

**Nos. 12-60797 and 12-60856**

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

**DIXIE ELECTRIC MEMBERSHIP CORPORATION**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The National Labor Relations Board believes that oral argument is appropriate in this case. The Petitioner/Cross-Respondent Dixie Electric Membership Corporation (“DEMCO”) is challenging the Board’s determinations that the company committed unfair labor practices by its unilateral midterm change to a collective-bargaining agreement, specifically involving the removal of certain classifications from an existing bargaining unit. Additionally, DEMCO is challenging the constitutionality of the President’s appointment of several members of the Board pursuant to the Recess Appointments Clause. The company’s constitutional challenges involve a wide range of textual, structural, and historical issues, all of which are addressed in detail in this brief. While the labor issues involve the application of well-settled principles to largely undisputed facts, oral argument may assist the Court in its consideration of the recess appointment issues.

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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of the Dixie Electric Membership Corporation (“DEMCO”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against DEMCO. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended (“the Act,” 29 U.S.C. §§ 151, et seq.). The Decision and Order,

issued on August 31, 2012, and reported at 358 NLRB No. 120 (D&O1-8),<sup>1</sup> is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

DEMCO petitioned for review on October 10, 2012; the Board cross-applied for enforcement on November 5. The filings were timely; the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because the underlying unfair labor practices occurred in Baton Rouge, Louisiana.

### **STATEMENT OF ISSUES**

1. Whether substantial evidence supports the Board's finding that DEMCO violated Sections 8(a)(5) and (1), and 8(d) of the Act by unilaterally removing the Chief Systems Operator and Systems Operator classifications from the bargaining unit.

2. Whether the President's January 4, 2012 appointments to the NLRB were invalid (a) because they were made during an intrasession recess; or (b) because they filled vacancies that first arose before the recess in question.

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<sup>1</sup> "D&O" refers to the Board's Decision and Order; "Tr." to the transcript of the hearing before the administrative law judge; "GCX" (General Counsel's), "RX" (DEMCO's), and "JX" (Joint) to exhibits introduced at that hearing. References preceding a semicolon are to Board findings; those following, to supporting evidence.

## STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by the International Brotherhood of Electrical Workers, Local Union 767 (“the Union”), the Board’s General Counsel issued a complaint against DEMCO, alleging violations of Sections 8(a)(5) and (1), and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (1), and § 158(d)). (D&O1.) After conducting a hearing, an administrative law judge issued a decision finding that DEMCO acted unlawfully by unilaterally eliminating the Chief Systems Operator and Systems Operator positions from the unit, thus altering the unit scope without the Union’s consent. The judge alternatively found that DEMCO unlawfully failed to bargain in good faith with the Union over the decision to transfer such work from the unit, and the effects of the decision. (D&O6.) Lastly, the judge found that DEMCO’s unit clarification petition, filed 4-plus months into the term of a new collective-bargaining agreement with the Union, was untimely. After DEMCO filed exceptions to the judge’s decision, the Board issued a Decision and Order, affirming the judge’s findings and conclusions. (D&O1.)

## STATEMENT OF FACTS

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

#### A. DEMCO Unilaterally Eliminates the Chief Systems Operator and Systems Operator Positions from the Bargaining Unit

DEMCO operates an electrical power cooperative that provides electricity to residential and commercial consumers. DEMCO and the Union have negotiated a series of collective-bargaining agreements over a period spanning more than 40 years. Relevant to this case, the parties executed a contract effective from February 28, 2007, to February 28, 2011, that included a unit expressly covering, among other classifications, the Chief Systems Operator (“CSO”) and Systems Operator (“SO”) positions. (D&O1;GCX3(Exhibit A).) The CSO and SO employees are primarily dispatchers who assign field personnel to address outages and other problems. They monitor and control certain electrical systems through various computer applications and other methods. They also analyze outages, prioritize work assignments, and maintain logs and records. (D&O2;Tr.52-55,60-61.)

