Nos. 12-2000 & 12-2065

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HUNTINGTON INGALLS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART F. DELERY
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

ROBERT J. ENGLEHART
Supervisory Attorney

DANIEL A. BLITZ
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-3823

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Huntington Ingalls, Inc. ("Huntington") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order of the Board issued on August 14, 2012, and reported at 358 NLRB No. 100. (A.1402-04)[1] In its Decision and Order, the Board found that Huntington 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)) ("the Act"), by refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") as the bargaining representative of a unit of Huntington's employees. (*Id.*) The Union intervened on the side of the Board.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because the

[1] "A." refers to the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Huntington's opening brief, and "ABr." refers to the brief of amici curiae.

unfair labor practice occurred in Virginia. Huntington's petition for review and the Board's cross-application were timely filed; the Act places no limit on such filings.

The Board's unfair labor practice order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 5-RC-16292), which is reported at 357 NLRB No. 163 (2011). (A.1241-58.) Pursuant to Section 9(d) of the Act (29 U.S.C. §159 (d)), the record before this Court therefore includes the record in that proceeding. *See also Boire v. Greyhound Corp*., 376 U.S. 473, 477-79 (1964). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board" but does not give the Court general authority over the representation proceeding. 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 in a manner consistent with the ruling of the Court in the unfair labor practice case. *See, e.g., Freund Baking Co*., 330 NLRB 17, 17 & n.3 (1999).[2]

[2] *But see NLRB v. Lundy Packing Co*. 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy*'s holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases, but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been

STATEMENT OF THE ISSUES PRESENTED

1. Whether a 20-day period in which the Senate had ordered that "no business" be conducted constituted a "Recess of the Senate" under the Constitution's Recess Appointments Clause.

2. Whether the Board acted within its discretion in determining that a unit of Huntington's radiological and other technicians who perform a safety function at the nuclear shipbuilding facility in Newport News, Virginia, constitutes an appropriate unit for collective bargaining. If so, then the Board properly found that Huntington violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the duly certified representative of those employees.

STATEMENT OF THE CASE

Huntington refused to recognize and bargain with the Union after the Board certified the Union as the exclusive bargaining representative of a unit of approximately 140 radiological control technicians ("RCTs"), 3 calibration technicians, 20 laboratory technicians, and 60 RCT trainees, all of whom work in

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considered by a reviewing court. *See, e.g., Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981). Should the Court disagree with the Board's unit determination, the Board asks that the case be remanded for further processing consistent with the Court's opinion. *See NLRB v. Local 347*, 417 U.S. 1, 8 (1974) (holding appeals court should have remanded question of remedy to the Board rather than deciding the issue).

Huntington's E85 Radiological Control Department in the Nuclear Services Division ("E85 RADCON").[3] The Board found that Huntington's refusal was unlawful. (A.1402-04.)

Huntington does not dispute that it refused to bargain. Instead, it contests the contours of the bargaining unit that the Board found appropriate, claiming that the unit should have included all 2,400 technical employees employed by Huntington at its shipyard. Huntington also asserts that the Board lacked a quorum to issue its Decision and Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Huntington's Operations and Organization

Huntington, formerly Northrop Grumman Shipbuilding, operates a shipyard in Newport News, Virginia, where it employs 18,500 individuals, and constructs, refuels, and overhauls nuclear-powered aircraft carriers and submarines for the U.S. Navy. Constructing a vessel takes about 6 years, and is a complex endeavor involving thousands of employees. After several years of service, a nuclear-powered carrier or submarine must be refueled and overhauled, which takes Huntington up to 3 and 1/2 years to complete, and involves refueling the ship's

[3] E85 RADCON also includes approximately 15 dosimetry techs and approximately 18 health physics techs. Neither party seeks to include these employees in the unit. (A.1252.)

nuclear reactor. (A.1241,1250;A.21,78,82,84,86-87,111,114,247-49.) A substantial proportion of Huntington's shipyard is also engaged in non-nuclear construction work. (A.1246,1254,1256-57;A.242.)

Huntington has organized its operations into several divisions. The Nuclear Services Division has numerous departments, and each department has its own supervisory hierarchy. (A.1250;A.29,239-42.) As is relevant to the present case, the RCTs, calibration technicians, laboratory technicians, and RCT trainees in the E85 RADCON department are the employees in the unit that the Board found appropriate. (A.1241,1250,1403;A.1261.)

B. Overview of Huntington's Work Force

Huntington classifies approximately 2,400 of its employees as technical employees. Technical employees perform non-manual work requiring some sort of specialized training. (A.1241,1250-51;A.81,155.) Huntington groups its technical employees in the following job classifications: RCTs, quality inspectors, test technicians, engineering technicians, dimensional control technicians, laboratory technicians, chemical handlers, and calibration technicians. (A.1241&n.2,1250-51;A.81.) All technical employees are salaried and receive the same benefits. (A.1251;A.42,134,250.)

C. To Ensure Employees' Radiological Safety, and To Comply with Radiological Protocols, Huntington Employs RCTs Located Exclusively in E85 RADCON

As noted above, as part of its operations, Huntington constructs, refuels, and overhauls nuclear-powered aircraft carriers and submarines. The power source for these vessels is an onboard nuclear reactor. Construction and refueling work can generate radiation and contaminated radiological materials. Therefore, Huntington must maintain proper safety and comply with relevant protocols. (A.1253;A.88,102-03.) Radiological oversight is required about 4 to 6 months before Huntington finishes building a carrier, and 2 months before Huntington finishes building a submarine. And it is typically necessary from the beginning of the refueling process. (A.1250;A.103,111.)

Huntington follows an overall radiological control philosophy called "As Low as Reasonably Achievable," or ALARA. Having RCTs in place who function independently to ensure radiological safety and oversight—as Huntington does—is a core component of ALARA. Huntington's E85 RADCON department, with approximately 140 RCTs, provides radiological oversight at the shipyard that is independent of both production and quality control. (A.1241;A.104,743-44.)

RCTs ensure that employees working in radiological areas follow the requirements of Huntington's radiological control program. To accomplish this,

they maintain radiological control areas, where they determine whether employees should be allowed to enter and they screen those entering. They also perform radiological surveys, which involves testing for contaminants. (A.1241,1253;A.44-46,49,52-53,97,104,106,172,968.) RCTs are uniquely trained and qualified to perform their radiological control tasks, and they use specialized equipment and tools. (A.1253;A.44,50,55-57,1006-17.)

D. The E85 RADCON Department Also Includes Laboratory Technicians, Calibration Technicians, and RCT Trainees, Whose Work Supports RCTs

The E85 RADCON department also includes approximately 20 laboratory technicians, 3 calibration technicians, and 60 RCT trainees. These employees essentially provide support for the RCTs' work. Thus, all of these employees, along with the RCTs, are in the same department, work under the same supervisory hierarchy, and work toward achieving radiological safety at the shipyard. Laboratory technicians test samples collected by RCTs, calibration technicians calibrate RCTs' tools, and RCT trainees perform some of the same tasks RCTs perform. (A.1242,1252-53;A.54,99-100,170-71.) All of these employees are qualified to use the specialized tools RCTs use. (A.1315;A.54,916-17.)

E. RCTs' Work Contacts with Other Technical Employees Are Infrequent

As stated above, RCTs screen all employees who seek entry to radiological control areas. These work-related contacts are generally brief and limited to

screening and monitoring. RCTs have the greatest degree of work-related contact with production and maintenance employees and other non-technical employees. (A.1254,1257;A.217,967-69,971,973.)

At certain stages during refueling overhauls and during the final months of new ship construction, RCTs have some increased contact at control points with other technical employees—mostly quality inspectors and test techs, but also designers and engineering techs. RCTs' contact with all employees—including technical employees—at control points is brief and involves screening and monitoring them, not working together to perform technical or production-related jobs. (A.1242,1254;A.49,111,469,534,536-37,971,1063.)

II. THE BOARD PROCEEDINGS

A. The Representation Proceeding

The Union petitioned the Board to represent the RCTs in E85 RADCON. (A.1240-50;A.1.) In the alternative, the Union agreed to proceed to an election in a departmental unit of all technical employees in E85 RADCON. (A.1249-50&n.4.) Huntington argued that the smallest appropriate unit had to include all of its 2,400 technical employees. (A.1333.)

