

Nos. 12-3120, 12-3258

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

BIG RIDGE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF OF
THE NATIONAL LABOR RELATIONS BOARD**

STUART F. DELERY
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
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

JILL A. GRIFFIN
Supervisory Attorney

NICOLE LANCIA
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2987

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STATEMENT OF JURISDICTION

The jurisdictional statement of Big Ridge, Inc. (“BRI”) is complete and correct.¹

STATEMENT OF ISSUES

- I. Whether the President’s recess appointments to the Board were valid.
- II. Whether the Board is entitled to summary enforcement of the uncontested violations of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(1)) (“the Act”), including threats of job loss and mine closure, and a promise of benefits.
- III. Whether substantial evidence supports the Board’s finding that BRI violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Wade Waller because of his union activity.

STATEMENT OF THE CASE

On April 8, 2011, the United Mineworkers of America (“UMWA”) petitioned the Board for a secret-ballot election, which was held on May 19 and 20. On May 26, BRI filed objections, seeking a rerun election. (JA2&n.1,3;709-12.) Acting on unfair-labor-practice charges filed by UMWA against BRI (JA2;713-15), the Board’s Acting General Counsel issued a complaint, alleging, as relevant

¹ “JA” references in this brief are to the Joint Appendix. “SA” refers to the Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

here, numerous violations of Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)). (JA2,12,19,21-22;427-30,716-34,738-40.) Thereafter, the Board's Regional Director consolidated the cases and directed a hearing.

Following a hearing, the administrative law judge issued a decision and recommended Order. He overruled BRI's election objections, certifying UMWA as employees' exclusive bargaining representative. (JA3-12,29.) He found that BRI violated Section 8(a)(1) by threatening employees with mine closure, job loss, and other unspecified reprisals because of their union support and promising benefits to employees for opposing UMWA (JA12-21,29) and violated Section 8(a)(3) and (1) by discharging employee Waller because of his union support (JA22-29). Absent exceptions to the Section 8(a)(1) violations, the Board adopted those findings. 29 U.S.C. § 160(c). (JA1&n.2.) Upon exceptions filed by BRI and UMWA, the Board issued a Decision and Order, and Certification of Representative, affirming the judge's decision and adopting his recommended Order. (JA1-2.) The Certification of Representative is not before this Court.

In a separate but related action commenced before the Board's Order issued, the Regional Director filed for a preliminary injunction against BRI, under Section 10(j) of the Act (29 U.S.C. § 160(j)), in the Southern District of Illinois. The court granted the injunction, ordering BRI to cease and desist from its unlawful activity and to reinstate Waller. *Harrell ex rel. NLRB v. Big Ridge, Inc.*, 2012 WL

1553163, at *1, *10-*11 (S.D. Ill. 2012). The Board's Order pretermitted further proceedings before the district court because the Order ended the court's jurisdiction.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Company Operations

BRI, a subsidiary of Peabody Energy, operates the Willow Lake coal mine in Equality, Illinois. It employs approximately 440 production and maintenance workers. (JA2;56-58,1075.) Underground employees are assigned to crews; each crew is divided into four units. (JA12,16,19;145-46,275,439,645,651.) A unit is supervised by a shift leader and production supervisor; the production supervisor reports to the mine manager overseeing the crew. (JA12,16,19;305,398-99,463,465,488,651-52.)

Willow Lake is headed by Vice-President of Underground Operations Tom Benner, Operations Manager John Schmidt, and Group Executive Charles Meintjes. (JA20-21;724.) Human Resources Manager Robert Gossman is responsible for issuing employee discipline upon Schmidt's approval and, in the case of termination, Benner's. (JA23& n.44;140-41.)

B. BRI Tolerates Verbal Threats and Physical Confrontations

Heated arguments and threats of physical harm occur often at Willow Lake, and employees use profanity and vulgar language daily. (JA25-26;83-84,89-90,99-102,112-13,131,265,270,367,407,419,505-06,633,706-07.) Since Peabody Energy acquired Willow Lake, BRI never prohibited or discharged employees for such conduct absent any significant physical contact (JA25-26&n.48;74,109-12,125-30,216,270,298,349-56,454-58,497-500, 507,667-68). For example,

- In 2005, employee Vaughan threatened other employees, stating he had a 9mm gun in his truck that he would get if necessary. BRI promoted him to production supervisor one month later. (JA26n.48;408-10,416-19.)
- Around February 2010, employee Horton told employee Lane to put on a reflective vest. When Lane refused and Horton insisted, Lane said he would shoot Horton if he had his gun. Lane admitted threatening to shoot Horton, but was never disciplined. (JA25;448,452-62,497-502.)
- In May 2011, employees Tadlock and Crissup got into a work-related argument. Tadlock called Crissup on an emergency phone to ask about coal tonnage; Crissup told him not to call on that phone and hung up. Tadlock phoned again and, following mutual cursing, Crissup called Tadlock a “fucking scab.” Forty-five minutes later, in front of a production supervisor, Tadlock threatened to “catch” Crissup off of company property and “beat [his] guts out.” No discipline issued. (JA25&n.46;107-12,115,349-56,365-66,368-69,371-72.)
- In July 2011, Maintenance Supervisor Hilliard threatened to fight Production Supervisor Stephenson. Hilliard yelled at Stephenson about a work-related issue in front of Mine Manager Hughes. Stephenson told Hughes that he did not “have to put up with this.” Hilliard approached them and said, “Don’t talk behind my Goddamn

back. I'll kick your fucking ass. I'm going to quit here one of these days, and when I do, I'm going to come and look you up, son." Stephenson replied, "Well, I'm not fucking hard to find," and told Hughes, "I have two witnesses that heard him threaten me." Hilliard responded, "That's not a threat; that's a promise. If you want to walk around the corner, we can settle this now." Neither was disciplined. (JA25-26&n.47;125-30.)

Even when employees and supervisors engaged in physical confrontations, BRI did not discipline them or merely issued three-day suspensions. In 2007, Manager Ward called Manager Francescon a "suck ass" and Francescon threw Ward to the floor; neither was disciplined. In March 2011, BRI suspended employee Bryan for grabbing another employee's collar; in July 2011, it likewise suspended employee Ashby for shoving another employee. (JA26&n.48;75-76,81-82,207-14,267-69,880-81.)

C. UMWA Begins Organizing; BRI Conducts an Aggressive Antiunion Campaign

Around March 3, 2011,² UMWA began organizing at Willow Lake to represent the production and maintenance employees. (JA2;60,67-68.) Within a month, 93% of employees had signed authorization cards. (JA2;1075.) On April 7, UMWA officials met with Managers Schmidt and Gossman and requested voluntary recognition, which Gossman denied. The next day, UMWA petitioned the Board for an election, which was set for May 19-20.

² All dates are in 2011, unless otherwise stated.

(JA2;57-58,62,218,708,716.)

In response, BRI began a vigorous antiunion campaign. (JA2;85, 138,142,151,203-04,220-221,397,483,614,661,664,679,688,692-705,821,885, 953,1037.) It held captive audience meetings with employees, in which Vice-President Benner and other company officials discussed the benefits of being union-free and presented films and slideshows indicating that nearby mines had closed following UMWA certification. (JA2,13,14n.24&n.25;220-26,397,605,661-62,664,678-79,689-90,692-705,953,SA6-7.) BRI distributed antiunion flyers, mailed letters and videotapes to employees' homes, and offered antiunion stickers. (JA2;85,203-04,220-21,605-15,1037.) It conducted three straw polls to gauge employees' union support. (JA2;142-45,841-42,857,869-70.) Manager Gossman gave managers lists with employee names and asked them to determine how each employee would likely vote; the managers, in turn, asked the production supervisors how employees might vote. (JA2;143-45,151-55,464-65,466,841-42,857,869-70.) Finally, BRI instructed supervisors to meet one-on-one with employees and encourage them to vote "NO." (JA2,12;473-83,495,885.)

D. Supervisors Threaten Employees With Mine Closure and Job Loss If UMWA Wins the Election

Despite company-conducted meetings explaining permissible campaign conduct (JA2;473-74,482,885), supervisors threatened employees with mine

closure and job loss if they chose union representation, and promised benefits if they opposed UMWA.

In mid-April, Production Supervisor Henderson threatened employee Gibby, an open union supporter: “If you vote the [UMWA] in, the mine will close. It will shut the mine down.” Gibby replied that it was better to shut the mine down than to work as a “scab.” (JA12-13;430-33,437-38.)

Around late April, Production Supervisor Bowlin approached employee Frailey, whom BRI believed was a union supporter, and warned that BRI would close the mine if employees voted for UMWA. When Frailey questioned how he knew that, Bowlin said he had seen it happen before and reiterated that if the Union won, the mine would shut down within a year. (JA19;440-42,683.)

In early May, as Compliance Supervisor Clarida and employee Kirkman accompanied a Mine Safety and Health Administration inspector underground, Kirkman opined that the pro-union graffiti underground was unnecessary because UMWA was going to win. Clarida replied that if so, BRI would close the mine. (JA19-20;262-63.)

In mid-May, Production Supervisor Hendricks asked employee Gibbons, an open union advocate, if he planned to vote for UMWA. When Gibbons said yes, Hendricks replied, “Well, you know what they’re saying . . . you might be voting your job away.” Gibbons replied, “[He’d] as soon shut the damn doors on the

place because [BRI had] been screwing [employees] ever since [they've] been there.” (JA20;230-32,235.)

Days before the election, Group Executive Meintjes and Superintendent Hood met with employee Hooven, an outspoken union advocate who sought this meeting to talk about UMWA. Meintjes asked Hooven why he was prounion. Hooven said that if Meintjes had been treated the way Hooven had been, Meintjes would support it too. Meintjes explained that BRI needed more employees who could repair coal haulers. Hooven admitted that he did not go to maintenance school. Meintjes stated that if Willow Lake was not unionized, he could put Hooven through school, but could not help him if UMWA won. (JA16,20-21;373-76,385,387-93.)

