Nos. 11-3440, 12-1027 & 12-1936

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION

Intervenor

v.

NEW VISTA NURSING AND REHABILITATION, LLC

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petitions of New Vista Nursing and

Rehabilitation, LLC to review, a Board Decision and Order entered on August 26, 2011, and reported at 357 NLRB No. 69. (A7-11.)[1] The Board found that New Vista violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)), by refusing to bargain with SEIU United Healthcare Workers East, N.J. Region as the certified collective-bargaining representative of certain licensed practical nurses ("LPNs") employed at New Vista's Newark, New Jersey facility, and to provide the Union with requested information. (A9.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), authorizing the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board's Order is final, and the unfair labor practices occurred in Newark, New Jersey.

As the Board's Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 22-RC-13204) is before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the

[1] Record references are to the Joint Appendix ("A"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to New Vista's opening brief.

representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case consistent with the Court's ruling. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

The Board's application for enforcement and New Vista's petitions for review are timely. There is no statutory time limit for such filings.

ISSUE STATEMENT

1. Whether the Board properly certified the Union as the collective-bargaining representative of New Vista's LPNs, and therefore reasonably found that New Vista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union.

2. Whether the Board's August 26, 2011 final Order and its subsequent orders denying New Vista's motions for reconsideration are valid.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. In a separate case, *NLRB v. New Vista Nursing & Rehabilitation* (3d Cir. 12-3524), New Vista challenges the Board's recess appointments. That issue is also raised in another case before this Court—*1621 Route 22 West Operating Co. v. NLRB* (3d Cir. No. 12-3768). Challenges to the recess appointments and to the expiration of Member

Becker's term have also been raised in several cases in other Circuits, as well as cases in various district courts and before the agency. In addition, *1621 Route 22 West Operating Co. v. NLRB* (3d Cir. No. 12-1031) includes a challenge to the Board's delegation of authority to a three-member panel that includes one recused member.

STATEMENT OF THE CASE

This case involves New Vista's refusal to bargain with and provide information to the Union, after a majority of New Vista's LPNs selected the Union as their collective-bargaining representative in a Board-conducted representation election. (A7-9.) New Vista bases its refusal on its claim, which the Board rejected in the underlying representation proceeding, that the LPNs are supervisors under the Act. In the representation proceeding, the Board's Regional Director conducted a hearing at which the parties presented evidence concerning New Vista's supervisory-status claim. (A63-397.) His findings, and the Board's subsequent findings and orders in the representation and unfair-labor-practice proceedings, are summarized below.

I. FINDINGS OF FACT

A. Background: New Vista's Operations, Staff, and Organizational Structure

New Vista operates a nursing and rehabilitative care facility that accommodates around 340 residents on three floors, with each floor divided into

two units. (A850-51;23,30,77,220.) It employs nurses, who are either LPNs or registered nurses ("RNs"), and certified nurse aides ("CNAs") to staff each unit in shifts, so that residents are cared for 24 hours a day, 7 days a week. (A850-51;74,78-80.) On any given shift, a unit's nursing staff consists of one nurse (RN or LPN) and several CNAs. (A851;78.)

New Vista's 42 LPNs provide basic medical care to the residents in their respective units. (A851,854;82,84,220,332.) The CNAs perform more routine tasks including feeding, bathing, and dressing the residents. (A851,854;84.)

During the day shift, nurses and CNAs are under the supervision of three unit managers, one for each floor. (A850-51;78-81.) During the evening and overnight shifts, nurses and CNAs are under a nursing supervisor who serves all three floors. (*Id.*) The unit managers and nursing supervisors report to Director of Nursing ("DON") Victoria Alfeche, who is on-site from around 8:00 a.m. to 6:00 p.m. every day and available by telephone at all other times. (A850;75-76,174.)

B. Direction and Discipline of the CNAs

Given the routine nature of the CNAs' tasks, they are not under continuous supervision. (A854.) Instead, they log their activities in an "accountability book," which is periodically reviewed by the unit manager or clerical staff. (A853;307-13.) If a CNA has failed to log or complete an assigned task, the CNA may be subject to discipline. (*Id.*) Unit Manager Grace Tumamak, who manages the third

floor, has prepared warnings for CNAs, based on errors she detected in the accountability books. (A861;307-13.)

In addition, if an LPN discovers that a resident is receiving improper care from a CNA, the LPN may speak to her and assist her in correcting the problem. (A854;368-72.) If the problem persists, the LPN may report it to the unit manager, either orally or on a company-provided form. (*Id*.) CNAs can also report problems involving other CNAs to a unit manager. (A184-85,238-39.)

To report a problem, an LPN can fill out a warning form, previously called a Notice of Corrective Action, on her own initiative or a unit manager's instructions. (A855;422-23.) The LPN enters information only in the form's top section, describing the problem. (A872;229-30,266-67,354-55.) The LPN leaves blank the other sections of the form—including the section on disciplinary action—and submits the partially completed form to a unit manager. (*Id*.) At that point, the unit manager investigates the problem by soliciting written reports from the CNA and any witnesses, and gives the packet of information to DON Alfeche. (A191-98,209-12.)

Alfeche may return the packet to the unit manager for supplementation; otherwise, she reviews the CNA's file and determines the discipline to be imposed under New Vista's progressive disciplinary policy, which identifies the maximum allowable discipline for a first incident of misconduct and for subsequent offenses

of the same type. (A855;191-98,209-12,583-85.) Alfeche has discretion to impose discipline below the maximum. (A216-17.) She completes the process by entering the discipline she selected, signing the form, and presenting it to the CNA in the presence of a union representative. (*Id*.) There is no regular mechanism for LPNs who report misconduct to find out what discipline issued. (A861-62;191-98,209-12.)

II. THE PROCEEDINGS BELOW

A. The Representation Proceeding

On January 25, 2011, the Union filed a representation petition seeking certification as the LPNs' representative. (A848;62.) New Vista, opposing, maintained that the LPNs are supervisors and therefore cannot constitute an appropriate unit for collective bargaining. (A848.) Following a hearing, the Regional Director issued a Decision and Direction of Election, finding that New Vista failed to meet its burden of proving that the LPNs are supervisors. (A849,863,878;63-397.) He ordered a secret-ballot election in the petitioned-for unit. (A878.)

New Vista sought Board review of that Decision, reiterating only its claim that LPNs are supervisors because they allegedly discipline or recommend CNAs' discipline. (A881-96.) The Board (Chairman Liebman and Member Becker, Member Hayes dissenting) denied the request for review. (A911.) In the election,

LPNs voted 26 to 7 for the Union, with 4 challenged ballots—a number insufficient to affect the Union's victory. (A39.) Accordingly, the Regional Director certified the Union as the LPNs' representative. (A9;912.)

Thereafter, the Union asked New Vista to negotiate an initial collective-bargaining agreement, and sought information concerning the unit. (A9;40-41.) New Vista refused those requests in order to test the certification in an unfair-labor-practice proceeding. (A9;42.)

B. The Unfair-Labor-Practice Proceeding

Based on the Union's unfair-labor-practice charge, the Board's General Counsel issued a complaint alleging that New Vista violated the Act by refusing to bargain and to provide information. (A7;21,23-29.) New Vista admitted its refusal, and the General Counsel filed a motion for summary judgment, which New Vista opposed. (A7;30-38.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 26, 2011, the Board (Chairman Liebman, and Members Becker and Hayes) granted the General Counsel's motion, finding that all representation issues raised by New Vista "were or could have been litigated in the prior representation proceeding," and there was no other basis for reexamining that proceeding. (A7.) Accordingly, the Board found that New Vista violated Section

8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union. (A9.)