Following a hearing, the Board's Regional Director for Region 5 ("RD") issued a Decision and Direction of Election ("DDE"), on May 29, 2009, finding that a unit consisting of RCTs, calibration technicians, lab technicians, and RCT

trainees in E85 RADCON, was appropriate for purposes of bargaining. Specifically, the RD, applying the standard described *TRW Carr Division*, 266 NLRB 326 (1983) ("*TRW Carr*"), and related cases (A.1249-58,1293-1320), found that the above-mentioned employees in E85 RADCON had a community of interest sufficiently distinct from other technical employees at Huntington's shipyard, such that the technical employees in E85 RADCON constituted an appropriate unit as a subset of Huntington's 2,400 technical employees. *See TRW Carr*, 266 NLRB at 326 n.4 (a subset of an employer's technical employees is appropriate "only when the employees in the requested unit possess a sufficiently distinct community of interest apart from other technicals to warrant their establishment as a separate appropriate unit").

Huntington requested Board review of the DDE, contending that, under *TRW Carr* and related cases, an appropriate unit must include all 2,400 technical employees. The Board granted the request for review on July 30, 2009, and reaffirmed the order granting review on August 27, 2010. (A.1240;A.1322-23.)

While the decision on review was pending, the Board, on August 26, 2011, issued its decision in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077 (2011) ("*Specialty*"), *petition for review pending sub nom. Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 12-1174 (6th Cir. oral arg. sch. Jan. 23, 2013). In *Specialty*, the Board clarified the

standard for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group (based on job classifications, departments, functions, work locations, skills, or similar factors) that shares a community of interest. Under that standard, an employer seeking to expand the unit must demonstrate that employees in the larger unit "share an overwhelming community of interest with those in the" otherwise appropriate unit. *Specialty*, 2011 WL 3916077, at *15.

On December 30, 2011, the Board issued a Decision on Review and Order, affirming the RD's finding in this case that the unit is appropriate. The Board found that, under the *Specialty* standard, the unit is appropriate. (A.1243-44.) The Board also found, as an alternative basis for its conclusion, that the unit is appropriate under the standard applied in *TRW Carr* and related cases. (A.1244-46&n.8.)

The unit employees voted for representation in a Board-conducted election, and the Board subsequently certified the Union as their exclusive representative for purposes of collective bargaining. (A.1260-61.)

B. The Unfair Labor Practice Proceeding

Following certification, Huntington refused to comply with the Union's bargaining request in order to contest the validity of the certification. The Union filed a charge, and the Board's Acting General Counsel issued a complaint alleging

that Huntington's refusal was unlawful. The Acting General Counsel subsequently filed a motion for summary judgment, which Huntington opposed, claiming that the unit must include all technical employees. Huntington also argued—for the first time—that the Board had erred in applying *Specialty* to the case, and that *Specialty* was wrongly decided. Finally, Huntington argued that the Board lacked a quorum to issue its Order. (A.1403.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 14, 2012, the Board (Chairman Pearce and Members Hayes and Griffin) issued a Decision and Order granting the motion for summary judgment, finding that Huntington's refusal to bargain was unlawful. (A.1402-04.)

The Board first concluded that Huntington's contentions about *Specialty* were untimely, because Huntington could have raised these arguments in a motion for reconsideration of the Board's December 30, 2011 representation decision, but did not do so. The Board further stated that, in any event, Huntington's contentions about *Specialty* were without merit. (A.1402&n.6.)

The Board also concluded that all other representation issues raised by Huntington in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that Huntington neither offered to adduce any newly discovered or previously unavailable evidence, nor

alleged the existence of any special circumstances that would require the Board to reexamine its representation decision. (A.1402-03&n.3.)

Finally, the Board rejected Huntington's other claims—that is, its challenge to the President's recess appointments, and its argument that the complaint was ultra vires—for the reasons set forth in *Center for Social Change, Inc*., 358 NLRB No. 24 (2012), 2012 WL 1064641, *petition for review pending*, Nos. 12-1161, 12-1214 (D.C. Cir.) (A.1402&n.4.)[4]

The Board's Order requires Huntington to cease and desist from its unlawful conduct and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 (29 U.S.C. § 157) rights; and to take affirmative action, including bargaining with the Union and posting a remedial notice. (A.1403-04.)

SUMMARY OF ARGUMENT

1. Huntington challenges the Board's authority to issue its August 14, 2012, Order, contending that the Board lacked a quorum because the President's recess appointments of three of the five Board Members acting at the time of that order were invalid. Huntington's claim is mistaken. The President made these appointments on January 4, 2012, during a 20-day period in which the Senate had

[4] In its opening brief, Huntington no longer argues that the complaint was "ultra vires." Accordingly, Huntington has waived this argument. *See, e.g., NLRB v. Daniels Constr. Co*., 731 F.2d 191, 193 (4th Cir. 1984).

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.

Huntington is incorrect that the Senate opined that it was not on recess within the meaning of that Clause. In fact, the Senate issued orders that declared the January break to be a "recess" and structured the Senate's affairs based on that understanding. In any event, the Senate cannot transform a 20-day recess into a series of short non-recess periods—thereby blocking the President from exercising his constitutional appointment authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designated "*pro forma* sessions only, with no business conducted."

Moreover, Huntington's position would frustrate the constitutional design that ensures the continuous availability of a mechanism for filling vacant offices. It would also upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments. The Constitution requires Senators to either stay in session and available to conduct

business, thereby precluding the President's use of his recess appointment power, or suspend business (presumably to leave the Capitol), thereby allowing the President to make recess appointments of limited duration. Huntington's position, if adopted, would upset this balance by allowing the Senate to declare itself on recess, while escaping the consequences of that declaration.

2. The technical employees in Huntington's E85 RADCON department, who perform the safety monitoring function at the nuclear shipbuilder, chose union representation. Huntington refused to bargain because it insisted that the bargaining unit must include all of its 2,400 technical employees. But the Board acted well within its discretion in certifying the unit.

First, the Board reasonably determined that the E85 RADCON technical employees were a readily identifiable group that shared a community of interest. an appropriate unit. Huntington does not dispute this finding. Then the Board found that Huntington failed to meet its burden of showing that its other technical employees share an overwhelming community of interest with these employees, such that the other technical employees must be included in the unit for it to be an appropriate one. The Board's application of that heightened standard, recently clarified in *Specialty*, comports with the Board's prior jurisprudence in this area. The standard represents a reasonably defensible construction of the Act, which gives the Board broad discretion to make unit determinations.

Huntington attacks only the *Specialty* standard, not its application here, arguing that it was "inconsistent" with the Act for various reasons. The Court is jurisdictionally barred from considering the arguments because Huntington failed to raise them before the Board at the appropriate point in the Board proceedings. In any event, the challenges are without merit. Finally, there is no merit to Huntington's argument that the Board's retroactive application of *Specialty* here resulted in a "manifest injustice."

Huntington also argued that the Board should apply a distinct test for analyzing unit determinations exists, citing *TRW Carr* and a related line of cases involving technical employees. The Board declined to reach the question of whether such a test exists, or survives *Specialty*, but nonetheless, applying the cases cited by Huntington, found that the result in this case would not be different and that a unit of E85 RADCON employees was equally appropriate under this test.

ARGUMENT

I. MEMBERS GRIFFIN, BLOCK AND FLYNN HELD VALID RECESS APPOINTMENTS WHEN THE BOARD ISSUED ITS AUGUST 14, 2012, ORDER

Huntington is incorrect that the Board lacked a quorum when it issued the August 14, 2012, order. Br. 19-22. On January 3, 2012, the first day of its current annual Session, the Senate adjourned and remained closed for business for nearly

three weeks, until January 23. Under the terms of the Senate's own adjournment order, it could not provide advice or consent on Presidential nominations during that 20-day period.[5] Messages from the President were neither laid before the Senate nor considered. The Senate considered no bills and passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in business with periodic *pro forma* sessions that involved a single Senator and lasted for literally seconds, it ordered that "no business" would be conducted at those times.

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

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[5] The President had nominated Terence Flynn to be a Board Member in January 2011. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). Sharon Block and Richard Griffin were nominated in December 2011. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

These appointments were valid because the Senate was plainly in "Recess" at the time under any reasonable understanding of the term. Huntington's argument to the contrary is rooted in a misunderstanding of the meaning and purpose of the Recess Appointments Clause that—if adopted by this Court—would frustrate the purpose of the Clause and substantially alter the longstanding balance of constitutional powers between the President and the Senate.