Production Supervisor Henderson asked employee Shepherd why he thought UMWA would help employees. When Shepherd replied that it would create a happier workforce and safer mine, Henderson said that, based on everything he heard, if employees voted for UMWA, the mine would close. (JA14-15;488,493-96.) Later that day, as Henderson's crew ate dinner, Henderson warned that, if UMWA won, “[T]his place is done, they're going to shut it down.” (JA15;493-96.)

E. Employees Waller and Koerner Disagree Over Dumping Coal into the Feeder

Wade Waller, a 54-year-old coal miner with approximately 28 years of experience, worked as ram car driver for BRI since 2004. He transported coal from a miner-machine, which strips coal from the walls, to the feeder, which dumps the coal onto a belt. (JA3;93,146-47, 275-77,303-04.) He was hard-working, dependable, well-liked, and usually worked on his days off. (JA25;132-33,137,157-59,233,275-76,340,404,626,654.) Waller openly supported UMWA, wearing union paraphernalia, including stickers on his hardhat, and singing an anti-“scab” song. (JA3&n.5,24;64-70,120,234,265,271,276-81,310-11,339,385-86,406,411,415,598,821,1074.)

Ronald Koerner began working for BRI in April 2011 and occasionally served as a feeder-watcher. (JA3;283-87,537.) Feeder-watchers direct traffic when ram cars bring coal to the feeder. They use helmet lights, radios, and horns to “flag,” or communicate with, ram car drivers. Turning the helmet light sideways signals the driver to “stop” whatever he is doing; if someone is in the approach to the feeder, the feeder-watcher is supposed to sound an audible warning alarm, or horn. (JA26n.50;103-04,134-35,283-87,517,552,935,946.) Hooven had previously warned Koerner that some drivers would continue dumping coal even after they had been flagged. (JA27;283-85,543-44.)

On May 20, Waller got into a disagreement with Koerner regarding coal-dumping at the feeder. (JA23-27&n.53,28;283-87,318,321.) Waller parked his ram car on one side of the feeder and began dumping coal; another car was already parked and dumping coal on the other side. Koerner stood at the front of the feeder, 20-40 feet away, safely out of the path of both cars. (JA26-27;136,286-87,541-42.) Koerner “flagged” Waller with his helmet light by turning his head sideways. Waller stopped dumping coal and asked Koerner, by radio, what he wanted. Koerner told Waller to stop dumping because he was worried the feeder would “gob out,” or stop running. According to Waller, he assured Koerner that the feeder was not going to “gob out” and that two cars could dump coal simultaneously. According to Koerner, Waller said that he would not stop no matter how many times Koerner flagged him. (JA26-27;199-200,517-18.) Waller finished dumping his coal and returned to the miner-machine. (JA23-27&n.53;95,283-87,318-23.) There were no witnesses to this exchange. (JA24n.45.)

No one was in the approach to the feeder when Koerner flagged Waller. Koerner never blew his horn and he admitted that Waller’s ram car was stopped and dumping coal. (JA24n.45,26n.50,27&n.53;486,541-48,552-54,593.)

Shortly after, Koerner complained to Shift Leader Davis, who supervised the unit that night; Davis reported it a few days later. (JA26;523,634-42.)

F. UMWA Wins the Election; Supervisor Henderson Continues to Threaten Employees with Mine Closure and Job Loss

On May 20, the Union won the representation election, 219 to 206.

(JA2;717.) After the votes were tallied, Production Supervisor Henderson posted on his Facebook page: “how can you bee [sic] so blind to vote the damn umwa in they shut every [mine] down that they represent and you think Peabody is going to stand for them . . . excuse me while I go vomit and [] start sending out resumes.”

(JA15-16;467-69,882-84.) Employee Craig responded: “Ill puke arm in arm with ya.” Employee Waller’s wife saw these posts and commented: “IM THANKFUK N U CAN DELETE ME IF U WANT TO! IM PROUD OF THE MEN THAT VOTED N STRUTTED THEIR SHIRT!” (JA16;288,883-84.)

Later, Supervisor Henderson approached employee Shepherd, who was trying on his UMWA hat, which he had kept hidden. Henderson yelled, “I hope you’re fucking happy that you just voted all these people out of their fucking jobs.” Believing Henderson wanted a fight, Shepherd walked away. (JA16;434-35,489-91.)

The following day, Shift Leader Pezzoni asked employee Hooven if he had ever intimidated or been intimidated by anyone. Hooven said he had not, and that they should put the election behind them. Supervisor Henderson approached them, pointed at Hooven, and said, “I hope you’re happy, you just put us all on the G.D. unemployment line . . . That’s fine because Peabody knows. They’ve got a list.”

Henderson told Hooven that BRI knew who supported the Union. (JA16-17;377-79,385,393-94.) Employee Wise overheard them arguing and intervened, asking Henderson why he was being such a sore loser. Henderson said, "We are all going to be unemployed." (JA17-18;118-24,378-79.)

G. Waller Confronts Craig About His Facebook Post

On May 21, Waller confronted Craig in the picnic area and told Craig he did not appreciate what Craig wrote about him on Facebook. Craig replied that the post was not about him. Waller asked Craig not to post any similar statements. They both said "fuck you;" Waller walked away. Moments later, Waller returned and offered to "meet in the parking lot" if Craig wanted a "piece of this old man." (JA24,27;289-91,873,875.)

Later, Waller was instructed to report to Manager Lawrence. Lawrence asked him about his confrontation with Craig and whether Waller ever threatened to run over someone with a ram car. (JA27;69-73,291-93,579.) Waller admitted the argument with Craig, but denied he ever threatened to run over anyone or would ever do that. Lawrence told Waller to forget it and to leave Craig alone. Waller asked if he could work additional shifts; Lawrence agreed. (JA26;291-93,575-80,588-89.) Waller worked on May 22-24 and his scheduled days off, May 25-26. (JA27;69-73,193-95,293,815.)

H. One Week After the Election, BRI Discharges Waller

On May 21, BRI began collecting employee and supervisor statements about alleged election-related misconduct during the campaign, preparing to file objections challenging UMWA's victory. During that time, Manager Gossman also collected eight written statements alleging misconduct by Waller and anonymous threats and acts of vandalism. (JA3,23;189,716,871-77,879,1038-43.)

On May 21, Koerner told Mine Manager Lawrence that someone scratched "scab" on his truck, that he received anonymous threatening phone calls, and discussed his disagreement with Waller. (JA23,26;590,872.) Lawrence wrote a statement noting Koerner's complaints and left it in Gossman's mailbox for him to read on Monday. (JA27;575-80,588-89,872.) Koerner also prepared a statement recounting the threatening calls and scratched truck, but did not reference Waller. (JA23;879.) Craig and another employee wrote about Craig's confrontation with Waller; likewise, Manager Gossman wrote his own statement describing that incident, after hearing about it from Koerner, who witnessed it.

(JA23;873,875,877.) Three statements alleged that Waller disliked "scabs," including employee Kirk's statement, which claimed that Waller indirectly threatened him by saying he would "pick something up and hit that scab motherfucker." (JA23;871,874,876.) Of those eight statements, only one sentence (in Manager Lawrence's statement) references the Waller-Koerner dispute:

“Waller also told [Koerner] that he could flag him all he wants and he would not stop.” (JA26;872.)

On May 26, Gossman reviewed the eight statements with Vice-President Benner. Benner authorized Gossman to discharge Waller, instructing him first to interview Waller about those allegations. (JA22-23& n.44;160,162-67,594-98,600,603,616.) Prior to meeting with Waller, Gossman drafted a termination letter based on those statements. (JA24;164,1023.)

On May 27, Waller reported to work and was escorted to Gossman’s office. (JA24;294-98.) Gossman said he heard Waller threatened some employees, and asked about Waller’s altercation with Craig. Waller admitted the argument with Craig and explained the incident, and said he already met with Lawrence about it. (JA24;164-65,294-96,878.) Gossman asked if Waller threatened to run over an employee if the employee kept flagging him. Waller emphatically denied it, saying he would never do that. (JA24&n.45;334-35,878.) Waller also denied Gossman’s claim that Waller yelled “fuck all you fucking scabs” in the bathhouse. (JA24;294-96.) Gossman told Waller there were many witnesses to these incidents and handed Waller the pre-written termination letter, which states, in relevant part:

There have been several reports of certain employees threatening or intimidating other employees in the last several weeks. As you are aware this type of behavior is prohibited by Company Policy. During our investigation of the allegations you were implicated in the type of behavior.

(JA24&n.45;160,163-64,219,294-98,331-38,684-87,878,1023.) Waller said he could not believe what was happening, retrieved his belongings, and left the property. (JA24;294-98,686,878.)

Before his discharge, Waller had never been called into the office to discuss any misconduct or disciplined for any infraction. (JA25;157,290,345.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 31, 2012, the Board (Members Hayes, Griffin, and Block), agreeing with the judge, found that BRI violated Section 8(a)(1) and (3) of the Act by its multiple threats of mine closure and job loss, promise of benefits, and unlawful discharge of Waller. (JA1,29-30.)

The Board's Order requires BRI to cease and desist from its unlawful conduct. Affirmatively, it requires BRI, among other things, to offer Waller full reinstatement to his former job or, if it no longer exists, a substantially equivalent position; expunge Waller's record; make Waller whole; and post remedial notices. (JA1,29-30.)

SUMMARY OF ARGUMENT

1. BRI contends that the President's recess appointments to the Board in January 2012 were invalid and that the Board therefore lacked a quorum when it issued the August 31, 2012 order in this case. Acting pursuant to the Recess Appointments Clause, the President made these appointments during a 20-day

period and the Senate had declared ahead of time that it would be closed for business during that entire period. The Recess Appointments Clause has long been understood by both the Legislative and Executive Branches to apply when the Senate is unavailable to give advice and consent on Presidential nominations because it has taken a break from doing business. The Senate's 20-day break in January 2012 unquestionably constitutes a "Recess of the Senate" under that well-settled standard. Indeed, the Senate itself issued orders that declared the January break to be a recess.