The Board's Order requires New Vista to cease and desist from the unfair labor practices found and from any like or related interference with employees' exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (*Id*.) Affirmatively, it requires New Vista to bargain with the Union upon request, and to embody any understanding reached in a signed agreement; and to furnish the requested information. (A9-10.)[2]

SUMMARY OF ARGUMENT

The Board reasonably found that New Vista failed to meet its burden of showing that its LPNs are supervisors under the Act. It failed to establish that the LPNs' purported authority to prepare warning forms and remove CNAs from the floor imbues them with supervisory status. Moreover, its claim that LPNs responsibly direct CNAs is not properly before the Court and, in any event, lacks merit because New Vista failed to show that LPNs are "responsible"—meaning accountable—for CNAs' work. As New Vista thus failed to carry its burden of proving that its LPNs are supervisors, its refusal to bargain and provide information is unlawful.

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[2] Thereafter, New Vista filed a series of motions for reconsideration, which the Board denied. (A12-18,51-61.) See below pp. 30-60.

New Vista mistakenly argues that the Board's unfair-labor-practice Order is invalid because it was not "issued" to the parties or posted on the Board's website until after the term of one participating Board member (Chairman Liebman) expired on August 27, 2011. The date on the draft—August 26, 2011—is the date on which all members had taken final action by voting on the final draft, and Chairman Liebman was indisputably on the Board that day. The validity of a Board order does not turn on whether all participating Board members remained for completion of such ministerial functions as service of the Order. New Vista has shown no irregularity that warrants questioning that the Board concluded its deliberative process and took final action as of that date.

New Vista's argument that the Board lacked a properly constituted quorum when it entered its December 30 reconsideration order similarly is incorrect. First, the Board's delegation of the reconsideration motion to a three-member panel is consistent with the text of Section 3(b) and the Board's longstanding practice when it has only three sitting members, one of whom is recused from a particular matter. Second, contrary to New Vista's position, Member Becker's recess appointment did not expire on December 17, 2011. (Br.49.) By operation of the Twentieth Amendment, and without regard to prior *pro forma* sessions, Becker's appointment did not terminate until midday on January 3, 2012—the end of the 112th

Congress's First Session. The Senate and Executive Branch agree on this point, and there is no basis to disregard the political branches' congruent views.

Finally, in attacking the Board's March 2012 orders, New Vista challenges the President's recess appointments of three Members on the Board at that time. But the President made those 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: it refers to a break from the Senate's usual business. The Senate regarded its 20-day January break as functionally indistinguishable from other breaks at which it is indisputably on recess.

New Vista claims that the Senate opined it was not on recess within the Clause's meaning, but that is not so. The Senate's only pertinent declaration was its unanimous order that it would not engage in any business whatsoever during the 20-day January break. In any event, New Vista mistakenly asserts that the Senate can transform a 20-day recess into a series of short non-recess periods—thereby unilaterally blocking the President from exercising constitutional powers—by having a lone Senator gavel in for mere seconds every few days for "pro forma sessions only, with no business conducted." New Vista's position would frustrate

the constitutional design, which ensures a mechanism for filling offices at all times. It would also upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments—a balance in which Senators either remain in session to conduct business, including providing advice and consent on presidential nominations, or leave 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

I. THE BOARD REASONABLY FOUND THAT NEW VISTA VIOLATED THE ACT BY REFUSING TO BARGAIN WITH AND PROVIDE INFORMATION TO THE UNION

A. The Board Properly Found that New Vista Failed To Meet Its Burden of Proving that the LPNs Are Supervisors

1. Applicable principles and standard of review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees …." An employer violates this provision not only by refusing to bargain outright, but also by refusing to provide its employees' representative with requested information relevant to collective bargaining. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). Here, New Vista has admittedly (Br.16,59) refused to bargain and provide information in order to challenge the Union's certification

as the LPNs' representative. New Vista specifically claims the LPNs are statutory supervisors, who are excluded from the Act's protections. *See* 29 U.S.C. § 152(3).

Section 2(11) of the Act (29 U.S.C. § 152(11)) states, in relevant part, that a "supervisor" is "any individual having authority, in the interest of the employer, to…discipline other employees, or responsibly to direct them … or effectively to recommend such action," provided that "the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Thus, individuals are statutory supervisors only if "(1) they have the authority to engage in a listed supervisory function, (2) their exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer." *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *accord Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In interpreting Section 2(11), the Board is mindful of the statutory goal of distinguishing truly supervisory personnel, who are vested with "genuine management prerogatives," from employees who enjoy the Act's protections even though they perform "minor supervisory duties." *Id.* at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)).

The party asserting supervisory status bears the burden of proving that status by a preponderance of the evidence. *Mars Home*, 666 F.3d 950, 854 (3d Cir.

2011). The assertion must be supported with specific examples, based on record evidence. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012). Conclusory or generalized testimony is insufficient to establish that individuals actually possess supervisory authority. *See, e.g.*, *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006). Nor is theoretical or "paper power"—as in a job description—sufficient to prove supervisory status. *Beverly Enters.-Mass, Inc. v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board's expertise and therefore subject to limited judicial review. *Mars Home*, 666 F.3d at 853. The Board's supervisory-status determination must be upheld so long as it is supported by substantial evidence, "even if [the Court] would have made a contrary determination had the matter been before [it] de novo." *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

2. New Vista failed to prove that its LPNs are statutory supervisors

New Vista claims that the 42 LPNs in the bargaining unit discipline or effectively recommend discipline of CNAs, and responsibly direct CNAs' work. (Br.61-72). For the reasons explained below, both claims must be rejected.

a. New Vista did not establish that LPNs discipline CNAs or effectively recommend their discipline

New Vista argues (Br.61-70) that its LPNs are supervisors because they prepare warning forms that can lead to CNA discipline, and they remove CNAs from the floor for insubordination. However, the Board reasonably found that the LPNs' role is purely reportorial, not disciplinary (A870), and that New Vista failed to establish that LPNs can remove CNAs from the floor (A877).

i. New Vista's limited evidence shows that LPNs only report misconduct

In arguing (Br.64) that its LPNs have authority to discipline CNAs, New Vista mainly relies on 33 warning forms purportedly prepared by LPNs over a 6½ year period. (A422-532.) New Vista, however, grossly overstates the import of these forms. As the Board found (A871-23), most were prepared by an individual who was not a regular LPN at any relevant time. Further, New Vista presented LPN testimony concerning only three forms, and it showed LPNs merely report CNA misconduct to unit managers or nursing supervisors, just as other employees (including CNAs) can do. Thus, as the Board found, the LPNs, whose authority does not extend beyond this reportorial function, "are barely on the margins of the disciplinary process." (A184-85,238-39,873.) As for the remaining forms, New Vista failed to present explanatory testimony from the individuals who purportedly prepared them.

First, the Board reasonably declined to rely (A871) on 19 of the 33 forms—prepared by Unit Manager Tumamak—because at all relevant times she occupied a position of greater authority than the unit LPNs. (A871;235-37.) Indeed, she was serving exclusively as unit manager when she prepared 8 of the forms. And she occupied a dual role—as unit manager on the day shift and LPN on the night shift—when she prepared the 11 remaining forms. (A235-37.) Testifying as to her role in preparing those 11 forms, Tumamak admitted to acting at times on her greater authority as a unit manager. (A871;303-08.) Given her testimony, it could not be determined which forms, if any, reflected her authority solely as an LPN. The Board therefore appropriately discounted the 19 forms initiated by Tumamak. (A871.)