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

1. The Recess Appointments Clause confers on the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution's careful balancing of powers required of our democracy. The Constitution confers on the President the power to make appointments and, with respect to principal officers, ordinarily conditions such an appointment on the advice and consent of the Senate. *Id.* art. II, § 2, cl. 2. But the Framers also created a second appointment process in recognition of the practical reality that the Senate could not (and should not) be "oblig[ated] . . . to be continually in session for the appointment of officers" and the need there always be available a mechanism for filling offices. *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *see also id.* (noting the possibility of

vacancies "which it might be necessary for the public service to fill without delay").[6] The Framers therefore provided for the President to make appointments of limited duration when the Senate is on recess. The provision for recess appointments frees Senators to return to their constituents (and families) instead of maintaining "continual residence . . . at the seat of government," as might otherwise have been required to ensure appointments could be made.[7] This provision reflects the constitutional design and the Framers' understanding that the President alone is "perpetually acting for the public," even in Congress's absence, because the Constitution obligates the President at all times to "take Care that the Laws be faithfully executed."[8]

2. Huntington'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

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[6] 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot's Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

[7] 3 Elliot's Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining undesirability of requiring the Senate to "be perpetually in session, in order to provide for the appointment of officers").

[8] 4 Elliot's Debates 135-36 (Archibald Maclaine) (explaining that the power "to make temporary appointments . . . can be vested nowhere but in the executive"); U.S. Const. art II, § 3.

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

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

The settled understandings of the Executive Branch and the Senate of the term "Recess" are consistent with that plain meaning. The Executive Branch has long maintained the view that the Clause authorizes appointments when the Senate is not open to conduct business and thus unable to provide advice and consent on

Presidential nominations. Attorney General Daugherty explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is present and open for business:

> [T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

33 Op. Att'y Gen. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

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

> It was evidently intended by the framers of the Constitution that [the word "recess"] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. . . . [The Recess Appointments Clause's] sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

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

3. The President properly determined that the Senate's 20-day break between January 3 and January 23, 2012, fits squarely within the well-established understanding of the term "Recess." By its own order, the Senate had provided by unanimous consent that it would not conduct business during this entire period. The relevant text of the Senate order provided:

> Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).[9]

[9] This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the final weeks of the First Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the Second Session began, per the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of this

Orders like this one, adopted by unanimous consent, "are the equivalent of 'binding contracts' that can only be changed or modified by unanimous consent." Walter Oleszek, Cong. Res. Serv., The Rise of Unanimous Consent Agreements, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008); *see also* Riddick's Senate Procedure at 1311 ("A unanimous consent agreement changes all Senate rules and precedents that are contrary to the terms of the agreement, and creates a situation on the Senate floor very different from that which exists in the absence of such agreement."). Thus, the Senate could have conducted business during its January 2012 break only if it reached subsequent agreement to do so by unanimous consent. Moreover, even if a majority of Senators had wanted to conduct business during the January break, a single Senator could have prevented the Senate from doing so by objecting. *See* United States Senate, Senate Legislative Process, at http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm ("A single objection ('I object') blocks a unanimous consent request."). This was a crucial feature of the Senate's order because it thereby gave Senators firm assurance that they could leave the Capitol without concern that the Senate would conduct business in their absence.

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transition. In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

Indeed, the Senate itself specifically and repeatedly referred to the January break as a "recess or adjournment," and arranged its affairs based on that understanding. For example, at the same time as it adopted the no-business order described above, the Senate made special arrangements for certain appointments during the January "recess or adjournment":

> [N]otwithstanding *the upcoming recess or adjournment of the Senate*, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards, conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate.

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (emphasis added); *see also ibid.* (providing that "*notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters" (emphasis added)). The Senate has taken similar steps before long recesses that are not punctuated by *pro forma* sessions,[10] which indicates that the Senate viewed its January 2012 recess as equivalent to such recesses.

That the Senate was in recess during this extended period in January is further underscored by the fact that messages from the President and the House of

[10] *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010) (providing for appointment authority before an intrasession recess expected to last for thirty-nine days); 153 Cong. Rec. S10991 (daily ed. Aug. 3, 2007) (same, recess of thirty-two days).

Representatives 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) (laying before the Senate report from the President "received during adjournment of the Senate on January 12, 2012"); *id.* (laying before the Senate message from the House received "on January 18, 2012"). Thus, any nomination sent by the President to the Senate during this 20-day break would not even have been formally presented to the Senate during this time. The Senate also specifically identified January 23 as the next date it would vote on a pending nomination. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

As the Supreme Court has explained, it is "essential . . . that each branch be able to rely upon definite and formal notice of action by another" and warned against the "uncertainty and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of a Senate communication. *United States v. Smith*, 286 U.S. 6, 35-36 (1932). The Senate here declared it would conduct "no business" between January 3 and 23, and referred to the January break as a "recess." Thus, given the Senate's declared and actual break from business over this 20-day period, the President plainly possessed the authority to exercise his recess appointment power.

4. Huntington fails to address the longstanding interpretation of the Constitution's text by the Senate and Executive Branch. It does not claim that the Senate was conducting business at any point during the January break. Nor does it suggest that a 20-day break in business is too short to constitute a recess for purposes of the recess appointment power. Instead, Huntington mistakenly asserts that intermittent and fleeting *pro forma* sessions, held pursuant to a Senate order that no business be conducted, had transformed this 20-day period into a series of three-day breaks, and that the President was therefore precluded from treating the full period as a "Recess of the Senate." Br. 21

Huntington's logic fails, however, because the *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done, *i.e.*, that "no business" would be conducted under the Senate's own prescription. Indeed, the very label "pro forma" that the Senate used confirms that those session was only a "matter of form," rather than indicating any substantive availability of the Senate. The *pro forma* session on January 6 was typical. A virtually empty Senate Chamber was gaveled into *pro forma* session by Senator Jim Webb of Virginia. No prayer was said and the Pledge of Allegiance was not recited, as typically occurs during regular daily Senate sessions.[11] Instead, an

[11] *Compare* 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) *with* 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); *see also id.* at S8783-84 (daily ed.

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.[12] These sessions allowed the Senate to assume compliance with the constitutional requirement that it not adjourn for more than three days without concurrence of the House,[13] a matter irrelevant for the Recess Appointments Clause analysis. *See infra* pp.36-39.

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

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Dec. 17, 2011) (making clear that "the prayer and pledge" would be required only during the January 23, 2012, session).

[12] *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).

[13] U.S. Const., art. I, § 5, cl. 4.

Senate to cease business over that time.[14] Since 2007, however, the Senate has, instead, regularly used *pro forma* sessions to allow for recesses from business during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.[15]

This procedural innovation does not alter the application of the Recess Appointments Clause. For purposes of determining if the Senate is out on recess, the adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions: both allow the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their

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[14] Congress regards the concurrent resolution process as satisfying the Adjournment Clause, which provides that "[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days." U.S. Const., art. I, § 5, cl. 4; *see* John Sullivan, Constitution, Jefferson's Manual and Rules of the House of Representatives, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011).

[15] The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when it was unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate's *regular* use of *pro forma* sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued frequently since. *See* 148 Cong. Rec. 21,138 (Oct. 17, 2002); *see generally* Congressional Directory for the 112th Congress 536-38 (2011) [hereinafter "Congressional Directory"]. Indeed, since August 2008, the Senate has, on five different occasions, used *pro forma* sessions to permit breaks in business in excess of thirty days. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (describing breaks of 31, 34, 43, 46 and 47 days punctuated by pro forma sessions).

respective States without concern that business could be conducted in their absence. The only difference is that one Senator remains in the Capitol to gavel in and out the *pro forma* sessions, but no other Senator need attend and "no business [may be] conducted." That single difference does not affect whether the Senate is on "Recess" as the term has long been understood. The 1905 Senate Report makes clear that there cannot be a "constructive session," any more than there can be a "constructive recess." S. Rep. No. 58-4389, at 2. The core inquiry remains focused on whether "the members of the Senate owe … [a] duty of attendance? Is its Chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?" 33 Op. Att'y Gen. at 25; *accord* S. Rep. No. 58-4389, at 2.

