is out on recess, the adjournment 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

¹⁴ Congress regards the concurrent resolution 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, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011).

¹⁵ The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when it was 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 frequently since. *See* 148 Cong. Rec. 21,138 (Oct. 17, 2002); *see generally* Congressional Directory for the 112th Congress 536-38 (2011) [hereinafter “Congressional Directory”].

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 [may be] conducted.” That single difference does not affect whether the Senate is 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 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,” II Webster, *supra* at 51—not an interruption of that recess. To conclude otherwise would “give the word ‘recess’ a technical and not a practical construction,” would “disregard substance for form,” 33 Op. Att’y Gen. at 22, and would flout 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 577.¹⁶

¹⁶ Petitioners point to (Br. 31, 44 n.33) 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

B. Petitioners' Countervailing Arguments Are Meritless

1. Petitioners urge (Br. 22) that the “Senate[] determin[ed] that it was not in recess” because it engaged in *pro forma* sessions. Based on that view of the Senate’s actions, Petitioners assert (Br. 22-25) 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.

The Rules of Proceedings Clause does not aid Petitioners here. As an initial matter, the Senate’s decision to engage in *pro forma* sessions does not constitute 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 setting forth the conclusion that the Senate was not on recess for purposes of the Clause, and the only formal statement from the Senate was its order that there would be “no business conducted” during its *pro*

Justice has since conducted a thorough examination of the legal implications of *pro forma* sessions at which no business is conducted. That analysis 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, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645 (Jan. 6, 2012). Contrary to Petitioners’ assertion (Br. 29 n.14), neither the President nor the OLC memorandum designated the *pro forma* sessions “shams.” Instead, the memorandum explains the differences between the Recess Appointments Clause and other constitutional provisions, which Petitioners conflate without explanation. *See id.* at 18-23.

forma sessions.¹⁷ And, as explained, the recess appointments here are entirely consistent with the Senate’s own longstanding interpretation of the Recess Appointments Clause.

Apart from Petitioners’ failure to point to a “Rule” defining the January break not to be a recess, the Rules of Proceedings Clause in any event provides the Senate with authority only to establish rules governing the Senate’s *internal* processes and “only empowers Congress to bind itself.” *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983). The Senate’s exercise of that authority cannot unilaterally control the interpretation of the Constitution or determine the consequences of the Senate’s action on the authority of a coordinate Branch, as Petitioners suggest (Br. 22-23). 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).¹⁸

¹⁷ Contrary to Petitioners’ suggestion (Br. 23, 30 n.17, 45), individual Senators’ statements that *pro forma* sessions preclude 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).

¹⁸ Petitioners are thus incorrect that “the meaning of ambiguous congressional rules is nonjusticiable.” Br. 24. Congressional rules are 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

Thus, although Congress may generally “determine the Rules of its Proceedings,” that constitutional provision does not control here, where the President’s Article II appointment powers are at issue rather than just matters internal to the Senate or Legislative Branch.

Petitioners’ reliance (Br. 20-25) on *United States v. Ballin* is misplaced. In *Ballin*, the question before the Court—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by the contemporaneous congressional journal entries. 144 U.S. at 2-3. In that context, the Court stated that the journal “must be assumed to speak the truth.” *Id.* at 4. In contrast, the congressional journals here in no way provide “conclusive evidence” (Br. 22) that the Senate was not on recess under the Recess Appointments Clause on January 4. To the contrary, the journal entries *reinforce* the conclusion that the Senate was on recess, by highlighting that the Senate was not engaged in any business.¹⁹

because of constitutional infirmity.”). In any event, the question here is not the “meaning” of the Senate’s order of adjournment. Its meaning was clear—all sessions were to be only *pro forma* and no business was to be conducted. The question here concerns the significance under the Constitution of the Senate’s unambiguous act for actions occurring *outside* the Senate.