Of the 14 remaining forms, New Vista presented LPN testimony concerning only 3, and the LPNs involved—Simon Ramirez, Marisol Roldan, and Abosede Adekanmbi—testified that they merely described incidents on the form's top portion. (A872;229-30,266-67,354-55,425,523-24,624.) They left blank the section for noting discipline or "action to be taken," and passed on to their managers partially completed forms containing only factual information. (A872;230,355-56,266-67,282-83.) Adekanmbi, moreover, admitted that she acted on Tumamak's express instructions. (A872;354-56.)

Far from contradicting the testimony of these LPNs, DON Alfeche confirmed that LPNs merely describe an incident and have no role in any ensuing disciplinary process. Thus, she testified that LPNs are not consulted or updated after submitting factual information, and are not present when discipline is issued. (A861-62.) Instead, Alfeche and the unit managers take over the partially completed forms, conducting their own investigation, determining the level of punishment, and issuing the discipline.

The evidence accordingly is clear that LPNs merely refer incidents to nurse managers who then take the action that they deem appropriate. Such "referrals [of misconduct], by themselves, do not establish disciplinary authority as a matter of law." *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000). Consistent with this principle, the Board found (A872) that the LPNs' involvement in this purely "reportorial" activity does not bespeak authority to discipline under the Act. *See Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 890 (1997) (factual accounts of misconduct on "warning" forms not disciplinary, but "merely reportorial" and not indicative of supervisory status); *accord NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147 (1st Cir. 1999); *Ten Broek Commons*, 320 NLRB 806, 812 (1996); *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989).

As the Board further found (A872-83), the record fails to support New Vista's related claim (Br.67) that LPNs "effectively recommend" discipline. There is no documentary evidence of any recommendation by an LPN. Although DON Alfeche conclusorily testified that LPNs effectively recommend discipline, and LPNs Ramirez and Roldan testified that, on occasions not captured by any documentary evidence, they recommended discharge, the Board reasonably found those vague and uncorroborated assertions unpersuasive. (A874;230-31,273-74.) *See Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority").

Not only do LPNs not recommend discipline, DON Alfeche's testimony clearly establishes that any incident they describe on a partially completed warning form is subject to independent investigation and review by nursing managers. And under Board precedent, "authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997); *see Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Thus, as the Board found, New Vista failed to establish that LPN reports of CNA misconduct on company-provided forms constitute effective recommendations of discipline.

Excluding the 19 forms prepared by Tumamak, the three forms testified to by LPNs Ramirez, Roldan, and Adekanmbi, and an additional form that post-dated the Union's petition (A876;422), New Vista is left with just 10 forms to establish its supervisory-status claim. As to those 10 forms, however, New Vista failed to present any testimony explaining their genesis by their purported authors. Consequently, New Vista could not explain why the forms contained different handwriting in the top and bottom sections, or why some forms were unsigned by any LPN. (A861,876;423,426,434,483,494,513-14,531,670,682.) Particularly given the three LPN witnesses' statements that they merely made factual reports, the 10 forms—barren of any testimony by the individuals who purportedly prepared them—do not enable New Vista to meet its burden of proving supervisory status.

As the Board also noted (A876), even assuming *arguendo* that the 10 reports constituted discipline or effective recommendation, such "a minor number of instances over a six-year period…[in] a bargaining unit of 42 LPNs" would not suffice to establish supervisory status. Contrary to New Vista (Br.62-64), the Board did not err in expressing reluctance to rely on such sparse evidence. To "avoid unnecessarily stripping workers of their organizational rights" (*Beverly Enters.-Mass*, 165 F.3d at 962), the Board appropriately exercises caution in evaluating evidence such as the 10 forms here, which suggest, at most, the exercise

of supervisory authority in a sporadic manner. *See Kanawha Stone Co.*, 334 NLRB 235, 237 (2001) (employee's sporadic exercise of supervisory authority over eight-year period did not make him a supervisor).

ii. New Vista erroneously relies on distinguishable cases

Notwithstanding the evidence that LPNs merely refer factual reports of misconduct to managers, New Vista insists (Br.63,65) that they are supervisors because they "initiate" a progressive disciplinary process that "can result" in job-affecting discipline. In so arguing, New Vista erroneously relies on *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 27-29 (2007), which found LPNs to be supervisors based on their role in a progressive disciplinary system far more defined than New Vista's. There the LPNs were not merely using company-issued forms to pass on factual reports of misconduct to managers. They were empowered to document employee infractions on counseling forms that corresponded to specific, progressive steps in a disciplinary system. Moreover, in *Oak Park*, an accumulation of counseling forms would automatically lead to suspension and ultimately discharge.[3] *Id*. at 28-29.

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[3] Similarly, in *Lakeland Health Care Assocs., LLC v. NLRB*, ___ F.3d ___, 2012 WL 4492836 (11th Cir. Oct. 2, 2012), the court, in concluding that team leader LPNs were supervisors, found that LPNs could independently issue "coachings" that automatically led to suspension and termination under the progressive disciplinary system. *Id*. at *4-5, *7.

By contrast, New Vista's warning forms do not correspond to specific disciplinary steps, and do not automatically lead to suspension or discharge. (A583-85.) *See The Ohio Masonic Home*, 295 NLRB at 394 (issuance of written warnings "that do not automatically affect job status or tenure" does not establish supervisory status). Instead, on paper New Vista's policy broadly sets forth maximum penalties, and in practice confers on DON Alfeche discretion to determine the level of discipline in any given instance. (A216-17,583-85.) In short, the record fails to show that New Vista has a defined progressive disciplinary system that "predetermine[s] discipline based solely on the receipt of a certain, set number of warnings." *Ten Broek Commons*, 320 NLRB at 809. Accordingly, New Vista cannot reasonably claim that its LPNs "lay[] the foundation" for future discipline as in *Oak Park*. 351 NLRB at 28-29. *Cf. Concourse Village, Inc.*, 276 NLRB 12 (1985) (progressive disciplinary policy expressly provided that receipt of three written warnings, issued independently by putative supervisors, would result in termination).

For similar reasons, New Vista errs (Br.67) in relying on *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998), and *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154 (3d Cir. 1999). There, unlike here, LPNs issued write-ups to CNAs that formally served as the first step in a progressive disciplinary system. The *Glenmark* court held, 147 F.3d at 344, that the write-ups were disciplinary actions

in themselves because they placed the CNA on a track that "automatically" called for certain defined disciplinary actions based on subsequent offenses, culminating in termination on the fourth offense.[4] This Court in *Attleboro* held, 176 F.3d at 158, 164-65, that the LPN-issued write-ups were at least effective recommendations of discipline, inasmuch as they played a definite role in a progressive disciplinary system similar to that in *Glenmark*, and included recommendations as to disciplinary action that were only "sometimes" reviewed by higher-level officials. By contrast, New Vista's LPNs neither complete nor issue warning forms to CNAs, and the forms they partially complete contain no disciplinary recommendations and are always reviewed by management officials.

Equally beside the point is New Vista's reference (Br.67-69) to cases addressing the possibility that nurses may exercise independent judgment in deciding whether to write up CNAs. Where, as here, the employer fails to prove that the putative supervisors exercise a Section 2(11) authority, there is no occasion to proceed to the question of independent judgment.