Under this well-established standard, the Senate was on recess from January 3 to January 23. The *pro forma* sessions were part and parcel of the Senate's 20-day recess—its ongoing "suspension" of the Senate's usual "business or procedure," II Webster, *supra* at 51—not an interruption of that recess. To conclude otherwise would "give the word 'recess' a technical and not a practical construction," would "disregard substance for form," 33 Op. Att'y Gen. at 22, and would flout the Supreme Court's admonition to exclude "secret or technical meanings that would not have been known to ordinary citizens in the founding

generation" when interpreting constitutional terms. *Heller*, 554 U.S. at 577.[16]

B. Huntington's Countervailing Arguments Are Meritless

1. Huntington suggests that the Senate determined that it was *not* on recess on January 4, urging that it "voted to remain in continuous session." Br. 21. Based on that view of the Senate's actions, Huntington suggests (*id*. at 22) that under the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, the Senate's "definitions of its own actions are controlling."

The Rules of Proceedings Clause does not aid Huntington here. As an initial matter, the Senate's decision to engage in *pro forma* sessions does not constitute a Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no contemporaneous rule or resolution setting forth the conclusion that the Senate was not on recess for purposes of the Clause. Indeed, as noted above, the only formal statements from the Senate were its order that there would be "no business conducted" during its *pro forma* sessions and the other orders declaring its January

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

break to be a "recess."[17] And, as explained, the recess appointments here are entirely consistent with the Senate's own longstanding interpretation of the Recess Appointments Clause.

Apart from Huntington's failure to point to a "Rule" defining the January break not to be a recess, the Rules of Proceedings Clause in any event provides the Senate with authority only to establish rules governing the Senate's "*internal* matters." *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (emphasis added); *see also id.* (noting that the Clause "only empowers Congress to bind itself"). The Senate's exercise of that authority cannot unilaterally control the interpretation of the Constitution or determine the consequences of the Senate's action on the authority of a coordinate Branch, as Huntington suggests (Br. 28-29). The Supreme Court has made clear that Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892).[18] Thus,

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[17] Individual Senators' statements regarding whether *pro forma* sessions preclude recess appointments do not constitute a Senate determination on that score. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those "authorized to represent their respective Houses of Congress"); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate's interest in litigation as amicus curiae only upon a resolution adopted by the Senate).

[18] Congressional rules are thus subject to judicial review when they affect interests outside of the Legislative Branch. *See Smith*, 286 U.S. at 33 (1932) ("As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."); *Vander Jagt v.*

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

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

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O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.").

necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate." *See In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att'y Gen. 20 (1921)).[19]

2. Even assuming the Senate had made the formal determination that Huntington suggests, allowing such a unilateral legislative determination to disable the President from acting under the Recess Appointments Clause would frustrate the Constitution's design to ensure the existence of a mechanism for filling offices at all times, and would upend a long-standing balance of powers between the Senate and President. The Supreme Court has repeatedly condemned congressional action that "disrupts the proper balance between the coordinate

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

branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Accepting Huntington's position would do just that, by allowing the Senate to effectively eliminate the President's recess appointment power.

The constitutional structure requires the Senate to make a choice: either the Senate can remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to perform its function of advice and consent; or it can "suspen[d] . . . business," II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This view is evidenced by past compromises between the President and the Senate over recess appointments.[20] For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal*

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

made on judicial recess appointments, May 19, 2004. These political accommodations allowed both Branches to vindicate their respective institutional prerogatives: they gave the President assurance that the Senate would act on his nominations, while freeing the Senators to cease business and return to their respective States without losing the opportunity to provide "advice and consent."

Under Huntington's view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate always possessed the unilateral authority to divest the President of his recess appointment power through the simple expedient of holding fleeting *pro forma* sessions over any period of time. Indeed, under Huntington'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 provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 (when it began providing for *pro forma* session during absences that it historically would have taken per a concurrent resolution of adjournment) even arguably purported to claim or exercise the power to simultaneously be in session for Recess Appointments Clause purposes 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).

The separation-of-powers concerns raised by Huntington's position are vividly illustrated by this case. If, as Huntington urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, there would have been a vacuum of appointment authority and the Board would have been unable to carry out significant portions of its statutory mission during the Senate's entire absence, thus preventing the execution of a duly passed Act of Congress and the performance of the function of an office "established by Law," U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional balance of powers, which ensures that all Branches can carry out their duties, including the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

In contrast, giving effect to the President's recess appointments here leaves in place the established constitutional framework and the accumulation of interests based on it. A mechanism for making appointments remained available while the Senate was closed for business. The President's recess appointments are only temporary, "expir[ing] at the End of [the Senate's] next Session." U.S. Const. art. II, § 2, cl. 3. The Senate retains authority to vote on the Board nominations, which

remain pending before it. More broadly, the Senate has the choice it has always had between remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President's recess appointment power, or ceasing to conduct business (and being free to leave the Capitol) knowing that the President may make temporary appointments during that period.

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

3. Huntington likewise misconstrues the relevance of the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4. That Clause provides that "[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. Huntington argues (Br. 21) that because "the House of Representatives never gave its consent to a Senate adjournment longer than three days" during the January break, the Senate could not have been on recess for purposes of the Recess Appointments Clause.

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

Moreover, the Adjournment Clause relates primarily, if not exclusively, to the internal operations and obligations of the Legislative Branch. With respect to internal matters, Congress's view as to whether *pro forma* sessions satisfy the requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violation of that Clause.[21] In contrast, the Recess 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.

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[21] The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick's Senate Procedure at 15 (noting that "in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it").

Even if this Court were forced to squarely confront the Adjournment Clause issue—which, again, it need not do—it would have to determine whether the Senate "adjourn[ed] for more than three days" within the meaning of that clause, and, if the Senate did so adjourn, whether it was "without the Consent of the other," *i.e.*, the House of Representatives. U.S. Const. art. I, § 5, cl. 4. Accepting *arguendo* Huntington's unexplained contention that whether the President exceeded his authority under the Recess Appointments Clause necessarily turns on whether the Senate complied with the Adjournment Clause, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The basic purpose of the Adjournment Clause is to furnish each House of Congress with the ability to ensure the simultaneous presence of both Houses of Congress so that they can conduct legislative business, by forcing each House to get the consent of the other before departing. *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (explaining the Adjournment Clause was "necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will."). As explained above, the Senate made itself unavailable to do business between January 3 to 23, 2012.

Assuming the Senate thus had "adjourn[ed]" within the meaning of the Adjournment Clause, the question whether there was a violation of the Clause then would depend on whether the House of Representatives "Consent[ed]" to the Senate order providing for its January recess; any such consent by the House would mean that there was no violation of the Adjournment Clause by the Senate. That, however, would be an issue for resolution by the House of Representatives or between the two Houses, not for this (or any) Court. Here, the House was aware that the Senate adopted an order to not conduct business during the January break. Rather than objecting to that order, the House adopted its own corresponding resolution permitting the Speaker to "dispense with organizational and legislative business" over roughly that same period of time (January 3 to January 17). *See* H. Res. 493, 112th Cong. (2011). Whatever the implications of that course of events for purposes of the relationship between the two Houses under the Adjournment Clause, the Senate's declared and actual break in business between January 3rd and 23rd was a "Recess of the Senate" for purposes of the President's authority under the Recess Appointments Clause.[22]

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[22] Huntington does not raise other arguments that have been raised in other challenges to these recess appointments, and those arguments are therefore waived. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999). For example, in other cases, challengers have urged that Senate was not out on recess during its January break because it had previously passed legislation by unanimous consent during a December session originally intended to be a *pro forma* session

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT A UNIT OF RADIOLOGICAL AND OTHER TECHNICIANS WHO PERFORM A SAFETY FUNCTION AT HUNTINGTON'S NUCLEAR SHIPBUILDING FACILITY CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING, AND THEREFORE PROPERLY FOUND THAT HUNTINGTON VIOLATED THE ACT BY REFUSING TO BARGAIN

Section 8(a)(5) of the Act makes it unlawful for an employer "to refuse to bargain collectively with the representative of [its] employees." 29 U.S.C. § 158(a)(5). Huntington does not dispute that it refused to bargain with the Union. Rather, it contends (Br.17) that the bargaining unit was inappropriate because it did not include all of Huntington's technical employees.

In the instant case, the Board concluded that the unit sought by the Union was appropriate on two alternative grounds. Specifically, as the Board stated, "under *either* the framework described in *Specialty Healthcare*, or the 'sufficiently distinct community of interest' standard applied in *TRW Carr*, et al., a unit of RCTs and other E85 RADCON technical employees is" appropriate. (A.1246,1402). Because the Board's unit finding was not an abuse of discretion,

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with no business conducted. *See, e.g.*, Br. of Pet'r at 46-47, *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153 (D.C. Cir. Sep. 19, 2012). As the Board has explained, however, the passage of legislation during an earlier recess does not in any way alter the character of the January 2012 recess, during which the Senate passed no legislation. *See, e.g.*, Br. of NLRB at 40-43, *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153 (D.C. Cir. Nov. 1, 2012).