BRI challenges the President's authority to make recess appointments during that January recess, but none of its claims has merit. They cannot be squared with the text, purpose, or firmly established historical understanding of the Recess Appointments Clause. Individually and collectively, they conflict with the Clause's basic object of ensuring that the President can fill vacant offices when the Senate is unavailable for advice and consent. If any one of these contentions were adopted by this Court, the result would upset the longstanding balance of constitutional powers between the President and the Senate.

2. BRI failed to challenge before the Board the Section 8(a)(1) violations, including several threats of mine closure and job loss and the promise of benefits. Accordingly, the Board is entitled to summary enforcement of those uncontested violations.

3. Substantial evidence supports the Board's finding that BRI discharged Waller because of his union activities. Waller openly supported UMWA, BRI knew of Waller's union support, it repeatedly demonstrated unlawful animus towards UMWA (as evidenced by the unchallenged, unlawful threats made during and after the organizing campaign), and its animus spurred Waller's discharge. And BRI's continuously shifting justifications for Waller's discharge further illustrate BRI's unlawful animus. Moreover, BRI failed to prove that it would have terminated Waller absent his protected activity because, as the credited evidence shows, it never really believed Waller threatened to run over another employee; rather, it seized upon a routine work-dispute, disingenuously characterizing it as a threat and a safety violation to discharge a vocal union supporter and bolster its election-objections case against UMWA.

STANDARD OF REVIEW

This Court owes "significant deference" to the Board's findings. *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005). The Board's factual findings, and its application of the law to particular facts, must be upheld if they are supported by substantial evidence on the record as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 405 (7th Cir. 1992). The Court will affirm the Board's legal conclusions if they have "a reasonable basis in law."

Rochelle Waste Disposal LLC v. NLRB, 673 F.3d 587, 592 (7th Cir. 2012). The substantial evidence test “requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that *could* satisfy the reasonable fact finder.” *ATC Vancom of Cal. v. NLRB*, 370 F.3d 692, 695 (7th Cir. 2004) (emphasis in original). Since “[d]iscerning an employer’s motivation is a question of fact,” “the Board’s determination is conclusive if supported by substantial evidence, either direct or circumstantial.” *Rochelle Waste Disposal*, 673 F.3d at 597 (internal quotation marks omitted). Finally, the Court will not disturb the judge’s credibility resolutions, as adopted by the Board, absent “extraordinary circumstances.” *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005); *see also Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (attacks on credibility findings “almost never worth making”).

ARGUMENT

I. THE PRESIDENT’S RECESS APPOINTMENTS TO THE BOARD WERE VALID

A. The Recess Appointments Clause Preserves Continuity of Government Functions When The Senate Is Unavailable to Provide Advice and Consent

From January 3 until January 23, 2012, a period of nearly three weeks, the Senate was closed for business by the Senate’s own order. Under the terms of its adjournment order, the Senate was unable to provide advice or consent on

Presidential nominations. It considered no bills and passed no legislation. No speeches were made, no debates were held, and messages from the President were neither laid before the Senate nor considered. Although the Senate punctuated its 20-day break with periodic “*pro forma* sessions” conducted by a single Senator and lasting for literally seconds, it expressly ordered that “no business” would be conducted even at those times.

At the start of this lengthy Senate absence, the term of Board member Craig Becker came to an end, and the Board’s membership fell below the statutorily mandated quorum of three members, 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 invoked his constitutional authority under the Recess Appointments Clause to appoint three new members, bringing the Board to full membership.

The Recess Appointments Clause empowers the President 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.” Art. II, § 2, cl. 3. This provision plays a vital role in the constitutional design, by supplying a mechanism for filling vacant offices and maintaining continuity of government operations during periods in which the Senate is unavailable to provide advice and consent. The Framers recognized that “it would have been improper to oblige [the

Senate] to be continually in session for the appointment of officers,” but that during periods when the Senate is absent, there may be vacancies that are “necessary for the public service to fill without delay.” *The Federalist No. 67*, at 410 (Hamilton) (Clinton Rossiter ed., 1961). The Clause addresses this public need by “authoriz[ing] the President, singly, to make temporary appointments” in such circumstances. *Ibid.*

Justice Story explained that the Clause was intended to achieve “convenience, promptitude of action, and general security,” and to avoid requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers.” 3 Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833). The Recess Appointments Clause thus frees Senators to return to their constituents instead of maintaining “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.³ At the same time, the Clause reflects the Framers’ understanding that the President alone is “perpetually acting for the public,” and so acting even when Congress is not, because the Constitution obligates the President, alone, and at all times, to “take Care that the Laws be faithfully executed.”⁴

³ 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 409-10 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates).

⁴ 4 Elliot’s Debates 135-36 (Archibald Maclaine); U.S. Const. art II, § 3.

The importance of presidential recess appointments to our system of government is demonstrated by the frequency with which they have been made. Since the founding of the Republic, Presidents have made hundreds of recess appointments, including members of the President’s Cabinet, federal judges, and other principal officers of the United States. Recess appointments have been made during intersession and intrasession recesses of the Senate, at the beginning of recesses and in the final days (and hours) of recesses, and to fill vacancies that arose during the recesses and those that arose before the recesses.⁵ The regularity with which Presidents have invoked the Recess Appointments Clause confirms its critical role in the allocation of powers under the Constitution and the effective conduct of the government’s business.

B. The Senate Was On Recess At The Time Of The Challenged Appointments

1. The Supreme Court has repeatedly stressed that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931). Accordingly, a constitutional term’s meaning “excludes secret or technical meanings that would not have been known to

⁵ See generally Hogue, *The Noel Canning Decision*, *supra*, at 22-28 (identifying 408 appointments during recesses of greatly varying lengths); 10 Op. Att’y Gen. 356, 356 (1862) (noting the “continued practice of [the President’s] predecessors” to use the Recess Appointments Clause to fill vacancies that existed while the Senate was in session).

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 to mean a “[r]emission or suspension of business or procedure,” II 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); see also 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (“remission or suspension of any procedure”). The plain meaning of “Recess” as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such that it is unavailable to provide advice and consent.

That plain meaning accords with the purpose of the Recess Appointments Clause. It ensures that when the Senate makes itself functionally unavailable by whatever means to provide advice and consent, vacancies that are “necessary for the public service to fill without delay” can continue to be filled. *Federalist No. 67*, at 410.

The Executive Branch and the Senate have long shared an understanding of the constitutional language that conforms to its ordinary meaning and purpose. In a seminal report issued more than a century ago, the Senate Judiciary Committee carefully examined the constitutional phrase “the Recess of the Senate.” S. Rep. No. 58-4389, at 2 (1905). It explained that the 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.” *Ibid.*

The report defined the constitutional phrase in explicitly functional terms, concluding that Senate recesses occur “when the Senate is not sitting in regular or extraordinary session,” *i.e.*, periods “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.” *Ibid.* The Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” *See Riddick & Frumin, Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) (“Riddick’s Senate Procedure”).

The Executive Branch’s own firmly established understanding of the Recess Appointment Clause is consistent with the Senate’s understanding. Attorney General Daugherty explained in a 1921 opinion that the relevant inquiry is a functional one—“whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” 33 Op. Att’y Gen. 20, 21-22 (1921).

Paraphrasing the 1905 Senate report, Daugherty explained:

[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?

Id. at 25; *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

2. The President properly determined that the Senate’s 20-day break in January 2012 fits squarely within this understanding of the term “Recess of the Senate.” The Senate had ordered that it would not conduct business during this entire period. The relevant text of the 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).⁶

By providing that “no business” could be conducted for 20 consecutive days, even during the intermittent *pro forma* sessions, this order rendered the Senate unavailable to provide advice or consent as part of the ordinary appointments process. Moreover, under Senate procedures, because the order was adopted by unanimous consent of the Senate, recalling the Senate to conduct business would

⁶ This order also provided for an earlier period of extended Senate 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 of the 112th Congress began, by operation of the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; *infra* p.31-32. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

have required unanimous consent as well.⁷ The 20-day break from business thus constituted a recess under the ordinary, well-established meaning addressed above.

Consistent with the President's understanding, the Senate did not even purport to be in a *pro forma* session on January 4 in particular, and itself specifically and repeatedly referred to its break from business from January 3 to January 23 as a "recess" and arranged its affairs during the break based on that understanding. For example, at the same time it adopted the order that it would conduct no business during that period, the Senate made special arrangements for certain matters to continue during "the Senate's recess." *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that "notwithstanding the Senate's recess, committees be authorized to report legislative and executive matters"); *see also ibid.* (allowing for appointments "notwithstanding the upcoming recess or adjournment"). The Senate has taken similar steps before long recesses without

⁷ 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); Riddick's Senate Procedure, *supra*, at 1311. Thus, although the Senate enacted legislation on December 23, 2012, it did so only via a unanimous consent agreement. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The fact that the Senate retained the ability to recall itself to conduct business in this highly restricted manner during its January 2012 break does not undermine the validity of the appointments. Similar recall authority is also available in recesses where the President's recess appointment authority is unquestioned. *See* Brown, *et al.*, *House Practice* § 10, at 9 (2011).

pro forma sessions,⁸ which further indicates that the Senate viewed its January 2012 break as another recess.

The President's conclusion that the Senate was in recess is reinforced by the Senate's own words: the order declaring that the Senate would conduct "no business" between January 3 and 23 was adopted only moments after others that referred to that January break as a "recess." 157 Cong. Rec. S8783. The Supreme Court has explained that it is "essential . . . that each branch be able to rely upon definite and formal notice of action by another," and warned against the "uncertainty and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of Senate communications. *United States v. Smith*, 286 U.S. 6, 35-36 (1932). The President thus acted well within his constitutional authority by relying on that "definite and formal notice of action."

3. The scheduling of periodic "*pro forma* sessions" did not alter the continuity or basic character of the Senate's 20-day recess in January 2012, transform it into a series of periods that were not even recesses, or somehow remove the 20-day period from the scope of the Recess Appointments Clause. The *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done. By the terms of the Senate's adjournment order, "no business [was] to be done" during the *pro forma* sessions

⁸ See, e.g., 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

as well as in between them. . They thus preserve, rather than alter, the essential character of the 20-day January 2012 break as a single, extended recess of the Senate.