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[4] New Vista also errs in relying (Br.67) on *Glenmark*'s additional holding that LPNs in a separate facility with no progressive disciplinary system effectively recommended discipline. The Court there found, unlike here, that LPNs made recommendations while serving, "for a large portion of [the facility's] operating hours," as the highest ranking employees on site. 147 F.3d at 342.

iii. New Vista failed to show that LPNs can remove CNAs from the floor

To support its claim that LPNs are supervisors because they have authority to remove CNAs from the floor for insubordination, New Vista presented the testimony of two witnesses. The Board properly found, however, that their testimony failed to establish with the requisite specificity that LPNs actually possess such authority. *See Oil, Chem. & Atomic Workers*, 445 F.2d at 243 (requiring tangible examples of actual supervisory authority).

LPN Roldan testified that over 10 years ago, before New Vista owned the facility, she directed an insubordinate CNA to leave the floor and go to a supervisor's office. (A255-56.) She further testified that the CNA was later terminated on her recommendation, but she could not recall the CNA's name or any details. (*Id*.) Likewise, LPN Simon Ramirez testified that, over 3 years ago, he ordered an abusive CNA off the floor to speak with a supervisor, but he could not recall the CNA's name or the details of the incident. (A278.)

Given this "skeletal offering," the Board reasonably found (A877) that New Vista failed to prove that its LPNs can and do remove CNAs from the floor for insubordination. Although New Vista appears to challenge (Br.66,69) the Board's adverse finding on this point, it does not take issue with the Board's recitation of the meager testimony presented, nor does it claim that the Board overlooked other evidence.

b. The Court lacks jurisdiction to consider New Vista's meritless argument that LPNs responsibly direct CNAs

New Vista's argument (Br.70-72) that its LPNs are supervisors because they responsibly direct CNAs is not properly before the Court. New Vista failed to raise its argument to the Board in its request for review of the Regional Director's decision. *See* 29 C.F.R. § 102.67(b) (challenges to Regional Director's decision must be made in request for review). Consequently, the Court lacks jurisdiction to consider New Vista's responsible-direction argument. *See* 29 U.S.C. § 160(e) ("[n]o objection that has not been urged before the Board…shall be considered by the court" absent extraordinary circumstances); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (§ 160(e) imposes jurisdictional bar preventing court from considering issues not raised before the Board); *NLRB v. Konig*, 79 F.3d 354, 359 (3d Cir. 1996) (same).

In any event, New Vista's argument is meritless. For direction to be "responsible," the person giving it "must be accountable for the performance of the task by the other, such that some adverse consequence may befall [the person giving direction] if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691-92. *Accord Mars Home*, 666 F.3d at 854 (upholding this interpretation of responsible direction).

New Vista presented no evidence that LPNs have been disciplined, or faced the prospect of discipline, based on poor CNA performance. Of the 166 disciplines issued to LPNs over the years, not one is based on a failure to properly oversee faulty CNA work. (A869;379-80,683-847.) None of the five LPN witnesses testified that they had ever faced, or could face, discipline based on CNA performance. Even DON Alfeche could not identify a single instance where an LPN received discipline for that reason. (A188-89.) As for New Vista's assertion (Br.72) that Alfeche testified LPNs "can be disciplined for failure to supervise," the record contains no such testimony, and in any event such a generalized claim would not meet New Vista's burden of proof. *See Res-Care, Inc.*, 705 F.2d at 1467 (evidence "limited very largely to the administrator's general assertions" insufficient to show supervisory status).

In sum, the Board reasonably found (A863,878) that New Vista failed to meet its burden of proving the supervisory status of its LPNs. Accordingly, by refusing to bargain with and furnish requested information to the Union as the LPNs' representative, New Vista violated Section 8(a)(5) and (1) of the Act.

II. The Board's August 26, 2011 Final Order and Its Subsequent Orders Denying New Vista's Motions for Reconsideration Are Valid

A. The August 26 Order Is Valid

New Vista claims (Br.49-56) that the Board's August 26 Order is invalid because it was served on the parties and posted on the Board's website 3 business

days after Chairman Liebman's term expired. She was a member of the three-member panel to whom the Board delegated authority to decide the case. (A7). Thus, New Vista argues, when the Board's decision "issued," there was no valid panel. That claim is without basis.

As the Board explained, the date on the Order—August 26—"reflects the date on which all members had voted on the final draft," and therefore the date on which "final action was taken by the Board." (A13-14.) At that point, the decision "was ready for issuance to the public and service on the parties." (A13.) Thus, the three-member panel completed its deliberative process the day before Chairman Liebman's term expired on August 27. *See* NLRB, *Board Members Since 1935*, http://www.nlrb.gov/who-we-are/board/board-members-1935 (last visited Oct. 24, 2012).[5]

That some ministerial tasks, including service of the Order on the parties, occurred after Chairman Liebman's departure does not, as New Vista claims, render the decision invalid. As the Board explained, the interval between the date of the Board's final action and completion of certain "purely ministerial"

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[5] New Vista cites (Br.53,56) *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010), which held that the three-member group delegated all the Board's powers ceased to exist after the term of one of its members expired, and the group therefore could not act through the remaining two members. Unlike *New Process*—where the two remaining group members continued to decide cases long after the third member's departure (*see id.* at 2643 n.5)—here, the full delegee panel decided this case *before* Chairman Liebman's departure.

functions—such as reproduction, mailing and uploading the decision to the Board's website—did not affect the date "on which final action was taken by the Board." (A14.)

In so concluding, the Board properly relied on *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453 (D.C. Cir. 1967). There, the party challenged an administrative decision dated June 1, 1965, as invalid because it was served the following day, after the June 1 departure of one of three deciding board members. *Id.* at 459. The court rejected the argument that service of the decision the day after the board member's departure rendered the decision invalid, stating: "once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the ministerial act of service, of a member needed for a quorum." *Id. See also David B. Lilly Co. v. United States*, 571 F.2d 546, 547-49 (Ct. Cl. 1978) (quorum requirement satisfied where there was a valid quorum at completion of the "deliberative process," even though award was signed and mailed when only one board member remained).

New Vista questions the Board's statement that its deliberations were fully completed before Chairman Liebman left the Board, but fails to meet its heavy burden of demonstrating any impropriety by the Board. The proceedings and decisions of governmental agencies are entitled to a presumption of regularity. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Frisby v. HUD*,

755 F.2d 1052, 1055 (3d Cir. 1985). *See generally Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). To overcome this presumption, the challenging party cannot simply proffer unsubstantiated allegations, but must present "clear evidence" of irregularity on the part of the agency or its officers. *See Armstrong*, 517 U.S. at 464 ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"); *U.S. v. Chem. Found., Inc*., 272 U.S. 1, 14-15 (1926). *See also NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947) ("[W]e cannot reject [the Board's] explicit avowal that it did take into account evidence…unless an examination of the whole record puts its acceptance beyond reason.").

New Vista presented no irregularity that warrants questioning that the Board took final action before Chairman Liebman's term expired. The brief delay in service and other ministerial functions—all New Vista relies on—is not clear evidence that rebuts the presumption of regularity to which the Board is entitled. *See McLeod v. INS*, 802 F.2d 89, 95 n.8 (3d Cir. 1986) (presumption does not yield to claims that are "speculative and uncorroborated by objective evidence"); *Braniff*, 379 F.3d at 462 (court "cannot allow recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations").

Nor does *Braniff* support New Vista's claim that the "record of the vote" is "essential" to determine the validity of the Board's decision. (Br.50-51, 49, 53). The *Braniff* court, in determining that the board chairman was "a qualified member of the [b]oard when its deliberative process was completed"—the same day he was sworn in to a position in a different agency—relied on the facts that the "award on its face indicated that it was concurred in and signed on June 1" by the chairman and the other two board members, and that the chairman was sworn in to his new office only after presiding at the board's June 1 conference. 379 F.d at 459. Similarly, August 26—the date on the decision—is when "all members had voted on the final draft," and it is undisputed that Chairman Liebman's term expired the following day. (A13.)