Huntington's refusal to bargain violated Section 8(a)(5) and (1) of the Act.[23] *See Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 533 (4th Cir. 1999).

A. The Court Gives Considerable Deference to the Board's Finding of an Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to "decide in each case whether, in order to assure the employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *Id.* § 159(b). The Supreme Court, in construing that section, has stated that the determination of an appropriate unit "lies largely within the discretion of the Board, whose decision, if not final is rarely to be disturbed . . . ." *South Prairie Constr. Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976); *accord Fair Oaks Anesthesia Assoc., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992). Further, "the Board is possessed of the widest possible discretion in determining the appropriate unit." *See, e.g., Sandvik*, 194 F.3d at 534; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978).

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[23] A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 n.4 (4th Cir. 1998).

Section 9(b), however, does not direct the Board how it is to decide in a given case whether a particular grouping of employees is appropriate. Accordingly, the Board's selection of an appropriate unit "involves of necessity a large measure of informed discretion." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit, the Board focuses on whether the employees share a "community of interest." *Specialty Healthcare & Rehab. Ctr. Of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, *petition for review pending sub nom. Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 12-1174 (6th Cir. oral arg. sch. Jan. 23, 2013); *accord Sandvik*, 194 F.3d at 535.

The Board's decision must be upheld as long as it approves *an* appropriate bargaining unit. Nothing in the Act requires "that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.'" *See, e.g., Overnite Transp. Co*., 322 NLRB 723 (1990); *Morand Bros. Beverage Co*., 91 NLRB 409, 418 (1950). The Supreme Court has stated that "employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). The focus of the Board's determination

begins with the unit sought by the petitioner, because, under Section 9(d) of the Act, "the initiative in selecting an appropriate unit resides with the employees." *Id.*

Further, "[i]n many cases, there is no 'right unit' and the Board is faced with alternative appropriate units." *Corrie Corp. of Charleston v. NLRB*, 375 F.2d 149, 154 (4th Cir. 1967); *see also Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 618 (4th Cir. 2002); *Arcadian Shores*, 580 F.2d at 119. It is within the Board's discretion to select among different potential groupings of employees in determining an appropriate unit. *See Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992).

Therefore, an employer challenging the Board's unit determination "has the burden to prove that the bargaining unit selected is 'utterly inappropriate.'" *Sandvik*, 194 F.3d at 534 (citation omitted). "A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008); *accord Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees "share an overwhelming community of interest" with the employees in the otherwise appropriate unit, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421.

As we now show, under the standard described in *Specialty*, or the preexisting standard described in *TRW Carr* (which was the alternative basis for

the Board's conclusion), the Board did not abuse its discretion in finding the unit appropriate.

B. Under *Specialty*, the Board Reasonably Determined that a Unit Limited to the Technical Employees Who Perform a Safety Function at the Nuclear Shipbuilding Facility Is Appropriate

1. The Board properly found, and Huntington does not dispute, that the unit employees share a community of interest

To begin, the record evidence fully supports the Board's initial finding, under *Specialty*, that a unit of RCTs, calibration technicians, laboratory technicians, and RCT trainees in E85 RADCON are "readily identifiable as a separate group" and share a community of interest based on the Board's traditional inquiry. (A.1243.) As the Board stated in *Specialty*, "in determining whether employees in a proposed unit share a community of interest, the Board examines" the following factors:

> Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the [e]mployer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty, 2011 WL 3916077, at *14 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

Here, the Board reasonably found that the RCTs, calibration technicians, laboratory technicians, and RCT trainees are "readily identifiable as a separate group" and share a community of interest. As the Board explained, these employees are all located in E85 RADCON, work under common supervision, and share a *unique* function, which distinguishes them from all other technical employees—namely, to provide independent oversight of radiation exposure. The Board further described how the employees in E85 RADCON perform this distinct function at the shipyard. Thus, RCTs monitor employees and collect samples when appropriate. They rely, in turn, on lab techs to analyze the samples they collect and on calibration techs to keep their instruments in proper conditions. RCT trainees assist RCTS and operate limited control checkpoints. Additionally, many of the laboratory techs in E85 RADCON used to be RCTs. (A.1243,1256.)

Significantly, as the Board noted (A.1243), before the Board, Huntington did not even challenge the finding that these employees are readily identifiable as a group and share a community of interest (nor does it challenge it before this Court). Thus, the Court has no jurisdiction to consider this issue. *See* Section 10(e) (29 U.S.C. § 160(e)) of the Act ("no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here).

2. The Board acted within its discretion in applying the overwhelming community-of-interest test to determine whether all other technical employees have to be included in the unit

In addressing Huntington's argument that the unit must include all 2,400 technical employees, the Board applied the standard, clarified in *Specialty*, for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest. Under that standard, an employer seeking to expand the unit must demonstrate that employees in the larger unit "share an overwhelming community of interest" with those in the otherwise appropriate unit. *Specialty*, 2011 WL 3916077, at *15.

Huntington's claim that the Board abused its discretion in applying this standard is without merit. Thus, it is settled that the Act requires only *an* appropriate unit. *American Hosp. Ass'n*, 499 U.S. at 610. As the Board stated in *Specialty*, "it cannot be that the mere fact that [employees in the otherwise-appropriate unit] also share a community of interest with additional employees [thereby] renders the smaller unit inappropriate." *Specialty*, 2011 WL 3916077, at *15. Because a unit need only be *an* appropriate unit, it "follows inescapably" that simply demonstrating that another unit would also be appropriate "is not sufficient to demonstrate that the proposed unit is inappropriate." *Id*.

Although different language has been used over the years, the Board has consistently required a heightened showing from a party arguing for the inclusion

of additional employees in a unit that shares a community of interest.[24] And the overwhelming-community-of-interest standard is not new to unit determinations. The Board has applied it many times over the years. *See, e.g.*, *Academy LLC*, 27-RC-8320, Decision and Direction of Election, at 12 (2004) *Lanco Constr. Sys., Inc*., 339 NLRB 1048, 1050 (2003); *Lodgian, Inc*., 332 NLRB 1246, 1255 (2000).[25]

Moreover, the D.C. Circuit endorsed the overwhelming-community-of-interest standard in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008), where an employer challenged the Board's unit determination. There, the Court observed, that "excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit." *Id.* at 421. The Court recognized

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[24] *See, e.g., Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, 2010 WL 3406423, at *1 n.2 (2010); *United Rentals, Inc.*, 341 NLRB 540, 541-42 (2004); *Engineered Storage Prods*., 334 NLRB 1063, 1063 (2001); *Lawson Mardon, U.S.A*., 332 NLRB 1282, 1282 (2000); *JC Penney Co*., 328 NLRB 766, 766 (1999); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967).

[25] *See also Thomas Motors of Ill., Inc.*, 13-RC-021965, Decision and Direction of Election, at 5 (2010), *available at* www.nlrb.gov/case/12-RC-021965; *Stanley Assocs*., 01-RC-022171, Decision and Direction of Election, at 14 (2008), *available at* www.nlrb.gov/case/01-RC-022171; *Breuners Home Furnishings Corp*., 32-RC-4603, Decision and Direction of Election, at 9 (1999), *available at* ww.nlrb.gov/case/32-RC-004603.

that an employer must demonstrate that an otherwise appropriate unit is "truly inappropriate," which it can do by showing that "there is no legitimate basis on which to exclude certain employees from it" because the excluded employees "share an overwhelming community of interest" with the included employees. *Id*.

This Court has applied a similar standard, holding an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest. In *Sandvik Rock Tools v. NLRB*, a union petitioned to represent workers in an employer's chemical products division. 194 F.3d at 533. Like here, the employer admitted those employees shared a community of interest, but it insisted that additional employees—the mineral tools division employees—ought to be included in the unit. This Court rejected that argument. Even if the two groups of employees shared a community of interest, the Court stated, "that alone is not enough to overcome the Board's unit determination." *Id*. at 537. The employer had to prove more, namely, that the unit of employees certified by the Board—whom everyone agreed shared a community of interest—was "utterly inappropriate." *Id*. at 534, 538.[26]

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[26] *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999)("[I]t is not enough for the employer to suggest a more suitable unit; it must 'show that the Board's unit is clearly inappropriate.'"); *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991) ("An employer who challenges the Board's determination has the burden of establishing that the designated unit is clearly not appropriate").