Historically, when the Senate wanted to take a break from regular business over an extended period of time, the two Houses of Congress would pass a concurrent resolution of adjournment authorizing the Senate to cease business over that time. *See Brown, supra*, at 8-9. Since 2007, however, the Senate has begun to hold *pro forma* sessions during breaks when there traditionally would have been a concurrent adjournment resolution, like the winter and summer holidays. *See Sessions of Congress, Congressional Directory for the 112th Congress* 536-38 (2011) (“*Congressional Directory*”). These periodic *pro forma* sessions allow the Senate to claim compliance with the constitutional requirement in the Adjournment Clause that neither House adjourn for more than three days without concurrence of the other.⁹ Whatever the efficacy of the *pro-forma*-session device for that purpose, it does not affect application of the Recess Appointments Clause. *See infra* at p.29-30.

The fact that the Senate sought to facilitate its 20-day break from business by using one mechanism (*pro forma* sessions) rather than another (concurrent adjournment resolution) makes no difference under the Recess Appointments

⁹ U.S. Const., art. I, § 5, cl. 4.

Clause. For that constitutional purpose, adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions, because both are designed to enable the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. That one Senator comes to the Senate Chamber to gavel in and out the *pro forma* sessions, with no other Senator needing to attend and “no business [to be] conducted,” does not change the fact that the Senate as a body is in “Recess” as the term has long been understood.

4. To buttress its contention that the Senate’s three-week break from business was not a recess, BRI attempts to rely on a series of constitutional provisions *other* than the Recess Appointments Clause, but none of these other provisions is relevant here.

BRI argues that treating the Senate’s 20-day break as a recess would conflict with the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, which provides that “[e]ach House may determine the Rules of its Proceedings.” But BRI fails to cite any Senate rule that supports its position. To the contrary, the Senate by its own orders declared that its January break was a “recess” and that the purported “sessions” in that period were “*pro forma*” only, in which “no business” was to be conducted. 157 Cong. Rec. S8783. And, in any event, an officer of the Legislative

Branch itself has recognized that it does not have sole authority to determine whether there is a recess within the meaning of the Recess Appointments Clause, because that question implicates the President's Article II powers. *In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (“the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate”) (quoting 33 Op. Att’y Gen. 20 (1921)); *see also INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (explaining that the Rules of Proceedings Clause gives Congress authority only to establish rules governing the Senate’s “*internal matters*” and “only empowers Congress to bind itself”).

BRI likewise misconceives (Br.20-21&n.11) the relevance of 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. The Adjournment Clause relates primarily to the internal operations of the Legislative Branch, by furnishing each House of Congress with the power to ensure the simultaneous presence of the other so that they can together conduct legislative business.¹⁰ We may assume *arguendo* that,

¹⁰ *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790) *reprinted in* 17 The Papers of Thomas Jefferson 195-96 (Julian Boyd, ed. 1965) (explaining the Adjournment Clause was “necessary therefore to keep [the

insofar as the matter concerns solely the interaction of the two Houses, Congress could have some leeway to determine whether a particular practice, like the purely “*pro forma* sessions” here, comports with the Clause. And each respective House has the ability to respond to, or overlook, any potential violation of the Clause by the other.¹¹

The question presented here concerns the power of the President under Article II, § 2 of the Constitution—specifically, whether he reasonably determined that the Senate was in recess thereby permitting him to make a recess appointment. That question is fully answered by the plain meaning of the Recess Appointments Clause and the Senate’s own actions, including its explicit order that it would conduct “no business” during its January break, and its unambiguous characterization of that break as a “recess.” This Court need not and should not reach out to determine whether the Senate complied with the Adjournment Clause.¹²

houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will”).

¹¹ 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 “the Senate adjourned for more than 3 days” in June 1916 “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”).

¹² To resolve the issue of whether the Senate complied with the Adjournment Clause, the Court would need to decide not only whether the Senate “adjourn[ed] for more than three days” within the meaning of that Clause, but whether it did so

BRI also erroneously invokes (Br.16-17,20-21&n.11) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. The January 3 *pro forma* session was not necessary to begin the second session of the 112th Congress, because absent a law appointing a different date, the congressional Session begins at noon on January 3. To hold otherwise would vitiate the Twentieth Amendment’s requirement that the starting date of the annual Session may be changed only “by law,” a requirement that entails presentment to the President of a bill changing the date, rather than unilateral action of Congress or one of its Houses.¹³

“without the Consent” of the House. Art. I, § 5, cl. 4. Given that the Senate was unavailable to do business between January 3 and 23, 2012, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The question of consent by the other House would ordinarily be an issue for resolution between the two Houses, not for the courts. And even if the question were judicially cognizable, its answer would be unclear. The House was aware of the Senate’s adjournment order, but rather than objecting to that order, the House adopted a corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period. *See* H. Res. 493, 112th Cong. (2011).

¹³ Congress sometimes has enacted legislation to vary the date of its first annual meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but it did not do so here.

Thus, whatever the significance of the *pro forma* session for purposes of the Senate's own responsibilities under the Twentieth Amendment, the new Session began by operation of the Twentieth Amendment at noon on January 3 and the period of recess that the Senate had ordered commenced at that point and continued until January 23.¹⁴ In any event, BRI's suggestion again inappropriately equates two different constitutional provisions. Like the Adjournment Clause, the assembly requirement of the Twentieth Amendment relates primarily to the internal operations and obligations of the Legislative Branch. Whatever sway a congressional determination about the effects of a *pro forma* session might hold in that context, it has no bearing where, as here, the powers of a coordinate Branch are concerned.¹⁵

5. The Supreme Court has condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Allowing the use of “*pro forma* sessions” to disable the

¹⁴ *See supra* n.6.

¹⁵ Congress's has occasionally failed to assemble a quorum on the day constitutionally set for the beginning of Congress's annual meeting. *See, e.g.*, 6 Annals of Cong. 1517 (1796); 8 Annals of Cong. 2189 (1798); 8 Annals of Cong. 2417-18 (1798).

President from acting under the Recess Appointments Clause would do precisely that.

First, BRI's position would frustrate the constitutional design by leaving vacuums of appointment authority over potentially lengthy periods of times, during which nobody could fill vacancies that are "necessary for the public service to fill without delay." *Federalist No. 67*, at 410.¹⁶ Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods.¹⁷ But since 2007, the Senate has regularly used *pro forma* sessions to allow for extended suspensions of business.¹⁸ Indeed, on at least five different occasions in the past few years, the Senate has used *pro forma* sessions to facilitate breaks from business lasting longer

¹⁶ Although the President may convene the Senate "on extraordinary Occasions," Art. II, § 3, the adoption of the Recess Appointments Clause shows that the Framers did not regard the President's convening power as a sufficient solution to the problem of filling vacancies during recesses. Prior to ratification of the 20th Amendment, which changed the starting date of Congress's annual session from December to January, Presidents regularly exercised the convening power to call "special Senate sessions." See *Congressional Directory*, *supra*, at 522-28. Those sessions were usually convened because newly elected Presidents first took office on March 4, nearly ten months before Congress was then required to convene. See Berg-Andersson, *Explanation of the Types of Sessions of Congress*, The Green Papers (Jun. 6. 2001) at <http://www.thegreenpapers.com/Hx/SessionsExplanation.html#spe>. Planning for such special sessions could be done well in advance, and nearly always took place within days of the end of the previous session of Congress, when members would not yet have departed the capital. See *Congressional Directory*, *supra*, at 522-28. It would be far more disruptive if the President had to call the Senate into session unexpectedly to deal with problems created by vacancies in the middle of a recess.

¹⁷ See, e.g., 148 Cong. Rec. 21,138 (Oct. 17, 2002).

¹⁸ See generally *Congressional Directory*, *supra*, at 536-38

than a month. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (listing breaks of 31, 34, 43, 46, and 47 days punctuated by *pro forma* sessions). And BRI's position would allow the Senate to use the device of *pro forma* sessions to facilitate even longer breaks from business, and the absence of its Members from the Seat of Government, without triggering the Recess Appointments Clause.

Second, BRI's position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the Senate to make a choice: *either* remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to provide advice and consent; *or* "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 understanding of the Senate's constitutional alternatives is evidenced by, and has contributed to, past compromises between the President and the Senate over recess appointments.¹⁹

Under BRI's view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate would always possess the unilateral authority

¹⁹ For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004.

to divest the President of his recess appointment power through the simple expedient of punctuating extended recesses of the Senate as a body, and the extended absence of its Members, with fleeting *pro forma* sessions attended by a single Member. Indeed, under BRI's logic, early Presidents could not have made recess appointments during the Senators' months-long absences from the Seat of Government 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 even arguably purported to be in session for Recess Appointments Clause purposes, while it was actually dispersed and functionally conducting no business. That historical record "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, the Senate's "prolonged reticence" to assert that the President's recess appointment power could be so easily nullified by "*pro forma* sessions" 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).

C. Nothing in the Recess Appointments Clause Confines the President's Appointment Authority To Intersession Recesses

BRI also challenges the recess appointments on the ground that the President may make such appointments only during recesses that occur between enumerated sessions of the Senate, commonly known as *intersession* recesses. (Br.20.) In

common parlance, intersession recesses occur when the Senate uses a specific type of adjournment known as an adjournment *sine die*, the long-accepted parliamentary mechanism to terminate a legislative session. See Henry M. Robert, Robert's Rules of Order 148, 155 (1876) (legislative sessions terminate at the time the legislature adjourns "*sine die*"—literally "without [a] day" specified for reconvening).

When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session, and the resulting recess is commonly referred to as an *intrasession* one. BRI contends that the President is powerless, however, to make recess appointments intrasession recesses, even though such recesses are today far more common, and often longer, than intersession recesses. See generally *Congressional Directory*, *supra*, at 529-38. Although this argument was recently accepted in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), it was squarely rejected by the *en banc* Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005).