There is no merit to New Vista's claim (Br.54-55) that regulations relating to Board meetings require the Board to maintain records that should be included in the record before the Court. As the Board has previously advised the Court,[6] there are no minutes in connection with the August 26, 2011 Decision and Order;[7] in any event, minutes are not part of the administrative record under applicable agency

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[6] Board's Opposition to Motion of New Vista for Remand etc., filed May 3, 2012.

[7] The Board here followed its routine practice of notational or sequential voting; therefore, there was no meeting and no "minutes." The Board, like other agencies, follows that practice consistent with its authority and responsibility to promote effective administration and enforcement of the Act.

regulations (29 C.F.R. 102.45(b), 102.68); and there is no basis for any supplementation of the record. *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997), is inapposite. *Alvarez* reaffirmed the general rule requiring a "strong showing of bad faith or improper behavior to justify supplementing the record." *Id*. at 624. As shown, New Vista has not made any such showing or otherwise overcome the presumption of regularity applicable to the Board's decision-making process.

B. The Board's December 30, 2011 Order Denying New Vista's First Motion for Reconsideration Is Valid

1. The Board properly delegated its authority to rule on the motion

New Vista (Br.57-58) challenges the validity of the Board's December 30, 2011 Order Denying Reconsideration of New Vista's first motion for reconsideration, claiming that the Board acted without the statutorily required quorum in delegating its authority to rule on the motion to a three-member panel. Contrary to New Vista, the delegation was consistent with the text of Section 3(b) of the Act (29 U.S.C. § 153(b)) and the Board's longstanding practice, which was recognized approvingly in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Section 3(b) sets forth the delegation and quorum requirements under which the Board operates, and states in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise …. [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

By its terms, the delegation clause in the first sentence authorizes the Board to delegate its authority to a three-member group. The group quorum provision provides that two members shall constitute a quorum of any such three-member group. *See New Process*, 130 S. Ct. at 2640.

When the December 30, 2011 Order issued, the Board had three sitting members—Chairman Pearce, Members Becker and Hayes. The Order explicitly states that the "Board has delegated its authority in this proceeding to a three-member panel." (A12). Chairman Pearce, noting his recusal, stated that he was a "member of the present panel but did not participate in deciding the merits of the proceeding." (*Id*. n.2.) Accordingly, Members Becker and Hayes, acting as a two-member quorum of that delegee group as provided by Section 3(b), issued the Order. (A12-14.)

In so proceeding, the Board followed its longstanding practice when it has only three sitting members, one of whom is recused from a particular matter. *See, e.g.*, *Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers, Local #5-N.J.*, 337 NLRB 168, 168 & n.4 (2001); *Cable Car Advertisers, Inc.*, 336 NLRB 927, 927 & n.1 (2001), *enforced*, 53 F. App'x 467 (9th Cir. 2002);

McDonnell Douglas Corp., 324 NLRB 1202, 1202 & n.4 (1997); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989). Each of those decisions issued when the Board had only three sitting members.[8] And in each case, the Board delegated its authority to a three-member panel, which included the recused member, who noted his or her nonparticipation on the merits, and the case was decided by a two-member quorum of the delegee group.

New Vista incorrectly argues (Br.57-58) that the Board's longstanding practice runs afoul of the Supreme Court's decision in *New Process* that Section 3(b) requires that the "delegee group maintain a membership of three in order to exercise the delegated authority of the Board." 130 S. Ct. at 2638, 2644. That argument fails on its own terms because, as just shown, the three-member group delegated the authority to decide this matter did maintain its membership of three, notwithstanding that one member was recused. And contrary to New Vista's position, the Supreme Court in *New Process* approvingly recognized the Board's practice of issuing decisions with a two-member quorum of a three-member delegee group when the third member was recused.

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[8] *See Board Members Since 1935*, National Labor Relations Board (last viewed Oct. 24, 2012), available at http://www.nlrb.gov/who-we-are/board/board-members-1935.

Thus, the *New Process* Court contrasted the situation before it—where the third member (of the group and the Board) leaves the Board—with the Board's "longstanding" practice when a member of the delegee group is recused. *Id.* at 2644. As the Court stated, "the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case …." *Id*. at 2641. The Court explained that, while Section 3(b) requires the Board's powers to be vested at all times in a group of at least three sitting Board members, the delegation clause of Section 3(b) "still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified," and that so reading the statutory language gives effect to all provisions of Section 3(b). *Id.* at 2640, 2644. As the Board noted, *New Process* left "undisturbed" the practice of proceeding in this manner. (A12 n.2.)

New Vista nonetheless argues (Br.58) that the Board's delegation was invalid because Chairman Pearce was "previously recused…and [therefore] could not participate in the decision to delegate to a panel." If New Vista is suggesting that Chairman Pearce did not actually participate in the delegation, that claim ignores the three-member Board's statement that it delegated its authority in this proceeding to the panel, and Chairman Pearce's statement that he was a member of

the present panel. New Vista provides no basis for looking behind those statements. *See* cases cited above pp. 27-28.

Nor did Chairman Pearce's recusal bar him from participating in the unfair-labor-practice proceeding for the limited purpose of delegating the motion to a three-member delegee group of which he is a member but not a participant in ruling on the motion. His limited participation here is no different from those of the recused Board members in the cases cited above pp. 31-32, which reflect the Board's longstanding practice where it has only three sitting members, one of whom is recused in a particular case.[9]

Construing Section 3(b) as permitting Chairman Pearce's limited participation is consistent with the common law "rule of necessity."[10] *See generally FTC* v. *Flotill Products, Inc.*, 389 U.S. 179, 183-186 (1967) (recognizing that Congress enacted statutes creating federal administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies). That rule

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[9] *Chamber of Commerce of the United States v. NLRB*, 2012 WL 1664028 (D.D.C. May 14, 2012), *appeal docketed*, No. 12-5250 (D.C. Cir. Aug. 13, 2012), upon which New Vista relies (Br. 56), is inapposite. That case did not involve the Board's longstanding panel delegation procedure approved in *New Process* and followed here. Rather the different issue presented and decided there was whether the third member needed to constitute a three-member quorum was either present for a vote on the merits or participated in deciding the merits.

[10] *See United States v. Will*, 449 U.S. 200, 213-216 (1980); *Atkins v. United States*, 556 F.2d 1028, 1036-38 (Ct. Cl. 1977).

enables an otherwise-recused member of a body to participate in the decision on the merits, in order to achieve a quorum. Thus, the rule of necessity may "require[] an adjudicatory body (judges, boards, commissions, etc.) with *sole or exclusive* authority to hear a matter to do so even if the members of that body have prejudged the results of a particular hearing." *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052 (5th Cir. 1997); *see also United States v. Will*, 449 U.S. 200, 213 (1980) (rule of necessity allows a judge, normally disqualified because he has a conflict of interest, to hear a case when "the case cannot be heard otherwise."); *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 593-94 (7th Cir. 1945) ("rule of necessity" applied to administrative agency with sole power to decide case); *Siteman v. City of Allentown*, 695 A.2d 888, 892 (Pa. Cmwlth. 1997) (court vacated city council resolution passed without a quorum, but remanded for council to apply rule of necessity and reconsider the case with quorum, including the recused members).