Here, the record fully supports the Board's finding that technical employees in the E85 RADCON department constitute an appropriate unit without including all Huntington's other technical employees. (A.1243-44.) In this regard, the Board concluded that, even though all technical employees share the same salary structure, personnel policies, benefits, and break facilities, those similarities are outweighed by the facts distinguishing E85 RADCON's technical employees. (*Id.*)

Most significantly, the Board observed, E85 RADCON's job function is to independently ensure workplace radiological safety and control radioactive contamination, which is a task distinct from the production-oriented jobs of all the technical employees outside of E85 RADCON. (A.1244;A.1057.) As the Board explained, the distinct role, and independence of, the technical employees in E85 RADCON is underscored by the fact they work in a separate department, with separate supervision, from all other technical employees outside of E85 RADCON. (A.1244.)

E85 RADCON employees also play a distinct role. In fulfilling their independent oversight role, they are set apart from, and not functionally integrated into, the production work flow at the shipyard. Indeed, at times, RCTs' distinct oversight tasks put them in *conflict* with the production and quality control goals of other technical employees, as when they order work stopped due to radioactive contamination or other worksite irregularities. In a related vein, RCTs' work

contacts with technical employees outside their department are brief and, outside of a few exceptions during particular projects, are limited to the same control-point screening that thousands of trade employees receive from the RCTs. (A.1244.)

Further, the Board reasonably explained that RCTs possess unique skills, derived from highly specialized training, which no other employees receive. As the Board observed, RCTs use specialized tools that technical employees outside of E85 RADCON do not use, except for a few other classifications of technical employees who are only qualified to use some of the tools on occasion. (A.1242,1244.)

Huntington does not even challenge, as a factual matter, the Board's finding that all other technical employees do not share an overwhelming community of interest with the E85 RADCON technical employees. Instead, it simply attacks *Specialty* itself. As we now show, its arguments are untimely and, in any event, without merit.

C. Huntington's Challenges to the Board's *Specialty* Standard Are Not Properly Before the Court; In Any Event, They Are Without Merit

1. The Court is jurisdictionally barred from considering Huntington's arguments about *Specialty*, because they are untimely

Before this Court, Huntington argues that the *Specialty* decision is "inconsistent with the Act" (Br.22), and that its application to the instant case

constituted an "abuse" of the Board's discretion. (Br.22-45.) However, judicial consideration of these arguments—and by extension amici's challenges to *Specialty*—is precluded by Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides, in relevant part, that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here.

Simply put, Huntington missed its opportunity to raise any arguments about *Specialty* before the Board by failing to raise them at the appropriate point in the Board's proceedings. Thus, as the Board stated (A.1402), following the issuance of the Decision on Review and Order, Huntington did not avail itself of the opportunity, under Section 102.65(e)(1)-(2) of the Board's Rules and Regulations (29 C.F.R. § 102.65(e)(1)-(2)), to file a motion for reconsideration of the Board's Decision on Review and Order, in which it could have raised arguments about *Specialty*. Huntington (Br.3) ignores this failure.

Because Huntington failed to raise its concerns in "the time appropriate under [the Board's] practice" (*United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)), its contentions about *Specialty* were "untimely raised" and, under Section 10(e), cannot be considered on review. (*Id.*) In this regard, Section 10(e) embodies the well-established principle that the need for "orderly procedure and good administration" requires that "courts should not topple over

administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice." *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 37. *Accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000). In any event, as we now show, Huntington's challenges to *Specialty* are meritless.

2. In any event, Huntington's arguments challenging *Specialty* are without merit[27]

a. The overwhelming-community-of-interest standard does not give controlling weight to extent of organizing

Huntington and amici principally argue (Br.24-26,A.Br.19-25) that the Board's overwhelming community-of-interest test improperly gives controlling weight to a union's extent of organization in the workplace, and thus "offends Section 9(c)(5) of the Act." (Br.24.) In *Specialty*, the Board properly rejected this contention, 2011 WL 3916077, at *13, *16 n.25, and Huntington's argument to the contrary is unavailing. As the Board stated in the instant case, the analysis does not consider the extent of organizing—it begins with the petitioned-for unit, as the Board has always done, but then turns to analyzing a set of factors solely within the control of the employer. (A.1327n.9.)

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[27] In *Nestle Dreyer's Ice Cream Co. v. NLRB* (4th Cir. Nos. 12-1684, 12-1783), which has been fully briefed, the employer raises substantially similar arguments with respect to *Specialty*.

Section 9(c)(5) of the Act provides that the Board, in making unit determinations, shall ensure that "the extent of organization shall not be controlling." 29 U.S.C. § 159(c)(5). The Supreme Court has construed this language to mean that "Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of extent of organization," but that Congress did not preclude the Board from considering organization "as one factor" in making unit determinations. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965). In other words, as the Board noted in *Specialty*, "the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account petitioner's preference), that the proposed unit is an appropriate unit." 2011 WL 3916077, at *13.

Procedurally, the Board processes unit determinations consistent with this twin admonition. It "examines the petitioned-for unit first," and if that unit is appropriate under the traditional community-of-interest test, the Board's *initial* inquiry "proceeds no further." *Id*. at *12; *see also Wheeling Island*, 355 NLRB No. 127, 2010 WL 3406423, *1 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the Board did that, and reasonably determined that a unit somewhat larger than the Union had petitioned for was "readily identifiable as a separate group of employees and that this distinct group shares a community of

interest."[28] (A.1326.) Huntington and amici have entirely failed to "show that the extent of organization was the *dominant* factor in the Board's unit determination." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002).

Nor did the Board violate Section 9(c)(5) when it applied the overwhelming-community-of-interest test to determine whether all other technical employees outside of E85 RADCON must be included in the unit. Because the Board had already found the E85 RADCON technical employees to be a clearly identified group that shared a community of interest without giving controlling weight to the petitioned-for unit, Section 9(c)(5) concerns have no separate application at the next stage of the analysis. (A.1326.)

In a related vein, Huntington argues (Br.27-36) that this Court's decision in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), prohibits the *Specialty* test the Board applied here. Huntington's argument is unpersuasive. The *Lundy* Court's objection was that the Board had *presumed* the petitioned-for unit was appropriate rather than properly applying the traditional community-of-interest standard. *Id*. at 1581; *see Lundy Packing Co*., 314 NLRB 1042, 1043-44 (1994). The Court characterized the presumption applied by the Board as "a novel legal standard" that could only be explained by an effort to give controlling weight to

[28] As noted above, the Union petitioned to represent only the RCTs, but agreed, in the alternative, to proceed to an election in a unit consisting of the RCTs plus the other technical employees in E85 RADCON. (A.1250.)

the extent of organizing. 68 F.3d at 1581-82. The Court specifically stated that a union's desire for a certain unit alone is not grounds for certification if a unit is "otherwise inappropriate." *Id*. at 1581. *See also Sandvik*, 194 F.3d at 538 (upholding Board's unit determination and noting *Lundy* was unexplained departure from long history of prior precedent). Here, the Board applied no presumption of appropriateness. It did not rely solely on the Union's request for a certain unit, but examined the community of interest factors and, in doing so, expanded the petitioned-for unit of RCTs to include all the technicals in the E85 RADCON department and not just the RCTs. (A.1242-44.) This approach is consistent with *Lundy*.

In fact, to avoid the problem raised by *Lundy* in this and future cases, the Board in *Specialty* clearly stated that it must first determine whether the petitioned-for employees constitute a readily identifiable group who share a community of interest. 2011 WL 3916077, at *16 n.25, *17. This must be done *before* the Board assesses whether the employer has met its burden of showing that additional employees share an overwhelming community of interest with employees in the proposed unit. In *Blue Man Vegas*, the D.C. Circuit agreed that the Board did not run afoul of *Lundy* under these circumstances: "As long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the

statutory injunction that the extent of the union's organization not be given controlling weight." 529 F.3d at 423.

Contrary to Huntington's claim that the Board's analysis stopped short after finding the "readily identifiable group" (Br.34-35), the Board here did precisely what it will do "in each case" as required by Section 9(b) of the Act. Unlike *Lundy*, here the Board first expressly found that the RCTs, calibration technicians, laboratory technicians, and RCT trainees—who provide a unique function at the shipyard—share a community of interest under the traditional test. Only *after* that did the Board apply the overwhelming-community-of-interest standard to determine whether additional employees ought to be included.