¹⁹ *United States v. Smith*, 286 U.S. 6 (1932), is even less helpful to Petitioners. In the very portion of the opinion they cite (Br. 23), the Supreme Court explained that it is “essential . . . that each branch be able to rely upon definite and formal notice of action by another” and warned against the “uncertainly and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning

Petitioners’ reliance on the Rules of Proceedings Clause is particularly inapt because the recess appointments here were an exercise of Executive authority under Article II, not Legislative power under Article I, and the President’s determination that the predicate for the exercise of his authority (that the Senate was in “Recess”) was satisfied is therefore entitled to a measure of deference. *See Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (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”); *United States v. Alocco*, 305 F.2d 704, 713 (2d Cir. 1962) (before making a recess appointment, “the President must in the first instance decide whether he acts in accordance with his constitutional powers”). Indeed, in 1980, the Comptroller General—an officer of the Legislative Branch—affirmed the President’s authority to make recess appointments to a newly created federal agency during an intrasession recess, relying on the 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

of a Senate communication. *Id.* at 35-36. The Senate here declared it would conduct “no business” between January 3 and 23. *Smith* supports the President’s reliance on that declaration.

advice and consent of the Senate.” See *In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att’y Gen. 20 (1921)).²⁰

2. Even assuming the Senate had made the formal determination that Petitioners posit, allowing such a unilateral legislative determination to disable the President from acting under the Recess Appointments Clause would frustrate the Constitution’s design to ensure a mechanism for filling offices at all times, and would upend a long-standing balance of powers between the Senate and President. 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

²⁰ This view has long historical roots in the Senate. In 1814, Senators from opposing political parties agreed that 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”).

citations omitted). Accepting Petitioners' position would do just that, by allowing the Senate to effectively eliminate the President's recess appointment power.

The constitutional structure requires the Senate to make a choice: either the Senate can remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to perform its function of advice and consent; or it can "susp[en]d . . . business," II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business 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 President and the Senate over recess appointments.²¹ For example, in 2004, the political Branches reached a 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

²¹ 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).

nominations, while freeing the Senators to cease business and return to their respective States without losing the opportunity to provide “advice and consent.”

Under Petitioners’ view, however, the Senate would have had little, if any, incentive to so compromise, 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.²² Indeed, under Petitioners’ logic, early Presidents could not have made recess appointments during the Senators’ months-long absences from Washington if only the Senate had one Member gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 (when it began providing for *pro forma* session during absences that it historically would have taken per a concurrent resolution of adjournment) even arguably purported to exercise the power to simultaneously be in session for Recess Appointments Clause purposes and officially away for purposes of conducting business. That historical record

²² Petitioners’ citation to *Bowsher v. Synar*, 479 U.S. 714 (1986), illustrates the fallacy of their invocation (Br. 26-27) of separation-of-powers principles. Far from suggesting that Congress’s authority over internal matters leaves the President without any authority to determine when his Article II recess appointment power has been triggered, the Supreme Court there warned that “[t]he dangers of congressional usurpation of Executive Branch functions have long been recognized,” and struck down a statute purporting to give a legislative officer authority over the President’s execution of the law. *Id.* at 727.

“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 Petitioners’ position are vividly illustrated by this case. If, as Petitioners urge, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, the Board would have been unable to carry out significant portions of its statutory mission during the Senate’s entire absence, thus preventing the execution of a duly passed Act of Congress and the performance of the function of an office “established by Law,” U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional balance of powers, which ensures that all Branches can carry out their 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 in place the established constitutional framework and the accumulation of interests based on it. The President’s recess appointments are only temporary; recess commissions granted by the President “expire at the End of [the Senate’s] next Session.” U.S. Const. art. II, § 2, cl. 3. The Senate retains authority to vote on the

Board nominations, which remain pending before it. More broadly, the Senate has the choice it has always had 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 potentially leaving the Capitol) knowing that the President may make temporary appointments during that period.

Indeed, since the recess appointments at issue here, the President and Senate 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 a longstanding inter-Branch balance of power. This Court should not upset that balance.

3. Petitioners' reliance on two other constitutional provisions is equally misplaced. First, Petitioners misconstrue (Br. 30) the relevance 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. Petitioners suggest (Br. 19-20) that because "[t]he House of Representatives did not consent to

a Senate recess or adjournment of longer than three days” during the January break, the Senate could not have been on recess for purposes of the Recess Appointments Clause. They argue further (Br. 27, 30) that a decision upholding the recess appointments here would be tantamount to determining that the Senate violated the Adjournment Clause.

This Court is not presented with the question whether the Senate complied with the Adjournment Clause, and need not decide that issue. Petitioners provide no basis in the text or structure of the Constitution for equating Article I’s Adjournment Clause with Article II’s Recess Appointments Clause. 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. With respect to internal matters, Congress’s view 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 violation of that Clause.²³ In contrast, the Recess Appointments Clause defines the scope of

²³ 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

a Presidential power, and that Clause’s interpretation has ramifications far beyond the Legislative Branch. The Senate’s *pro forma* sessions did not eliminate the President’s recess appointment power, whatever their effect with respect to other constitutional provisions.