While the common law rule permits a disqualified adjudicator to participate in a decision on the merits, here Chairman Pearce's participation was more limited and tailored to procedures set out in Section 3(b). By participating only in the delegation of the case to the three-member panel, and not the decision on the merits, Chairman Pearce enabled the Board to issue a decision, by a two-member quorum, as permitted by Section 3(b) of the Act.

2. Member Becker's recess appointment did not expire before December 30, 2011

New Vista fares no better with its other argument that the Board lacked a quorum when it issued the December 30 order. That claim incorrectly contends Member Becker's term expired on December 17, 2011.

Under the terms of the Recess Appointments Clause, Becker's "Commission[] * * * expire[d] at the End of [the Senate's] next Session." U.S. Const. art II, § 2, cl. 3. Because Becker was appointed during the Second Session of the 111th Congress, *see* NLRB, *Members of the NLRB since 1935*, at http://www.nlrb.gov/members-nlrb-1935, his term did not expire until January 3—the end of the Senate's First Session of the 112th Congress.

The Senate and Executive Branch have uniformly expressed the understanding that this First Session ended midday on January 3, 2012—after the challenged NLRB order. *See* Senate of the United States, Executive Calendar (Jan 3, 2012), *available at* http://www.senate.gov/legislative/LIS/executive_calendar/2012/01_03_2012.pdf (indicating the First Session "adjourned January 3, 2012" at midday); *Entergy Mississippi, Inc.*, 358 NLRB No. 99, at 1 (2012) (explaining that Becker exercised authority as a Member until noon on January 3, 2012); *see also* 157 Cong. Rec. H10036 (daily ed. Jan. 3, 2012) (House of Representatives declaring "the first session of the 112th Congress adjourned").

New Vista's assertion that the Senate's First Session ended on December 17 is contradicted not only by the political branches' shared understanding, but also by longstanding congressional practice. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("traditional ways of conducting business give meaning to the Constitution"). As the Congressional Research Service explains, annual Senate sessions are terminated by a specific kind of adjournment, known as an adjournment *sine die* (literally, "without day"). Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 1 (Jan. 9, 2012).[11] And in the absence of a concurrent resolution authorizing such an adjournment, *sine die* adjournment is accomplished automatically by the Twentieth Amendment, which sets noon on January 3 as the date and time for commencement of the next legislative Session. *Id.* at 1-2 & n.5; U.S. Const., amend. XX, § 2. Indeed, the Senate itself (via the presiding officer) has acknowledged that when there is no resolution authorizing adjournment *sine die*, one annual session of the Senate automatically transitions into the next at noon on January 3. *See* 142 Cong. Rec. 1 (Jan. 3, 1996) ("The PRESIDENT pro tempore. The hour of 12 noon on January 3 having arrived, pursuant to the Constitution of the United States, the 1st session of the Senate in the 104th Congress has come to

[11] *See also R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1064 n.2 (9th Cir. 1997) ("Adjournment *sine die* means final adjournment for the session.").

an end ….”). And this practice applies not only to Sessions of the Senate, but to Sessions of Congress as well. *See* Wm. Holmes Brown, *et al.*, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, § 13, at 11 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf (“Adjournments *sine die* … are used to terminate the sessions of a Congress …. A session terminates automatically at the end of the constitutional term.”).[12]

The 112th Congress passed no concurrent resolution authorizing adjournment *sine die* of its First Session. Nor did the Senate purport to adjourn *sine die* on its own before January 3. Accordingly, the Senate’s Session and Becker’s term ended midday on January 3, and the Board had a quorum when it issued its December 30 order.

Contrary to New Vista’s assertion, the logic underlying the President’s January 4, 2012 recess appointments does not yield the conclusion that the Senate’s First Session “ended on December 17, 2011,” when the Senate

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[12] *See also* Deschler’s Precedents of the House of Representatives, H. Doc. 94-661, vol. I, § 2, at 8 (noting absence of *sine die* adjournment or relevant statute, and therefore concluding that “the 76th Congress, 3d session, terminated and the 77th Congress, 1st session, began at noon on Jan. 3, 1941, pursuant to the twentieth amendment”); General Accounting Office, *Matter of Commodity Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) (“It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session sine die or (2) operation of law, immediately prior to the beginning of the next session of Congress.”).

commenced its series of *pro forma* sessions. (Br.48.) The use of *pro forma* sessions does not affect the end of an annual Session of Congress, which is ended only through adjournment *sine die* or through the Twentieth Amendment's automatic commencement of the subsequent annual Session. Indeed, the Senate held *pro forma* sessions at the end of its Second Session in the 110th Congress, and when it adjourned the *pro forma* session on December 31, 2007, it expressly did so *sine die* pursuant to a previously-enacted concurrent resolution. *See* 153 Cong. Rec. 36,508 (2007) ("Under the provisions of [the resolution] the Senate stands adjourned sine die until Thursday, January 3, 2008."). Thus, even when the Senate engages in *pro forma* sessions, a concurrent resolution is still required to terminate the annual Session before January 3.

C. Members Block, Griffin, and Flynn held valid recess appointments when the Board issued its March 2012 orders

For the nearly three-week period between January 3, 2012 (the first day of the current Session) and January 23, 2012, the Senate was closed for business. Under the Senate's own adjournment order, adopted by unanimous consent, it could not provide advice or consent on Presidential nominations during that 20-day period. 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 had ordered that "no business" would be conducted during those sessions.

Just before this lengthy Senate absence, Craig Becker's recess appointment ended, *see supra* at 36-39. This brought the NLRB's membership below the statutorily mandated quorum, leaving the Board unable to perform significant portions of its congressionally-mandated mission. *See New Process Steel*, 130 S. Ct. at 2645. 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 Board members, ensuring that the NLRB's work could continue without substantial interruption.

These recess appointments were valid because the Senate was plainly in "Recess" at the time under any reasonable interpretation of that term. New Vista's contrary argument (Br.37-47) is rooted in a misunderstanding of the Recess Appointments Clause, and threatens to alter a longstanding balance of constitutional powers.

1. Under the well-established understanding of the Recess Appointments Clause, the Senate was on recess between January 3 and January 23

a. The Recess Appointments Clause gives 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. The Constitution gives the President the power to make appointments and, with respect to principal officers, ordinarily conditions such appointments on the Senate's advice and consent. *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).[13] The Framers therefore empowered the President to make temporary appointments when the Senate is on recess. This lets Senators return to their constituents instead of maintaining "continual residence … at the seat of government," as might otherwise have been required to keep offices filled.[14] The provision also reflects the constitutional design, and the Framers' understanding, that the President alone is "perpetually acting for the public," even

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[13] *See also* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833).

[14] 3 *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 409-10 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot's Debates) (James Madison); *see also* 5 Elliot's Debates 409-10 (Charles Cotesworth Pinckney).

in Congress's absence, because the Constitution continuously obligates the President to "take Care that the Laws be faithfully executed."[15]

The frequency of recess appointments underscores their importance. 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 of recesses and in their final days, and to fill vacancies that arose during recesses and those that arose before them. Even as Senate recesses have become comparatively short, Presidents have continued to invoke the Recess Appointments Clause routinely, confirming the Clause's critical role in the Constitution's allocation of powers.[16] And 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) (holding the recess appointment power extends to an eleven-day intrasession recess, 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) (holding

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[15] 4 Elliot's Debates 135-36 (Archibald Maclaine) (explaining that power "to make temporary appointments … can be vested nowhere but in the executive"); U.S. Const. art II, § 3.