And while Huntington (Br.23) and amici (ABr.24) suggest that the Union has control over who ends up in the unit, in reality it is the employer who has control over nearly all of the community-of-interest factors that the Board assesses. In fact, the community-of-interest test "focuses almost exclusively on how the employer has chosen to structure its workplace." *Specialty*, 2011 WL 3916077, at *14 n.19; *see also Int'l Paper Co.*, 96 NLRB 295, 298 n.7 (1951). All of the relevant facts in this case regarding how the workplace is structured, for example, were determined by Huntington.

Moreover, the Supreme Court has long recognized that the choice of unit is not merely a union's choice but is the employees' as well. *See Pittsburgh Plate*

Glass Co. v. NLRB, 313 U.S. 146, 156 (1941). Employees are fully informed of the composition of the unit on the Notice of Election posted at least 3 days before voting and on the ballot itself. *See* 29 C.F.R. § 103.20. If employees have second thoughts about the unit that was sought and that the Board approved, the employees can reject representation in that unit.

Huntington speculates (Br.33) that the *Specialty* standard will, in effect, always result in approval of the unit sought by a union.[29] This is incorrect. *See Gen. Dynamics Land Sys.*,19-RC-076743, Decision and Direction of Election, at 2 (May 31, 2012) (including employees union sought to exclude because they "share an overwhelming community of interest with the petitioned for unit"), *available at* http://www.nlrb.gov/case/19-RC-076743, *review denied*, 2012 WL 2951834 (2012).[30] And when the Board applied a similarly heightened standard under a different name, the Board regularly granted requests to expand the unit where the employer showed *more* than that its alternative unit was also appropriate. *E.g.*,

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[29] Here, as noted above, the Board expanded the unit the Union petitioned for, by including the other technical employees in E85 RADCON.

[30] *See also Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417, *1-2 (2011) (finding employer demonstrated that its merchandisers shared an overwhelming community of interest with the employees the union petitioned to represent); *Academy LLC*, Decision and Direction of Election at 12, 27-RC-8320 (2004) (rejecting petitioned-for unit because additional employees "share an overwhelming community of interest" with the petitioned-for unit), available at www.nlrb.gov/case/27-RC-008320.

United Rentals, 341 NLRB 540, 541 (2004); *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000); *J.C. Penney Co.*, 328 NLRB 766, 766 (1999); *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976); *Colorado Nat'l Bank of Denver*, 204 NLRB 243, 243 (1973).

b. The Board did not abuse its discretion or violate the Administrative Procedure Act by clarifying the appropriate standard

Huntington also argues (Br.43) that *Specialty* impermissibly adopted a "new, generally applicable standard for determining appropriate bargaining units" and that such changes in the law must be done through rulemaking. As the Board found (A.1402n.6), Huntington is wrong about this.

To begin, the Board in *Specialty* did not make the "substantial changes" Huntington claims it made. (Br.23,45). As explained above, although various terms have been used, the Board has always imposed a heightened burden on a party claiming that additional employees must be included in an otherwise appropriate unit. In *Specialty*, the Board concluded that the use of "slightly varying verbal formulations" to describe this heightened burden could be improved by unifying terminology. 2011 WL 3916077, at *17. To provide this clarity, the Board adopted the careful work of the D.C. Circuit in *Blue Man Vegas*, 529 F.3d at 421, which viewed the Board caselaw as articulating an "overwhelming community of interest" standard. *Id*.

In a related vein, Huntington objects (Br.23) to *Specialty's* use of the word "clarifying" to describe its articulation of the overwhelming-community-of-interest standard. But courts "give great weight to an agency's expressed intent as to whether a rule clarifies existing law or substantively changes the law." *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999). The court there agreed with an agency that its amendments to an administrative regulation were mere clarifications because they did "not represent any major policy changes" and "because the new wording is not 'patently inconsistent'" with prior interpretations. *Id*. at 479. The same is true here. The Board has made no policy change. It has always required only that the petitioned-for unit be appropriate, and it has always held a party seeking to expand that unit to a heightened standard. Huntington incorrectly claims that the overwhelming community-of-interest test was developed only for, and should only be used in, accretion cases. But the Board also has used this exact language in prior unit determination cases. *See Blue Man Vegas*, 529 F.3d at 423 (citing Regional Directors' use of the standard); *Lanco Constr. Sys.*, 339 NLRB 1048, 1050 (2003).

Finally, despite Huntington's suggestion to the contrary (Br.44-45), the issue the Board decided in *Specialty* was squarely before it. A union there petitioned to represent a group of CNAs, but the employer argued that additional employees should be included in the unit. The Board properly summarized the law applying a

heightened standard in such cases and clarified that it would apply the overwhelming community-of-interest test when a party seeks to include additional employees into an already-deemed-appropriate unit. 2011 WL 3916077, at *1, 15-17.

In sum, as the Board stated, it "has for 75 years developed the meaning of the statutory terms 'an appropriate unit' through adjudication," and the Supreme Court "'has approved the Board's use of adjudication in addressing the broad range of issues arising under the Act.'" (A.1402n.6, quoting *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56, slip op. at 3 (2010), 2010 WL 5195445, *4.) Huntington has provided no basis for the Court to find that the Board abused its discretion by using the adjudicative process in *Specialty*.

c. Huntington's contentions about the potential "proliferation" of bargaining units and alleged infringements on employee free choice are without merit

Huntington (Br.23) argues that the *Specialty* standard will result in the "proliferation of bargaining units which could make it impossible for an employer to operate." This contention should be rejected as irrelevant outside the healthcare industry. The legislative history of the 1974 healthcare amendments to the Act contains an admonition that the Board has an obligation to make unit determinations with "due consideration" given "to preventing proliferation of bargaining units in the health care industry." S.Rep.No.766, 93rd Cong., 2d Sess.

5 (1974); H.R.Rep.No.1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). This case, of course, involves a shipbuilder, rather than a healthcare employer, making this legislative history irrelevant. Even if it were relevant, the Supreme Court unequivocally found that the "admonition" from the committee reports is not binding on the Board and does not have "the force of law." *Amer. Hosp. Ass'n*, 499 U.S. at 616-17 ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute.") Simply put, there is nothing in the Act suggesting that two or more units at one facility constitutes "undue proliferation." *See Teledyne Economic Development v. NLRB*, 108 F.3d 56,57 (4th Cir. 1997).

Finally, there is no merit to Huntington's (Br.36-37) and amici's argument (ABr.30-36) that the *Specialty* standard fails "to consider the right of employees to refrain from self-organization." (Br.36.) The RCTs, calibration technicians, laboratory technicians, and RCT trainees in E85 RADCON had the right to vote *for or against* unionization, and to encourage their coworkers to do the same. And the statutory rights of the other technical workers remain firmly intact whether or not their colleagues unionize. *See Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (stating certification of unit of drivers, and excluding mechanics who did not wish to be included, protected the rights of both groups). The Board's *Specialty* standard, in short, "assure[s] to employees," both those

inside and outside the unit, "the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. § 159(b).

d. Huntington's contention that *Specialty* is "logically untenable" in light of the Board's *Armour-Globe* "self-determination principles" was not raised before the Board, and the Court is therefore jurisdictionally barred from considering it

Huntington devotes several pages of its brief (Br. 39-43) to its novel argument that *Specialty* is "irreconcilable with" the Board's principles, developed in *Armour & Co.*, 40 NLRB 1333 and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937) ("*Armour-Globe*"), for determining, among other things, whether a self-determination election should be held to ascertain whether employees in a group wish to be included in an existing unit or continue to remain unrepresented.

Huntington, however, *never* raised this argument before the Board—it never appeared in any form in any pleading. Its failure to do so means that the Court is jurisdictionally precluded from considering it under Section 10(e) of the Act. *See* Section 10(e) ("no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). The principal rationale behind this jurisdictional bar is especially applicable here, because to allow this challenge would result in the Board having been ambushed, and deprived of an opportunity "to address a matter in the first instance." *Quazite*

Div. of Morrison Molded Fiberglass Co. v. NLRB, 87 F.3d 493, 497-98 (D.C. Cir. 1996). Accordingly, the Court is without jurisdiction to consider this argument.

e. Huntington's argument that the Board's retroactive application of *Specialty* constituted a "manifest injustice" is unavailing

In its final attack on *Specialty*, Huntington argues (Br.56-59) that the retroactive application of *Specialty* here resulted in a "manifest injustice" (Br. 57), because *Specialty* imposed an evidentiary burden on it that it was not given an opportunity to meet. The Board reasonably rejected this contention. (A.1243&n.8,1402.)