BRI's position flies in the face of the constitutional text and history. Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. See Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The Noel Canning*

Decision and Recess Appointments Made From 1981-2013, at 22-28 (2013).

These intrasession recess appointments include three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See Hogue, Intrasession Recess Appointments, supra*, at 5-31. The practice has continued regularly since Attorney General Daugherty, relying on the Senate Judiciary Committee's own interpretation of the Clause, confirmed nearly a century ago that such appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); *supra* p.22-23. The Legislative Branch itself has acquiesced in the President's power to make such appointments.²⁰ Nevertheless, BRI urges that every one of these appointments was unconstitutional. This Court should reject that contention. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

1. BRI's argument founders at the outset on the text of the Recess

Appointments Clause, because that text “does not differentiate between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. As explained above, the plain

²⁰ *See, e.g.*, 41 Op. Att'y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the “accepted view” of the Recess Appointment Clause, and interpreting the Pay Act in a consistent manner).

meaning of the term “recess” means a “period of cessation from usual work,” 13 *Oxford English Dictionary, supra*, at 322-23, and does not distinguish between those periods that are between sessions of the Senate and those that are within sessions. Consistent with that understanding, the Senate itself described the period at issue here as part of its “recess.” 157 Cong. Rec. S8783.

Furthermore, at the time of the Framing, the term “the Recess of the Senate” would have naturally been understood to encompass both intrasession and intersession recesses. The British Parliament, whose practices formed the basis for American legislative practice, had used the term “recess” to encompass both intersession and intrasession breaks. *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (2d ed. 1812) (describing a “recess by adjournment” as one occurring during an ongoing session). Indeed, the Oxford English Dictionary, in defining the word “recess,” provides a usage example from Parliament in 1621 that refers to an *intrasession* recess. *See* 13 *Oxford English Dictionary, supra*, at 322-23 (“They [the House of Commons] humbly desire to know the Time of the Recess of this Parliament, and of the Access again, as they may accordingly depart and meet again at the same Time as their Lordships shall.” (citing 3 H.L. Jour. 61 (Mar. 22, 1621))); 3 H.L. Jour. 74 (Mar. 27, 1621) (adjourning until April 17).

Founding-era legislative practice in the United States conformed to the Parliamentary understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States “in the recess of Congress” (Arts. IX & X). The only time Congress did so was for a scheduled *intrasession* recess.²¹ And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”²²

State legislatures employed the same usage. The Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes “in the recess” of the legislature. *See* Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during legislative recesses that were not preceded by *sine die* adjournment or its equivalent and that were therefore *intrasession* recesses

²¹ *See* 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. The scheduled recess was *intrasession* because new congressional terms began annually in November, *see* Articles of Confederation of 1781, art. V, but Congress had adjourned only until October 30.

²² *See, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York “during the recess” due to a broken carriage), *reprinted in* 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION 76; 3 FARRAND, *supra*, at 191 (recounting a 1787 speech by Luther Martin in which he discussed matters that occurred “during the recess” of the Convention); *see also* 2 FARRAND, *supra*, at 128.

in common parlance.²³ *See supra* pp.35-36. And in 1775, the New York legislature appointed a “Committee of Safety” to act “during the recess” of the legislature; the referenced recess was a 14-day intrasession one.²⁴

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause, which allowed state governors to “make Temporary Appointments” of Senators “if Vacancies happen * * * during *the Recess* of the Legislature of any State.” Art. I, § 3, cl. 2 (emphasis added). Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted the commission without objection.²⁵ The absence of objection is telling, for the Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state

²³ *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (recessing from April 16, 1781 to June 13, 1781). In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, § 9; Vt. Const. of 1777, ch. II, sec. VII.

²⁴ 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

²⁵ *See* 8 Annals of Cong. 2197 (Dec. 19, 1798); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess between November 8, 1798 and January 16, 1799).

legislative practices. *See generally* Butler & Wolf, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES: 1793-1990 (1995).

This interpretation also best serves the purpose of the Recess Appointments Clause. *See supra* p.19-20. The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the need to fill vacancies is just as great. Intrasession recesses often last longer than intersession ones. *See Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken “zero-day intersession recesses” as well as “intrasession recesses lasting months”). And in modern Senate practice, intrasession recesses account for more of the Senate’s absences than intersession recesses. *See Congressional Directory, supra*, at 530-37.

By contrast, BRI’s position would apparently empower the Senate unilaterally to eliminate the President’s recess appointment authority even when the Senate is unavailable to advise and consent, simply by recasting an adjournment *sine die* as an equally long adjournment to a date certain. For example, the 82nd Congress’s second session ended on July 7 when Congress adjourned *sine die*, and the President was able to make appointments from then until January 3, when the next session of Congress began pursuant to the 20th Amendment. *Congressional Directory, supra*, at 529. If the Senate had adjourned from July 7 to a date immediately before the next congressional session (say,

January 2), the break would have been equally long, but it would have constituted an intrasession recess, during which the President would have been powerless to make recess appointments under BRI's theory. The Framers could hardly have intended such a result. Rather, the Framers must have intended the Senate's practical unavailability to control in that hypothetical setting, despite the Senate's efforts to elevate form over substance in the manner of adjourning and reconvening.

Finally, the longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further supports the government's interpretation. The Supreme Court has stressed that "[t]raditional ways of conducting government give meaning to the Constitution," and "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. at 689.

Instead of giving "great weight" to this vast and settled body of practice, the *Noel Canning* court looked to the fact that no intrasession recess appointment had been documented before 1867. 705 F.3d at 501-503. But until the Civil War, there were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See Congressional Directory, supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th Century. *See id.*

at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of intrasession recesses beyond three days.

2. BRI argues that the Clause's reference to "*the* Recess of the Senate" confines the Clause to intersession recesses. *Noel Canning* similarly held that the Clause's use of the definite article "suggests specificity." 705 F.3d at 500. But as the *en banc* Eleventh Circuit explained, the word "the" can also refer generically to a *class* of things, *e.g.*, "The pen is mightier than the sword," rather than a specific thing, *e.g.*, "The pen is on the table." See *Evans*, 387 F.3d at 1224-25 (citing dictionary usages). In context, it is obvious that the Framers used the word "the" in its former sense, as referring to *all* periods during which the Senate is unavailable to conduct business, rather than a *specific* one.²⁶

Contrary to *Noel Canning*'s suggestion, 705 F.3d at 505, this usage is not solely a modern one. The Constitution itself elsewhere uses "the" to refer to a class of things. For example, the Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days "during *the Session*

²⁶ Indeed, it is apparent that even the *Noel Canning* court could not have meant to use the definition of "the" on which it purported to rely. See *Noel Canning*, 705 F.3d at 500 ("'the' [is] an 'article noting a *particular* thing'" (quoting Johnson, *supra*, at 2041)). *Noel Canning* did not read "the Recess of the Senate" as referring to a particular recess in the same way that "the pen on the table" refers to a particular pen. Instead, it read "the Recess" as referring generically to the *class* of all intersession recesses. Once that Rubicon is crossed, "the" provides no textual basis for drawing a constitutional line between a restrictive class of recesses limited to intersession ones, and a broader class that includes intrasession ones as well.

of Congress.” Art. I, § 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to “the Session” cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President “in *the Absence* of the Vice President,” Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* p.38-40.

The fact that the Clause uses the singular “Recess” rather than the plural “Recesses,” *Noel Canning*, 705 F.3d at 499-500, 503, is equally inapposite. The Senate is constitutionally required to have at least two enumerated sessions per Congress, *see* Amend. XX, and in the 18th and 19th Centuries, the Senate regularly had three or four enumerated sessions. *See generally Congressional Directory, supra*, at 522-26. Thus, the Senate regularly had at least two intersession “Recesses” per Congress. Also misplaced is BRI’s reliance on the Framers’ capitalization of “Recess” (Br.19), because “nearly every noun in the Constitution is capitalized.” Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 413 n.166 (2005).

3. In addition to the flawed textual analysis pressed by BRI, the *Noel Canning* decision raised a number of additional points, none of which has merit. *Noel Canning* rejected the functional definition of the constitutional phrase “the

Recess of the Senate” long employed by both the Senate and the Executive Branch (*see supra* pp.22-24)—a definition which includes both intersession and intrasession recesses—on the ground that its “inherent vagueness . . . counsels against it.” 705 F.3d at 504. But in the context of the Constitution’s provisions allocating powers among the Branches, there is nothing novel or objectionable about a test that may result in close cases at the margins. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 670-72 (1988) (applying a multi-factor test under which the distinction between principal and inferior officers under the Appointments Clause is “far from clear”).

Noel Canning also concluded that the Constitution treats a “recess” and a “session” as mutually exclusive, so that the Senate cannot have a recess during a session. *See* 705 F.3d at 500-501. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that recess appointments expire at the end of the Senate’s “next” session. But this provision says nothing about whether a recess can occur *within* an enumerated session. *Noel Canning* viewed the specified termination point as conclusive evidence that the Framers anticipated that the recess appointment power could be invoked only during the recess between the enumerated sessions of Congress. *Id.* (citing Federalist No. 67). But as shown above, intrasession recesses were a recognized legislative practice at the time of the Framing. If the Framers meant to exclude them from the reach of the Recess

Appointments Clause, they would hardly have expressed that intent in such an oblique manner, through the provision setting the termination date for the appointments. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

Because the Constitution sometimes uses the verb “adjourn” or the noun “adjournment,” rather than “recess,” the *Noel Canning* decision also inferred that the term “recess” must have a meaning narrower than “adjournment.” *Noel Canning*, 705 F.3d at 500. But to the extent that these terms were distinguished from one another in the Constitution, the distinction was not the one that *Noel Canning* perceived. The Framers used “adjournment” to refer to the “act of adjourning,” 1 Oxford English Dictionary, *supra*, at 157, and used “recess” to refer to the “period of cessation from usual work,” 13 Oxford English Dictionary, *supra*, at 322. Compare, e.g., Art. I, § 7, cl. 2 (Pocket Veto Clause) (“unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law”) with Art. II, § 2, cl. 3 (“[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate”).²⁷ Thus, when the Continental Congress convened a committee “during the recess,” it did so under an intrasession

²⁷ That understanding is reinforced by the fact that, at the time of the Framing, the word “recess” was generally not used as a verb, as that function was instead performed by the word “adjourn.” See Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, at <http://lawlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1/>

“adjournment.” 27 J. Continental Cong. 1774-1789, at 555-56. And to the extent that “adjournment” was used at the time to refer to breaks in legislative business, rather than to the act of adjourning, it was used interchangeably with “recess.” For instance, George Washington used the terms “recess” and “adjournment” in the same paragraph to refer to the same 10-day break in the Constitutional Convention. Letter from Washington to John Jay (Sept. 2, 1787) (expressing regret that he had been unable to come to New York “during the adjournment” because a broken carriage had impaired his travel “during the recess”), *reprinted in* 3 Farrand, *supra*, at 76.