[16] *See Mistretta*, 488 U.S. at 401 ("[T]raditional ways of conducting government give meaning to the Constitution." (quotations and alterations omitted)); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions[.]").

the power extends to vacancies that arose before the recess and to Article III appointments); *United States v. Allocco*, 305 F.2d 704, 705-706 (2d Cir. 1962) (same).

b. New Vista's 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 voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (explaining that the Framers "must be understood to have employed words in their natural sense, and to have intended what they have said"). 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).

In the founding era, 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" in the Recess

Appointments Clause is thus a break in the Senate's usual business, such as when Senators return to their respective States, as the Framers anticipated.

The settled understandings of the Executive Branch and Senate are consistent with that plain meaning. The Executive Branch has long maintained that the Clause authorizes appointments when the Senate is not open to conduct business and thus not providing advice and consent on nominations. More than 90 years ago, Attorney General Daugherty described the inquiry as a functional one:

> [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). That test has been reaffirmed repeatedly. *See* 13 Op. O.L.C. 271, 272 (1989).

The Legislative Branch has maintained a similar view. In a seminal 1905 report, the Senate Judiciary Committee expressed an understanding of "Recess" that also looks to whether the Senate is open 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). The Senate's parliamentary precedents continue to cite this report as authoritative. *See* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992).

c. The Senate's 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:

> 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).[17] And tellingly, messages from the President and the House were not laid before the Senate, nor 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) (noting presidential

[17] Because this order was adopted by unanimous consent, it could only be rescinded 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).

message "received during adjournment of the Senate on January 12, 2012"). The Senate was thus on a declared and actual break from business throughout this 20-day period.

2. The Senate's use of *pro forma* sessions, with no business to be conducted, did not eliminate the President's recess appointment power

a. New Vista does not claim that the Senate conducted regular business during the January break. Nor does it suggest that a 20-day break is too short to constitute a "Recess." Instead, it claims that intermittent and fleeting *pro forma* sessions preclude treating this period as a "Recess" because such sessions transformed the Senate's 20-day break into a series of much smaller breaks. (Br.32-33,43.)

But these *pro forma* sessions were nothing like regular working Senate sessions. Instead, they were (as their name suggests) technical formalities whose principal function was to allow the Senate to cease business for 20 days. The *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that "no business" would be conducted, as the Senate itself ordered. [18]

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[18] Even if this Court concluded that the only relevant Senate recess occurred between January 3 and 6, that three-day break would support the President's appointments in the circumstances of this case. That 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—of Senate absence and announced inactivity.

January 6 was typical. 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, as typically occurs during regular Senate sessions.[19] 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.[20]

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

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[19] *Compare, e.g.*, 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011). *See also id.* at S8783-84 (explaining that "the prayer and pledge" would be required only during the January 23, 2012, session).

[20] *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.[21] Since 2007, however, the Senate has frequently used *pro forma* sessions to permit breaks from business during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.[22]

Whatever the reason for this innovation, the change does not alter the Recess Appointments Clause analysis. The orders providing for *pro forma* sessions are functionally indistinguishable from concurrent adjournment resolutions: both let the Senate cease business for an extended period, thereby enabling Senators to return to their respective States without the risk of missing Senate business while away. The only difference is that one Senator remains in the Capitol to conduct 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 away on

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[21] Congress regards this 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).

[22] The Senate had previously, on isolated occasions, used *pro forma* sessions when it could not agree 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, however, commenced at the end of 2007, and has continued frequently since. *See* 148 Cong. Rec. 21,138 (Oct. 17, 2002); Congressional Directory for the 112th Congress 536-38 (2011).

"Recess" as the term has long been understood. The 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 21-22, 25 (emphasis in original); *accord* S. Rep. No. 58-4389, at 2.

There is no question that under this well-established standard the Senate was away on recess notwithstanding the periodic *pro forma* sessions. 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 "technical meanings" unknown to ordinary citizens when interpreting constitutional terms. *Heller*, 554 U.S. at 577.

b. New Vista urges that the Senate was "available" for business during its *pro forma* sessions, noting that it previously passed legislation by unanimous consent during a session originally intended to be *pro forma*. (Br. 33,45; *see also* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011)). But the Senate passed no legislation during the 20-day recess in January 2012, and so this Court need not determine whether such action could interrupt an ongoing recess.

Furthermore, the mere theoretical possibility that the Senate *could* have passed legislation or acted on nominations (though only by unanimous consent) provides no basis for distinguishing the January 2012 recess from many other adjournments that are plainly recesses under the Recess Appointments Clause. Indeed, New Vista's logic would place virtually *all* recesses outside the Clause's scope, since concurrent adjournment resolutions typically give Congress a mechanism for reconvening before the recess ends, and the Senate has used that authority to pass legislation during what initially had been indisputable "Recesses." *See, e.g.*, 156 Cong. Rec. S6995, S6996-7 (daily ed. Aug. 12, 2010) (recalling Senate during recess scheduled by concurrent resolution[23] to pass legislation by unanimous consent). In fact, before the recess appointment at issue in *Evans*, the Senate had adjourned under a resolution that expressly allowed for early reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004). The *en banc* Eleventh Circuit nonetheless upheld that appointment. *Evans*, 387 F.3d at 1222.

3. New Vista's other arguments are meritless

a. New Vista urges that the Senate itself "determined that it was … not in recess from January 3-23, 2012," pointing to the existence of Congressional Record entries for the *pro forma* sessions. (Br.44.) But those entries are not a formal Senate determination about the meaning of the Recess Appointments

[23] 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010).

Clause.[24] 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.[25] The Senate did, however, formally order that "no business [be] conducted" during the *pro forma* sessions, and New Vista makes no attempt to address that order.

Furthermore, the Senate itself *expressly referred* to its absence as a "recess." *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (authorizing committee reports "notwithstanding the Senate's recess"); *ibid* (authorizing Senate leadership to take various actions "notwithstanding the upcoming recess or adjournment of the Senate"). That the Senate referred to a "recess" is no surprise, given the Senate's own longstanding interpretation of the Recess Appointments Clause, discussed above.

New Vista similarly errs by invoking the Rules of Proceedings Clause. (Br.43,45.) As noted, the Senate as a body passed no rule or resolution stating that

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[24] 44 U.S.C. § 903, which simply directs the printing of the Senate's "public proceedings" in the Congressional Record, also does not purport to interpret the Recess Appointments Clause.

[25] Individual Senators' statements do not constitute a Senate determination. *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 Senate Legal Counsel to assert Senate's interest in litigation as *amicus curiae* only upon a Senate resolution).

the Senate was not on recess for purposes of the Recess Appointments Clause. And in any event, the Rules of Proceedings Clause gives the Senate authority to establish rules governing merely *internal* legislative processes and "only empowers Congress to bind itself." *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983). That authority cannot unilaterally control constitutional interpretation or determine the consequences of Senate action on a coordinate branch's powers; Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892).[26]

In fact, because the recess appointments here were an exercise of Executive authority under Article II, not Legislative power under Article I, the President's determination that his authority existed is entitled to some deference. *See Evans*, 387 F.3d at 1222 ("[W]hen 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*, 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"). Indeed, in 1980, a legislative officer

[26] New Vista incorrectly asserts that "the meaning of ambiguous congressional rules is nonjusticiable." Br. 24. *See, e.g.*, *United States v. Smith*, 286 U.S. 6, 33 (1932) (explaining that Congressional rules are subject to judicial review when they affect interests outside the Legislative Branch). In any event, no ambiguous "meaning" requires interpretation because the Senate's order was quite clear—sessions were to be *pro forma* only with no business conducted. The only issue is the constitutional significance *outside* the Senate for its unambiguous actions.

approvingly cited 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." *See In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980).[27]

Finally, New Vista mistakenly relies (Br.45) on *United States v. Ballin*. The question there—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by 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. But the journals here provide no "conclusive evidence" (Br.22) of New Vista's position. To the contrary, the journals *reinforce* the conclusion that the Senate was on recess, as they contain the Senate order declaring that no business be conduct, and also demonstrate that the Senate in fact conducted no business.[28]

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[27] This view has long historical roots in the Senate. *See, e.g.*, 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (noting 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 reasoning the President is accordingly "the judge" of when that authority may be exercised); *id.* at 707-08 (April 1, 1814) (Sen. Horsey) ("[S]o far as respects the exercise of the [Executive's] qualified power of appointment, … the Senate have no right to meddle with it."). Senators' Bibb and Horsey's view prevailed against a movement to censure President Madison. *See* Irving Brant, JAMES MADISON: COMMANDER IN CHIEF 1812-1836, at 242-43 (1961).