It is settled that the Board recognizes a presumption in favor of the retroactivity of new rulings in representation cases, including to all pending cases, unless retroactive application would cause manifest injustice. *See SNE Enterprises*, 344 NLRB 673, 673 (2005) ("*SNE*"); *NLRB v. Bufco Corp*., 899 F.2d 608, 611 (7th Cir. 1990).

As the Board explained (A.1243&n.8, 1402), the retroactive application of *Specialty* in this case did not result in manifest injustice. In fact, the short answer to Huntington's argument is that, as the Board stated, *Specialty* was not, actually, a "new ruling." As discussed above, in *Specialty*, the Board *clarified* the standard for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest

under the traditional standard. (A.1243&n.8.) As the Board also noted, expressly clarifying that the burden of proof is on employers in the limited circumstances specified in *Specialty* does not otherwise represent a significant departure from a well-settled area of law. (*Id.*)

In any event, clarifying that the burden of proof is on the employer does not impose a retroactive change that "work[s] a manifest injustice." *See SNE Enterprises*, 344 NLRB at 673 (citation omitted). By definition, retroactive application is not manifestly unjust if the complaining party fails to show that it relied on the prior rule and that the new rule severely penalizes it. *See NLRB v. Bufco Corp.*, 899 F.2d at 611-12. Here, as the Board explained, there is no evidence that Huntington relied on any precedent relieving it of the burden of proof. Indeed, as the Board noted, Huntington presented extensive evidence—during the hearing in the representation case—aimed at demonstrating that technical employees outside of E85 RADCON shared a community of interest with the technical employees in that department. (A.1243n.8.)

D. The Board Also Reasonably Found that, Under *TRW Carr* and Related Cases, the Unit Is Appropriate

In its representation decision, the Board noted that Huntington had argued that, pursuant to then-existing caselaw, "special [unit determination] rules apply to technical employees and, in particular technical employees in nuclear facilities." (A.1244.) According to Huntington, which cited (A.1222) *TRW Carr*, 266 NLRB

326 (1983), the unit was not appropriate, because the E85 RADCON technical employees did not have a sufficiently distinct community of interest to warrant their inclusion in a unit that did not also include all other technical employees. (A.1244-45.)

The Board's decision acknowledged that the Board had "*arguably*" developed a distinct test for unit determinations affecting technical employees. (A.1244) (emphasis added).) The Board stated that in *TRW Carr*, 266 NLRB 326,326 n.4 (1983), it concluded that a subset of an employer's technical employees is appropriate "only when the employees in the requested unit possess a sufficiently distinct community of interest apart from other technical employees to warrant their establishment as a separate appropriate unit." (*Id.*)

Having said that, the Board declined to reach the question of whether a distinct test for technical employees either existed or survives *Specialty* but, nonetheless, decided to independently analyze the E85 RADCON unit under the *TRW Carr* caselaw. And, when it did, it found that a unit of RCTs, calibration technicians, laboratory technicians, and RCT trainees in the E85 RADCON department was appropriate for bargaining. (A.1244-46.)

Thus, applying *TRW Carr* and the related technical-employee line of cases, the Board concluded (A.1244-46,1256,1258) that the the E85 RADCON departmental unit of technical employees constituted a functionally distinct

grouping with a "sufficiently distinct" community of interest to warrant a separate unit for the purposes of bargaining. (A.1245.)

As the Board found (A.1245,1256):

- The RCTs perform—with the integrated support of calibration technicians, laboratory technicians, and RCT trainees in E85 RADCON—the unique function of providing independent radiological oversight at the shipyard. No employees outside of E85 RADCON perform that task.
- The E85 RADCON technical employees were distinct from other technical employees because they possess unique skills, have distinct job functions, are qualified to use specialized tools and equipment, have separate supervision, and do not temporarily interchange with other technical employees.
- The E85 RADCON technical employees' work contacts with other technical employees, and their level of functional integration, "is not so substantial as to negate their separate and distinct community of interest."
- RCTs' work contacts with technical employees outside E85 RADCON are limited to subjecting them to the same radiological screening that other employees receive.

- Employees in technical classifications outside of E85 RADCON perform tasks that are directly related to production, as opposed to radiological safety, and the E85 RADCON technical employees are not part of the production work flow. (A.1245,1256-57.)

In sum, the technical employees in E85 RADCON perform a radiological safety function that is sufficiently distinct from all other employees at the shipyard to warrant their having a separate unit.

In challenging the Board's finding, Huntington primarily argues (Br.51) that the Board erred in not finding that the *Westinghouse* cases—in which the Board found that comprehensive units of technical employees were appropriate—controlled the result here. Those cases involved petitioned-for units of some, but not all, of the technical employees at the Naval Reactors Facility at the National Reactor Testing Station in Idaho. (A.1245,1257.) As the Board thoroughly and reasonably explained, those cases were readily distinguishable from the present case, however. (A.1246-47,1257.) Thus, "[a]lthough both the Westinghouse and [Huntington's] facility employ RCTs, who perform similar functions, the similarity ends there." (*Id.*) For instance, the Board noted that the overall technical work force at the facilities is different, given that, in *Westinghouse*, radiological oversight is an absolute necessity at all stages of some functions at the facility. By contrast, in this case, radiological oversight is only needed with respect to some

tasks, and for limited durations. Further, unlike the RCTs in the *Westinghouse* cases, who had close contact with, and provided direct support for, the other technical employees, Huntington's RCTs tasks are more appropriately viewed as discrete from Huntington's major function of shipbuilding and refurbishing. Moreover, the Board noted that the RCTs at the shipyard, unlike the RCTs in the Westinghouse cases, are in a separate department and do not have any temporary interchange with other technical classifications. As the Board stated, this further attests to their unique function. In sum, the Board found the facts that drove the result in *Westinghouse* are quite different from the facts in the present case. (A.1246.)

Huntington has not provided any basis for unsettling the Board's finding. At bottom, it quarrels with some of the Board's factual determinations and reasonable inferences. However, it has failed to meet its burden of demonstrating that the Board's reasonable determinations should be replaced by its own view of the evidence. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008). For example, Huntington points to the testimony of one witness who opined that the RCTs at Huntington function in the same manner as the RCTs at Westinghouse. (Br.53.) The opinion of one of Huntington's own witnesses in no way detracts from the Board's reasonable finding that the cases are distinguishable, and that the E85

RADCON technical employees perform a unique role at the shipyard. Huntington also seems to argue that it was unreasonable for the Board not to view *all* technical employees at the shipyard as functionally integrated participants in the "ultimate goal" of shipbuilding. (Br.54-56.) However, the Board reasonably found that the E85 RADCON technical employees play a role that is distinct from the production-oriented and quality control tasks of other technical employees. Huntington has provided no basis for disturbing that finding.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying Huntington's petition for review and enforcing the Board's Order in full.

STUART F. DELERY
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

SCOTT R. McINTOSH
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
202-514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Daniel A. Blitz
DANIEL A. BLITZ
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
202-273-2978
202-273-1722

December 2012

STATEMENT REGARDING ORAL ARGUMENT

Huntington has requested oral argument. The Board agrees that argument would be of assistance to the Court. In its opening brief, Huntington argues that the President's recess appointments to the Board on January 4, 2012, were invalid, and therefore the Board lacked a quorum of validly appointed Board members to enter its final order in this unfair-labor-practice case. The issue of whether the Board had a proper quorum during the relevant time period implicates constitutional questions concerning the President's power to make recess appointments. Huntington also challenges the merits of the Board's decision in this case. Accordingly, if argument is held, the Board requests that the parties each be given 30 minutes.

STATUTORY ADDENDUM

United States Constitution

Article I, section 5, cl. 4

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

Article II, Section 2, cl. 3

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Amendment XX, Section 1

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

National Labor Relations Act

Sec. 7. [29 U.S.C. § 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [29 U.S.C. § 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

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

Sec. 160. [§ 160.]

e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

National Labor Relations Board Rules and Regulations

Sec. 102.65 (e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however,* That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo,* the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to this paragraph shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

Sec. 103.20 (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2000 **Caption:** Huntington Ingalls, Inc. v. NLRB

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: December 11, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HUNTINGTON INGALLS, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 12-2000
	)	12-2065
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 11th day of December, 2012