In any event, the government’s position is consistent with the possibility that “recess” may be narrower than “adjournment,” and with the conclusion that the Recess Appointments Clause does not apply to the period following all adjournments. The Adjournment Clause makes clear that the action of taking even an extremely short break counts as an “adjournment,” *see* Art. I, § 5, cl. 4 (recognizing that breaks of less than three days are still “adjourn[ments]”), but the Executive has long understood that such short breaks that do not genuinely render the Senate unavailable to provide advice and consent and do not trigger the President’s authority under the Recess Appointments Clause. 33 Op. Att’y Gen. 20, 22 (1921).

Finally, there is no basis for *Noel Canning*'s speculation that Presidents would use intrasession recess appointments to evade the Senate's advice-and-consent role. *See* 705 F.3d at 503. Despite the long-held understanding that Presidents may make intrasession recess appointments, Presidents routinely seek Senate confirmation, and they have a strong incentive to do so, because recess appointments are only temporary.

D. The President May Fill All Vacancies During a Recess, not Just Vacancies that Arise During that Recess

BRI also asserts that the President lacked the authority to make the recess appointments on January 4, 2012, because they did not arise during that recess. The theory that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeals, two of them sitting *en banc*. *See Evans*, 387 F.3d at 1226-27 (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir.1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). The recent contrary decision of the *Noel Canning* court is erroneous.

1. The Recess Appointments Clause states that “[t]he 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.” Art. II, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist

during a recess, including those that arose beforehand. He pointed out that “happen” is an ambiguous term, which could be read to mean “happen to occur,” but “may mean, also * * * ‘happen to exist.’” 1 Op. Att’y Gen. 631, 632 (1823). He explained that the “exist” interpretation rather than the “occur” interpretation is more consonant with the Clause’s purpose of “keep[ing] these offices filled,” *id.*, and the President’s duty to take care of public business. Accordingly, “all vacancies which * * * *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled.” *Id.* at 633 (emphasis added).

Attorney General Wirt’s interpretation fits the durational nature of vacancies. While the event that *causes* a vacancy, such as a death or resignation, may “happen” at a single moment, the resulting vacancy itself continues to “happen” until the vacancy is filled. *Accord* Johnson, *supra*, at 2122 (defining “vacancy” in 1755 as the “[s]tate of a post or employment when it is unsupplied”); *see* 12 Op. Att’y Gen. 32, 34-35 (1866).²⁸ That durational usage accords with common parlance. For example, it would be conventional to say that World War II “happened” during the 1940s, even though the war began on September 1, 1939. And the durational sense of “happen” is all the more appropriate when asking if one durational event (a vacancy) happens in relation to another (a recess). Thus,

²⁸ *See also* Hartnett, *supra*, at 381-84 (giving examples of events that “happen” over an extended period).

although some eighteenth century dictionaries defined “happen” with a variant of “come to pass,” *Noel Canning*, 705 F.3d at 507, as applied to a durational event like a vacancy, that definition is consistent with Attorney General Wirt’s interpretation.

For nearly two centuries, the Executive Branch has followed the opinion provided by Attorney General Wirt to our fifth President, himself one of the Founding Fathers, and Congress has consistently acquiesced. *See Allocco*, 305 F.2d at 713-14. As noted above, such a longstanding and uncontroverted interpretation is entitled to “great weight” in “determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.” *The Pocket Veto Case*, 279 U.S. at 688-90.

This interpretation is also consistent with Executive Branch practice reaching back to the first Administration. President Washington made at least two recess appointments that would have run afoul of the rule proposed by BRI and adopted in *Noel Canning*. In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by a statute enacted in April 1792.²⁹ Under *Noel Canning*’s interpretation, the vacancy

²⁹ 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 1 Stat. 246. Scot’s appointment was occasioned by Joseph Wright’s death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in that office, and

did not “happen” during the recess because it arose when the statute was first passed, and was then filled up during a later recess after at least one intervening session. And in October 1796, Washington recess appointed William Clarke to be the United States Attorney for Kentucky, even though the position had gone unfilled for nearly four years.³⁰ President Washington’s immediate successor, John Adams, expressed the same understanding as the government does today³¹ (as did apparently the fourth President, James Madison, and possibly also the third, Thomas Jefferson³²).

This long-settled interpretation is also more consistent with the purpose of the Recess Appointment Clause. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate

even if he had been, it would have also been during the same recess that Scot was appointed after at least one intervening session (in which case Wright’s commission would have run afoul of *Noel Canning*). See 17 Am. J. Numismatics 12 (Jul. 1883); Fabian, JOSEPH WRIGHT, AMERICAN ARTIST, 1756-1793, at 61 (1985).

³⁰ Dep’t of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979).

³¹ See Letter from John Adams to James McHenry (April 16, 1799), reprinted in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES (“ADAMS WORKS”) 632-33; Letter from James McHenry to Alexander Hamilton (April 26, 1799), reprinted in 23 THE PAPERS OF ALEXANDER HAMILTON 69-71 (H.C. Syrett ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), reprinted in 8 ADAMS WORKS, at 647-48.

³² Hartnett, *supra*, at 391-401.

potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, the slowness of long-distance communication in the 18th Century meant that the President might not even have *learned* of such a vacancy until after the Senate's recess began. *See* 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant for months during a recess merely because news of the death during the session had not reached the Nation's capital until after the Senate was already in recess. BRI's position, by contrast, would make the President's ability to fill offices turn on the fortuity of when the previous holder left office. But "[i]f the [P]resident needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it must be filled now." Herz, *Abandoning Recess Appointments?*, 26 *Cardozo L. Rev.* 443, 445-46 (2005).

2. BRI's position also creates serious textual difficulties. If, as BRI urges, the phrase "during the Recess of the Senate" were read to modify the term "happen" and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and would be unavailable to limit the *time* when the President may exercise his "Power to fill up" those vacancies through granting commissions. As a result, BRI's reading would mean that the

President would retain his power to fill the vacancy that arose during the recess *even after the Senate returns from a recess*, an interpretation that cannot possibly be correct. *See* 12 Op. Att’y Gen. at 38-39 (criticizing the “happen to arise” interpretation for this reason). The government’s interpretation does not suffer from this defect. It allows for “during the Recess of the Senate” to delimit the President’s “Power to fill up” all “Vacancies.”

Noel Canning contended that the government’s interpretation renders the words “that may happen” superfluous. *See* 705 F.3d at 507. But in the Framing era, the words “that may happen” could be appended to the word “vacancies” without signifying an apparent additional meaning. *See, e.g.*, George Washington, General Order to the Continental Army, Jan. 1, 1776 (“The General will, upon any Vacancies that may happen, receive recommendations, and give them proper consideration[.]”). In any event, the government’s reading does not necessarily render any words superfluous. Without the phrase “that may happen,” the Clause could be read to enable the President to fill up known future vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing “that may happen” as the Executive has long read it confines the President to filling up vacancies in existence at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed the “happen to arise” interpretation. *See* 705 F.3d at 508-509. Randolph’s opinion has been thoroughly repudiated by a long line of Attorney General opinions dating back to 1823, *see Allocco*, 305 F.2d at 713, and it is not clear that any President ever found the advice wholly persuasive. As noted above, even George Washington, to whom Randolph gave his advice, departed from it on more than one occasion. At most, Randolph’s opinion shows an early “difference of opinion,” Letter from John Adams to John McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, *supra*, at 647, regarding an ambiguous constitutional provision. Any such early differences were resolved by Attorney General Wirt’s 1823 opinion, which has been adhered to consistently for nearly two hundred years.

Noel Canning also dismissed Congress’s longstanding acquiescence in the Executive Branch’s interpretation as a departure from a position supposedly expressed in an 1863 statute. *See* 705 F.3d at 509. But far from rejecting the Executive’s interpretation, the 1863 statute acknowledged it. *See* 16 Op. Att’y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress

subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1948, 54 Stat. 751.

Finally, *Noel Canning* attempted to minimize the damaging consequences of its decision by suggesting that Congress could more broadly provide for “acting” officials. *See* 705 F.3d at 511. The very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an “acting” capacity. Moreover, some positions (*e.g.*, Article III judgeships) cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions for an extended period of time, such as Cabinet level positions or positions on boards designed to be politically balanced.³³

³³ Even if the Recess Appointments Clause were confined to vacancies that arise during a recess, this Court would nevertheless be required to uphold the Board’s order, because under the facts found by *Noel Canning* the appointments of the two recess appointees on the panel that issued the challenged order—Sharon Block and Richard Griffin—met that purported requirement. The third member of that panel, Brian Hayes, was a Senate-confirmed member of the Board.