Second, Petitioners mistakenly invoke (Br. 19-20, 30-31) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. Petitioners suggest 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.

Whether the *pro forma* session held on January 3 satisfied the Twentieth Amendment’s assembly requirement is not squarely presented in this case because

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, again, 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.

the relevant recess here began after the January 3 *pro forma* session, continuing until January 23. In any event, Petitioners’ argument again inappropriately equates two different 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, a congressional determination about the effects of the *pro forma* session might hold more sway than it would here, where the powers of a coordinate Branch are concerned.

Furthermore, the transition from one annual Session to the next occurred by operation of the Twentieth Amendment’s requirement that the annual “meeting” of Congress “begin at noon on the 3d day of January,” unless a different date is set by a law presented for the President’s signature. Thus the annual “meeting,” or annual Session of Congress, begins at noon on January 3 whether or not Congress in fact “assemble[s]” on this date—to hold otherwise would vitiate the Twentieth Amendment’s requirement that the starting date may only be changed by law rather than unilateral action of Congress or one of its Houses.²⁴ The fact that the 1st Session of the 112th Congress ended (and the 2nd Session of that Congress

²⁴ Congress sometimes has enacted legislation to vary the date of its first annual meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but it did not do so here.

began) at noon on January 3, 2012, therefore does not depend on any *pro forma* session.

4. Petitioners further urge (Br. 28-29) that the Senate was not out on 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 with no business conducted. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend 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, Petitioners' reliance on the theoretical possibility that the Senate *could* have passed legislation (although only by unanimous consent²⁵) provides no basis for distinguishing the January 2012 recess from the many other recesses that Petitioners would concede constitute recesses for purposes of the Recess Appointments Clause. Indeed, Petitioners' logic would place virtually *all* recesses outside the scope of the Clause. Concurrent resolutions of adjournment

²⁵ Because the Senate 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 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).

typically allow Congress to reconvene before a recess's scheduled end if the public interest warrants it. The Senate in fact 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 resolution²⁶ to pass border security legislation by unanimous consent). That possibility does not alter the fact that the Senate had gone away on recess. Indeed, before the recess appointment at issue in *Evans*, the Senate recessed per a resolution 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.

5. Petitioners are also mistaken (Br. 40-42) 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. They therefore are wrong that the President's appointments to the Board on January 4 were invalid because the Senate was in an *intrasession* recess on that day.²⁷

²⁶ 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010).

²⁷ 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.

Petitioners' argument is contradicted by the Constitution's text and history, as well as judicial precedent and the longstanding interpretations of the Executive and Legislative Branches. The Eleventh Circuit has explained that "the text of the Constitution does not differentiate expressly between inter- and intrasession recesses for the Recess Appointments Clause." *Evans*, 387 F.3d at 1224. "[T]he Framers' use of the term 'the' [does not] unambiguously point[] to the single recess that comes at the end of a Session." *Ibid.*

Petitioners' unexplained assertion (Br. 41) that the term "recess" necessarily "corresponded to breaks between sessions" at the Founding, is flatly contradicted by history. During the period of 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. At the time the Constitution was being drafted, 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). Nevertheless, when the Framers vested state governors with the power to "make Temporary Appointments" of Senators "if Vacancies happen . . . during the Recess of the Legislature of any State," U.S. Const. art. I, § 3, cl. 2, they did not differentiate between intersession and intrasession recesses. Indeed, at least one Senator was appointed during an intrasession break, and the Senate accepted his commission without objection. *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).

Thus, “‘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.” *Evans*, 387 F.3d at 1224-25. It is therefore unsurprising that every court to address this question has refused to confine the President’s recess appointment power 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 applies to intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (Ct. Cl. 1884) (same).

Moreover, the Executive Branch’s longstanding interpretation of the Clause to permit intrasession recess appointments, 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).²⁸ This practice originated in the nineteenth century and has continued regularly since 1921, when Attorney General Daugherty—invoking the Senate Judiciary Committee’s own interpretation of “recess” and the Clause’s purpose of enabling Presidents to keep offices filled—concluded such appointments were within the President’s authority. *See* 33 Op. Att’y Gen. 20. Subsequent executive precedent follows, and legislative precedent acquiesces in, this conclusion. *See, e.g.,* 20 Op. O.L.C. 124, 161 (1996); *see also Appointments – Recess Appointments*, 28 Comp. Gen. 30, 34-36 (1948).