[28] *United States v. Smith* is even less helpful to New Vista. *Smith* recognized that it is "essential … that each branch be able to rely upon definite and formal notice of

b. Even assuming the Senate made a formal determination as New Vista posits, effectuating such a determination would frustrate the Constitution's design and upend a long-standing balance of power between the Senate and President. Such a disruption should be avoided. *See Morrison v. Olson*, 487 U.S. 654, 695 (1988).

The constitutional structure requires the Senate to make a choice: either 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 "suspen[d] … business," II Webster, *supra* at 51, or allow members to return to their States free from the obligation to conduct business, whereupon the President is constitutionally authorized to make recess appointments. This constitutional balance is evidenced by past compromises between the President and the Senate over recess appointments.[29] For example, in 2004, the political branches reached a compromise "allowing confirmation of dozens of President Bush's judicial

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action by another" and warned against the "uncertainly and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of a Senate communication. 286 U.S. 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.

[29] *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 culminating in negotiated agreements between the Senate and President).

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: the President received assurance that the Senate would act on his nominations, while Senators could cease business and return to their respective States without losing the opportunity to provide "advice and consent."

Under New Vista's view, however, the Senate would have had little incentive to so compromise, because it always possessed the unilateral authority to prevent recess appointments by simply holding *pro forma* sessions. Indeed, under New Vista's 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 does not support that view. To the contrary, the Senate had never before 2007 even arguably purported to be in session for Recess Appointments Clause purposes, while simultaneously and officially away for purposes of conducting business. That historical record "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).

Furthermore, this case vividly illustrates the separation of powers problems stemming from New Vista's position. If the Senate could prevent the President from filling Board vacancies while simultaneously being absent to act on nominations, the Board would have been unable to perform significant portions of its statutory mission during the Senate's absence, thus preventing the execution of a congressional act and performance of an office "established by Law," U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional balance of powers, 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 appointments here leaves in place the established—and balanced—constitutional framework. Recess appointments are only temporary, expiring "at the End of [the Senate's] next Session." U.S. Const. art. II, § 2, cl. 3. And the Senate retains authority to vote on the Board nominations (which remain pending), and also could have remained in session to conduct business, thereby removing the predicate for the President's recess appointment power.

Since the appointments at issue here, the President and Senate have resumed using the political process to reach inter-branch accommodation. 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.

c. New Vista raises several additional points in passing, none of which has merit. First, New Vista discusses the President's power to recall the Senate. (*See* Br.47.) It is unclear why the President would need to recall the Senate if it were already in session ready to conduct its business. Regardless, that recall power exists even during undisputed "Recess[es] of the Senate," and its existence has never been thought to diminish the President's recess appointment authority.

Second, New Vista's discussion of *Wright v. United States*, 302 U.S. 583 (1938)—a case addressing the scope of the Pocket Veto Clause, not the Recess Appointments Clause—wrongly assumes that the relevant recess here was "a mere temporary gap in proceedings of no more than three days." (Br.46.) New Vista fails to account for the Senate's express provision that no business be conducted for 20 days.

Third, New Vista relies on the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4, and suggests that because the House of Representatives did not expressly consent to the Senate's adjournment for more than three days during January, there could not have been a "Recess of the Senate" within the meaning of the Recess Appointments Clause. (Br.43.) But this Court is not presented with the question whether the Senate complied with the Adjournment Clause, and need not decide that issue. And New Vista identifies nothing in the Constitution's text or structure that supports 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 its separate text, history, and purpose.

Moreover, the Adjournment Clause relates primarily, if not exclusively, to the Legislative Branch's internal operations and obligations. Congress's view whether *pro forma* sessions satisfy that Clause's requirements may thus be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violation of that Clause.[30] In contrast, the Recess

[30] The Senate at least once previously violated the Adjournment Clause, over several days in 1916. The only apparent recourse was to the House, which declined to take action. *See Riddick's Senate Procedure*, Adjournment at 15. If this Court were forced to confront whether the Senate's *pro forma* sessions satisfied the Adjournment Clause—which, again, it is not—there is reason to conclude that the sessions do not comply with that Clause. The central purpose of the Adjournment Clause is to ensure the Houses' simultaneous presence in the

Appointments Clause defines the scope of 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.

Fourth, the government has not "conceded … that the pro forma session of the Senate on January 3, 2012" was significant in transitioning the 112th Congress from its First to Second Session. (Br.45.) To the contrary, as explained above, *see supra* pp. 37-39, the First Session ended by automatic operation of the Twentieth Amendment, not because of any *pro forma* session.[31]

Fifth, and finally, New Vista cites a passing reference by the Solicitor General in the course of a letter principally addressed to other subjects. (Br.33-34.) That reference was in no way aimed at definitively resolving the issue in this case. The Department of Justice has since conducted a thorough examination of the legal implications of the Senate's practice of providing for *pro forma* sessions at

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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). 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, is in tension with that purpose.

[31] The Twentieth Amendment requires Congress to "assemble at least once in every year" on January 3, unless that date is varied by law. The question whether the *pro forma* session held on January 3 in fact satisfied that "assembl[y]" requirement is not presented here, and in any event, the relevant recess commenced on January 3 after the start of the 112th Congress's Second Session.

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* Department 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).[32] The Department's position here is entirely consistent with that analysis.

[32] *Accord* 16 Op. O.L.C. 15, 15 n.1 (1992) (noting that aside from a "brief formal session on January 3" at which no business was conducted, Senate had been in recess since November 27, 1991). While the Department in that opinion considered the recess in question to be 18 days long, *id.* at 16, it also observed that "[f]or practical purposes with respect to nominations, this recess closely resembles one of substantially greater length." *Id.*

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying New Vista's petitions for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner/Cross-Respondent and 1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION Intervenor v. NEW VISTA NURSING AND REHABILITATION, LLC Respondent/Cross-Petitioner	)	Nos. 11-3440 12-1027 12-1936 Board Case: 22-CA-29988

COMBINED CERTIFICATIONS REGARDING
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In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Milakshmi V. Rajapakse certifies that she is a member in good standing of the bar of the District of Columbia Court of Appeals. She is not required to be a member of this Court's bar, as she is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,987 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007. Further, the

Board certifies that the hard copies of the brief submitted to the Court and counsel are identical to the electronically filed copy of the brief.

Finally, the Board certifies that the electronic copy of the brief filed with the Court in Portable Document Format (PDF) has been scanned for viruses using Symantec Endpoint Protection, version 11.0.7000.975, and no virus has been detected.

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Dated at Washington, D.C.
this 25th day of October 2012

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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