Member Block’s seat was previously held by Craig Becker. *Noel Canning* understood Becker’s recess appointment to have terminated pursuant to the Recess Appointments Clause “at the end” of the Senate’s session—at noon on January 3, 2012. *See* 705 F.3d at 512. Having made that finding, *Noel Canning* nevertheless appears to have erroneously held that the vacancy did not arise during the recess after January 3. *Id.* at 513. That view cannot be squared with the Recess Appointments Clause’s provision regarding the termination date of appointments. If Becker occupied the position until the end of the Senate’s session, the vacancy filled by Block could not have arisen in that same session. By definition, the vacancy must have arisen *after* the earlier recess appointment ended at the end of

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCHALLENGED FINDINGS THAT BRI UNLAWFULLY THREATENED MINE CLOSURE AND JOB LOSS AND PROMISED BENEFITS TO EMPLOYEES

BRI did not file exceptions to the judge's findings of several Section 8(a)(1) violations, including threats of mine closure and job loss and a promise of benefits in exchange for abandoning support for UMWA. *See* 29 C.F.R. § 102.48(a). (JA1n.2,12-21,29-30.) Section 10(e) of the Act (29 U.S.C. § 160(e)) states, "No objection that has not been urged before the Board . . . may be considered by the court. . . ." Thus, the Board is entitled to summary enforcement of the related portions of its Order. *See NLRB v. Somerville Constr. Co.*, 206 F.3d 752, 756 (7th Cir. 2000). Nevertheless, the "unchallenged violations do not disappear," but "remain, lending their aroma to the context in which the contested issues are considered." *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 818-19 (7th Cir. 2005) (citations omitted). This principle especially applies here, where BRI threatened

the session—*i.e.*, during the recess. The appointment of Block on January 4 was thus made during that same period in which the vacancy she filled had arisen.

Member Griffin, meanwhile, was appointed to a seat that had become vacant on August 27, 2011, during an intrasession recess. *See id.* at 512. Even under the "arise" interpretation, the Recess Appointments Clause plainly provides that so long as a vacancy arose "during the Recess of the Senate," the President possesses the power to fill it. Although *Noel Canning* concluded that the President's recess appointment power is limited to the *same* recess in which the vacancy arose, *id.* at 514, nothing in the text of the Clause imposes such a limitation.

employees with mine closure and job loss if UMWA were elected and, one week after the election, discharged a vocal union advocate.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BRI VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING WADE WALLER BECAUSE OF HIS UNION ACTIVITY

BRI discharged union activist and experienced miner Waller within days of its employees' selection of union representation. At the time of his discharge, BRI purported to rely on reports implicating Waller in unspecified threatening or intimidating behavior; throughout the course of litigation, BRI has abandoned all claims of any misconduct other than a verbal disagreement about dumping coal between Waller and co-worker Koerner. BRI "deliberately twisted" (JA28) Waller's statement, "No matter how many times you flag me, I'm not going to stop," to claim that he threatened to "kill" Koerner and created a safety violation (JA26-27;215). The Board reasonably found (JA27-28) that BRI did not have a "reasonable belief" that Waller made such a threat. Instead, BRI's shifting reasons for discharging Waller, its contemporaneous Section 8(a)(1) violations, prior tolerance of threats and physical altercations, and reliance on discredited testimony amply support the Board's finding that BRI terminated Waller because of his union activity, not its professed concerns about safety.

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to “form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) safeguards that right by prohibiting “discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.”³⁴ Thus, an employer violates Section 8(a)(3) and (1) by discharging an employee because of his union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005).

In *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397 (1983), the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Under this test, if substantial evidence supports the Board’s finding that an employee’s union activity was a “motivating factor” in the adverse employment action, the Court must affirm that conclusion unless the record as a whole should have compelled the Board to

³⁴ A violation of Section 8(a)(3) constitutes a “derivative” violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), *Rochelle Waste Disposal LLC v. NLRB*, 673 F.3d 587, 597 (7th Cir. 2012) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983)), which makes it unlawful for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”

accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *FedEx Freight East, Inc.*, 431 F.3d at 1025.

Questions of motive are usually resolved by inferences drawn from the record as a whole. *NLRB v. O'Hare-Midway Limousine Serv.*, 924 F.2d 692, 695-96 (7th Cir. 1991). The "Board is free to rely on circumstantial as well as direct evidence." *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 408 (7th Cir. 1992) (citations omitted). Circumstantial evidence includes the timing of the discharge, the employer's reliance on pretextual justifications, and the employer's other contemporaneous violations of the Act. *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997); *accord Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000). Also, shifting explanations for the adverse action "may, in and of themselves, provide evidence of unlawful motivation." *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *accord NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

To establish the affirmative defense that it would have taken the same action even absent the union activity, the employer must show it had a reasonable belief that the employee engaged in misconduct, and acted on that belief when it discharged him. *McKesson Drug Co.*, 337 NLRB 935, 937 (2002). The Board need not accept an employer's asserted explanation "if there is a reasonable basis

for believing it ‘furnished the excuse rather than the reason for [its] retaliatory action.’” *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted).

B. BRI Discharged Waller Because of His Union Activity

1. Waller’s discharge was motivated by union animus

The record amply demonstrates, as the Board found, that union animus was a motivating factor in Waller’s discharge. It is undisputed that Waller was “one of the strongest and most outspoken UMWA supporters at the mine” and company management was aware of his support. (JA25;69,382.) Waller openly wore and distributed union paraphernalia. (JA3&n.5,24;64-70,120,234,265,271,276-81,385-86,406,411,415,598,821,1074.) Senior Human Resources Manager Gossman and Vice-President Benner knew of Waller’s strong union support before terminating him. (JA2,23-25.) The straw polls, which Gossman kept, identified Waller as pro-union. After UMWA’s victory, Gossman collected and reviewed with Benner several statements regarding union conduct. Benner admitted that he was aware of Waller’s union support. (JA23,25;143-45,598,821-23,833,871-77,879.)

Moreover, BRI’s union animus is well-established. The Board found and BRI does not contest (JA1n.2,29-30) that, during the course of an aggressive antiunion campaign, BRI committed numerous Section 8(a)(1) violations. In doing so, BRI employed a carrot-and-stick approach, threatening job loss and mine

closure if employees selected union representation, while promising benefits to diminish union support. In discharging Waller, BRI made good on its threats. Applying this Court's "commonsense" view, "a company that does not dispute its responsibility for multiple prohibited practices is more likely to have engaged in an additional one than a company which has not been found to have engaged in any other prohibited practice." *Uniroyal Tech. Corp. v. NLRB*, 151 F.3d 666, 668-69 (7th Cir. 1998); *see, e.g., Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997) (contemporaneous violations of Act support inference of union animus); *N. Wire Corp. v. NLRB*, 887 F.2d 1313, 1318-19 (7th Cir. 1989) ("comments made by company officials demonstrating a 'manifest hostility' toward union activity are relevant to determining discriminatory motive").

BRI's animus is further supported by circumstantial evidence. It discharged Waller for an alleged threat of physical injury, despite evidence that he was "hard-working, experienced, dependable, well-liked and willing to fill in on his days off" and was never disciplined during his seven years at the mine. (JA25.) *See, e.g., id.* (union activist's glowing performance reviews and willingness to work days off suggested unlawfully motivated discharge); *NLRB v. Henry Colder Co.*, 907 F.2d 765, 769 (7th Cir. 1990) (evidence that discriminatee was "good employee" supported finding that union activity was motivating factor in discharge).

As the Board found, BRI's consistent failure to punish more serious misconduct further supports the Board's finding that BRI discharged Waller because of its union animus. (JA3n.5,25-26;83-84,89-90,99-102,112-13,131,265,270,367,407,419,505-06,633,706-07.) BRI did not discipline two employees who threatened to shoot other co-workers, an employee who threatened to "beat" another employee's "guts out," or two supervisors who threatened to fight each other. (JA25n.46,26&n.47;74,107-12,115,125-30,208,216-17,270,298,349-56,365-66,368-69,371-72,448,452-62,497-500,667-68.) Even when two employees grabbed and shoved co-workers in what BRI deemed "serious" incidents (Br.33), it suspended them for only three days. (JA26;76,81,207-14,880-81.) And it failed to discipline two managers who actually fought each other. (JA26n.48;267-69.) Indeed, since BRI took over the mine, it "had *never* prohibited or discharged any other employee for [threats of physical injury] in the absence of any significant physical contact." (JA25, emphasis in original.) Yet, in highly disparate treatment, BRI purportedly discharged Waller for threatening to run over Koerner, notwithstanding Waller's denial and the lack of any witnesses. (JA25-27;132-33,137,157-59,233,276,290,296-97,340-45,404,626,654.) Under this Court's precedent, such disparate treatment strongly supports an inference of unlawful motive. *See Great Lakes Warehouse Corp. v. NLRB*, 239 F.3d 886, 891 (7th Cir. 2001) (disparate

discipline of union advocate supports animus finding); *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 991-92 (7th Cir. 2004) (employer's "past willingness to give second and third chances to poor employees with a myriad of performance problems, but not to [the discriminatee], smacks of disparate treatment").

BRI's multiple arguments opposing the judge's finding of unlawful animus lack merit. First, contrary to BRI's claim (Br.28), in finding union animus, the judge did not rely on its lawful campaign against UMWA, but on the now-undisputed unlawful threats and promise of benefits "several supervisors and managers at various levels" made during the campaign. (JA25.) BRI's effort (Br.28) to dismiss these uncontested violations as "isolated comments" is baseless. The judge explained (JA14) that, although there was no overt evidence that BRI intentionally adopted a strategy of threats, it instructed supervisors to urge employees to vote "NO" and "did not specifically caution that their opinions should be carefully expressed on the basis of objective facts beyond [BRI's] control." *Cf. Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 824 (D.C. Cir. 2001) (though employer forbade threats and promises, campaign statements unlawful where employer instructed supervisors to convince employees to vote against the union and employees could reasonably believe employer's "public statements were primarily for show" while "[supervisors'] private warnings reflected management's actual position.").