Indeed, were Petitioners’ view to prevail, the President could be unable to make recess appointments during a majority of the time the Senate is out on recess. For decades, the time spent by the Senate out on intrasession recesses has routinely exceeded the length of intersession recesses, 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

²⁸ 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.

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”).

6. Finally, Petitioners are incorrect (Br. 35-40) that the Board vacancies “did not ‘happen’ during a Senate recess,” such that the President lacked authority to fill them using his recess appointment authority. The Clause provides that “[t]he President shall have power to fill up all Vacancies that may happen during the Recess of the Senate.” Petitioners contend (Br. 35-36) this Court must read this text to limit the President to filling vacancies that “happen to occur” during a recess, but as explained almost two hundred years ago, the Clause “may mean, also . . . ‘happen to exist.’” 1 Op. Att’y Gen. 631, 632 (1823). When “determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning,” courts look to “[l]ong settled and established practice” as a “consideration of great weight in a proper interpretation” of the Constitution’s text. *The Pocket Veto Case*, 279 U.S. at 688-90 (internal quotation marks omitted).

In this context, long-established practice—as well as the purpose of the Clause—precludes Petitioners’ interpretation. In 1823, Attorney General Wirt

concluded that “happen” should not be interpreted as “originate,” explaining that the Clause should be interpreted to permit the President to use his recess appointment powers to fill vacancies that predated the recess in question, or else the purpose of the Clause—and the President’s ability to execute the law—would be seriously impeded. *See* 1 Op. Att’y Gen. at 632-33. Properly construed, “all vacancies which . . . *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President.” *Id.* at 633 (emphasis added).²⁹ Since 1823, the Executive Branch has uniformly followed and acted in reliance upon this opinion against a backdrop of congressional acquiescence. *See Allocco*, 305 F.2d at 713 (offering citations to the “long and continuous line of [Attorney General] opinions” on this point, and noting that “Congress has implicitly recognized the President’s power to fill vacancies which arise when the Senate is in session by authorizing payment of salaries to most persons so appointed under the recess power”).

²⁹ Petitioners’ assertion (Br. 37-40) that the President has an incentive to make recess appointments *seriatim* ignores the temporary nature of such appointments. Many presidential appointments made with the advice and consent of the Senate, such as Article III judgeships, long outlast a single President’s tenure, and thus Presidents retain the incentive to compromise with the Senate in order to ensure the ability to get nominations confirmed. *See also Allocco*, 305 F.2d at 714 (concluding that “history is eloquent proof of Attorney General Wirt’s confidence that his interpretation of the recess power was ‘perfectly innocent,’” since there was no history of petitioner’s hypothesized presidential abuse of recess appointment power).

In light of this lengthy history and the purposes of the Recess Appointments Clause, it is unsurprising that Petitioners' crabbed interpretation of "happen" has been squarely rejected by all three courts of appeals to consider the argument. *See Evans*, 387 F.3d at 1226-27 (explaining that interpreting "happen" as happen to arise would "contradict[] . . . the purpose of the Recess Appointments Clause"); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *Allocco*, 305 F.2d at 709-15 (concluding such an interpretation of happen was "inconceivable" in light of Framers' intent and pointing to longstanding executive precedent). Petitioners offer no valid reason to disregard the purposes of the Recess Appointments Clause, to ignore almost two centuries of Executive Branch practice, and to create a split with the three courts of appeals to have addressed this question.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,933 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 27th day of September, 2012

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

DOUGLAS RICHARDS, et al.,)

Petitioners)

v.)

No. 12-1973

NATIONAL LABOR RELATIONS BOARD)

Respondent)

and)

UNITED STEEL, PAPER AND FORESTRY,)
RUBBER, MANUFACTURING, ENERGY,)
ALLIED INDUSTRIAL AND SERVICE)
WORKERS INTERNATIONAL UNION,)
AFL-CIO (USW))

Intervenor)

JOHN LUGO,)

Petitioner)

v.)

No. 12-1984

NATIONAL LABOR RELATIONS BOARD)

Respondent)

and)

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, AFL-CIO, et. al)

Intervenors)

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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

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