Second, BRI argues (Br.30), for the first time, that the union animus of supervisors who committed unfair labor practices cannot be imputed to Senior Human Resources Manager Gossman and Vice-President Benner. However, under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Court may not consider that argument because BRI failed to raise it to the Board (JA1160-1220). 29 C.F.R. § 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”). In any event, the Board did not impute animus to Gossman and Benner. Rather, the Board found that their undisputed knowledge of Waller’s union activity, coupled with BRI’s efforts to twist the Waller-Koerner exchange into an implausible threat to “kill” Koerner to justify his termination and their disparate treatment of him, amply demonstrates that BRI’s decision to discharge Waller was unlawfully motivated. Further, BRI cannot ignore that the discharge occurred within a week of the election and at a time when there were uncontroverted and pervasive threats of mine closure and job loss by managers at “various levels” that engendered “rampant” rumors and were “a primary concern” for employees. (JA7.) Cf. *Fleming Companies, Inc. v. NLRB*, 349 F.3d 968, 973 (7th Cir. 2003) (threats of mine closure against employees for engaging in union activity are unlawful “because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce”).

Third, BRI's attempts to distinguish (Br.32-34) other threats that resulted in no punishment by asserting that two employees did not "follow[] through on their threats" to injure one another, or that the threat to shoot another employee was well-received because the threatened employee "was joking" when he reported it to a mine manager, do not withstand scrutiny. Nor does its suggestion that Waller "repeatedly" committed safety infractions, when the record establishes that he had never been disciplined for any infraction. (JA25;157,345.) Though BRI avers (Br.33) that other employees' confrontations were merely verbal threats, there is no credited evidence that Waller's statement to Koerner was even a threat. Yet BRI blatantly mischaracterizes the Waller-Koerner exchange as Waller's "refusal to stop his ram car" endangering Koerner. Even assuming Waller said he would not stop if Koerner kept flagging him, the record demonstrates that the comment referenced dumping coal—which Waller was doing at the time—because Waller's car was parked and Koerner had not blown a horn or indicated that Waller was in danger of hitting anyone with the car. In light of the credited evidence concerning that incident, and the "weekly, if not daily" tolerated threats of physical violence, BRI's claim that it has "zero tolerance" (Br.34) for the supposed safety concerns raised by Waller's statement is not credible.

Critically, as the judge noted (JA26), throughout the litigation process, BRI's reasons for discharging Waller shifted in the face of contradictory evidence,

particularly that it tolerated threats and physical fights without discharge, let alone discipline.³⁵ Those shifting justifications “seriously undermine [BRI’s] attempts to portray its discharge decision as based upon anything other than [Waller’s] protected behavior.” *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990). At the hearing, Gossman testified that all the allegations in the written statements justified Waller’s discharge. In its posthearing briefs, after overwhelming evidence of BRI’s failure to punish profanity and fighting, BRI relied only on the unpersuasive “flagging” incident as its justification for Waller’s discharge. (JA26;1185-96.)

Now, before this Court, BRI argues (Br.24-25,27-28,32-33) that Waller’s “pattern of escalating threatening behavior” motivated his discharge, relying on discredited testimony and unsubstantiated statements. However, the evidence shows no such pattern. For example, the Waller-Craig confrontation over Craig’s Facebook post was not unusual, and Gossman admitted that cursing would not warrant discharging an employee. (JA26;216.) BRI also never claimed that Waller was responsible for the anonymous phone calls or damage to Koerner’s truck (JA26). Moreover, the judge discredited Kirk’s claim at the hearing that

³⁵ Despite BRI’s repeated suggestion (Br.4,8,10,13,24,33,41-42) that Waller’s vulgar “scab” song somehow legitimizes his discharge, BRI does “not contend that the song justifies either overturning the election or terminating Waller.” (JA3n.5.) *See Letter Carriers Branch v. Austin*, 418 U.S. 264, 283 (1974) (“scab” is “common parlance in labor disputes” and “entitled to the protection of [Section] 7 of the [Act]”) (citation omitted).

Waller threatened him during a midnight shift one week before the May 19-20 election. As the judge found, payroll records indicate that Waller worked the midnight shift only once on May 5 and was on vacation from May 6 to May 17, and the “witness” to the threat credibly denied it happened. (JA4-5,26;JA173-74,815,SA1-4,10,15-17.)

Further, BRI’s attempt to show (Br.38-39) that Koerner “in fact felt threatened” by Waller rests on unsubstantiated claims that other employees warned Koerner to “watch out for Waller” and on recasting the evidence to present a different story. But the judge who heard the testimony of all the participants discredited the claim that Koerner felt threatened at the time of the “flagging” incident, given that Waller was undisputedly parked and Koerner admittedly told Waller to stop dumping coal because the feeder was overloaded. (JA541-42.) In contrast, the judge described Waller as a “credible witness overall,” who testified in “an earnest and even manner . . . was not overly defensive or evasive” and readily admitted actions, even unflattering ones. (JA4,24n.45,25;331-33,878.)

Waller, an experienced miner, consistently denied that he threatened to hit Koerner with his ram car or that he would ever do such a thing. (JA292-93,295-97.) While BRI may be technically correct that employees may not “ignore feeder signals,” BRI’s workplace reality belies any suggestion that doing so is a basis for

discharge. Indeed, Koerner testified that another employee warned him that miners would disregard his signals and continue dumping coal.

Thus, BRI's asserted justifications rely on discredited testimony and conduct that was acceptable in the mine.³⁶ These shifting and implausible reasons—a nonexistent pattern of behavior; an admitted, minor verbal confrontation; a mischaracterized disagreement; and a discredited alleged threat—along with BRI's other admittedly coercive behavior and disparate treatment of Waller, support the Board's finding that BRI discriminatorily discharged Waller.

2. BRI would not have terminated Waller absent his union support

Based on overwhelming record evidence, the Board properly concluded (JA27-28) that BRI did not reasonably believe that Waller threatened to kill Koerner, nor did it act on that so-called belief in discharging Waller. To begin, when BRI summoned Waller into the office for his discharge, it did so based on eight statements Gossman collected describing anonymous phone calls and vehicular damage, a profanity-laced confrontation between Craig and Waller, a subsequently-disproven confrontation with Kirk, and the Waller-Koerner

³⁶ In attacking the judge's credibility determinations, BRI incorrectly asserts (Br.23) that the judge "faulted" Lawrence, Koerner, Pezzoni, and Davis for "consulting with counsel prior to their testimony." Rather, the judge reasonably found their testimony warranted "close scrutiny" because they "went over their testimony together as a group with Gossman and [BRI's] counsel prior to testifying" despite the judge's sequestration order. (JA3n.6,27n.53.)

exchange. (JA4-5,23-24;163-64,815,871-77,879,SA1-4,15-17.) Gossman prepared the termination letter before even speaking to Waller and, despite Waller's denials, discharged him. *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 677 (7th Cir. 2000) (discharging employee without formally warning him about potential consequences of misconduct and "without even cursory investigation" supports finding of unlawful motive).

Moreover, the letter states only that Waller was "implicated" in threatening, intimidating behavior, points to no specific conduct, and fails to mention any safety issues that BRI relies on now. (JA24;295-98,335,1023.) Therefore, as the record demonstrates and the judge found (JA27), Gossman and Benner "chose to spin" the Waller-Koerner conflict over coal-dumping into a threat to "kill" Koerner because "they knew that the other alleged incidents alone were insufficient to justify discharging Waller."

Indeed, the evidence dispels any realistic assertion that BRI reasonably believed Waller threatened to harm Koerner or create a safety issue. First, and most importantly, Koerner admitted that Waller's ram car was stopped and that he told Waller to stop dumping coal because the feeder was overloaded. (JA542-50.) Gossman admitted that Koerner never explained why he flagged Waller at the feeder, nor did Gossman bother to ask Koerner; Gossman did not even know where Koerner was standing. (JA26-27;JA196-201,SA5.) Second, neither Gossman's

nor Koerner's statement even mention the "flagging incident," and only one of the other statements on which Gossman and Benner relied reference it, albeit obliquely. (JA26-27&n.53;510,877,879.) Third, BRI repeatedly cites Shift Leader Davis's supposed interest in Koerner's well-being to show that BRI took the "threat" seriously (Br.31-32), but such reliance is misplaced. The judge discredited Davis's inconsistent testimony that he did not carry a radio on May 20 (and could not have heard the argument) but that Koerner "called [him] up" to tell him about the incident. Moreover, Davis did not immediately report the dispute or submit a written statement about it (JA26,27 n.53;634-37), although he allegedly "continuously checked on Koerner to make sure he was okay." (Br.31.) Lastly, after Koerner told Manager Lawrence about the disagreement, Lawrence did not reprimand Waller but allowed him to work extra shifts. (JA26;69-73,293,575-80,588-89,815.) *See Jet Star, Inc.*, 209 F.3d at 677 (rejecting stated reason for employee's discharge and finding discharge motivated by union animus where supervisors allowed employee to continue working after observing employee abusing company truck).

Thus, the Waller-Koerner incident "furnished the excuse rather than the reason" for Waller's discharge, *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 991-92 (7th Cir. 2004), and the other alleged incidents on which BRI relies either never occurred or could not plausibly justify Waller's discharge.

Accordingly, substantial evidence supports the Board's finding that BRI violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Waller because of his union support and activities.

CONCLUSION

The Board respectfully requests that this Court deny BRI's petition for review and enforce the Board's Order in full.

STUART F. DELERY
*Principal Deputy Assistant
Attorney General*

LAFE E. SOLOMON
Acting General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

CELESTE J. MATTINA
Deputy General Counsel

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

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

s/ Nicole Lancia
NICOLE LANCIA
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2987

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

_____)	
BIG RIDGE, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 12-3120, 12-3258
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	14-CA-30379
Respondent/Cross-Petitioner)	
_____)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 16,620 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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 15th day of March, 2013

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)	

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the 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

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ADDENDUM

Relevant provisions of the United States Constitution are as follows:

Article I, Section 5, cl. 2

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

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. 2

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

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.

Article II, Section 3

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

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.

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

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).

Sec. 8. [29 U.S.C. § 158]

(a) 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;

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

....

Sec. 10 [29 U.S.C. § 160]

(c) In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have power to petition any court of appeals of the United States . . . 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 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. . . .

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall . . . have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.46 [29 C.F.R. § 102.46]

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. . . .

Sec. 102.48 [29 C.F.R. § 102.48]

(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.