On November 17, 2010, prior to the expiration of the parties’ collective-bargaining agreement, DEMCO’s Chief Executive Officer (“CEO”) met with the Union’s Business Manager and informed him that DEMCO was going to transfer the CSO and SO employees and their work outside of the bargaining unit. The CEO’s statements were echoed in a letter, contemporaneously given to the Union

during the meeting, which stated that the CSO and SO positions “will be eliminated and new management positions having the same titles will be utilized,” and that the current employees “will be promoted” into the positions.

(D&O2;Tr.124,GCX6.) During the meeting, the Union’s representative objected to DEMCO’s decision by informing the CEO that it was going to have to file unfair labor practice charges; the CEO replied that he understood. (D&O2;Tr.60-68,127-29.) Prior to notifying the Union, DEMCO, via letters and verbally by its Vice President of Engineering and Operations, informed the CSO and SO employees that, “effective December 1, 2010, your position will be changed to a management position. Your old position will no longer exist.” (D&O2;Tr.62-64,GCX7-9.)

Even though a contract covering the CSO and SO classifications was in force, DEMCO never bargained with the Union or sought its consent to remove the these positions. DEMCO never solicited the Union’s input or requested proposals regarding the removal of work from the unit. As the CEO and Vice President indicated, DEMCO removed the CSO and SO positions from the bargaining unit around December 1. (D&O3;Tr.64-66.)

**B. Following DEMCO's Elimination of the CSO and SO Positions from the Bargaining Unit, and Its Transfer of the Work from the Unit, Employees in Those Positions Continue Performing the Same Duties; DEMCO Belatedly Files a Unit Clarification Petition**

After DEMCO moved the CSO and SO positions out of the bargaining unit, the same employees continued to perform the same duties that they had previously performed. They continued to work out of the same control room. The technical aspects of the job remained the same, and they processed outages the same as they did in the past. (D&O3;Tr.60-66.)

Following the removal, DEMCO and the Union met in January and February of 2011 to negotiate a successor collective-bargaining agreement to the one set to expire on February 28. Their efforts resulted in a new contract, which ran from February 28, 2011 to February 28, 2015. (D&O3;Tr.167-68,GCX14-16,18.) The parties, however, did not resolve their CSO and SO dispute. Instead, they signed an agreement noting that the Union did not agree to relinquish representation of the CSO and SO employees, and that the parties would abide by "a final legal determination . . . on any charge or suit" regarding their coverage under the collective-bargaining agreement. (D&O3;GCX16.)

On July 21, 2011, more than four months after the successor collective-bargaining agreement took effect,<sup>2</sup> DEMCO filed a unit clarification petition. The petition sought to remove the CSOs and SOs from the unit specified in the agreement, in effect by asking the Board to conduct a representation proceeding on that question. (D&O5;GCX1(a)and1(k).)

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

On August 31, 2012, the Board (Members Hayes, Griffin, and Block) issued its Decision and Order, finding, in agreement with the administrative law judge, that DEMCO violated Section 8(a)(5) and (1), and 8(d) of the Act (29 U.S.C. § 158(a)(5), and (1), and §158(d)) by unilaterally eliminating the CSO and SO positions from the unit, thus altering the unit scope without the Union's consent. (D&O1.) The Board majority alternatively found that DEMCO violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union regarding the decision to transfer such work from the unit, as well as over the decision's effects on unit employees.<sup>3</sup> (D&O1,6.)

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<sup>2</sup> The administrative law judge found that, although a date certain was difficult to establish, the parties executed the agreement sometime between February 28 and March 22, 2011. (D&O5n.12.)

<sup>3</sup> Member Hayes found it unnecessary to pass on the alternative theory that DEMCO violated the Act by unilaterally transferring unit work from the bargaining unit. (D&O1n.1.)

The Board ordered DEMCO to cease and desist from engaging in the above-described unfair labor practices and from, in any like or related manner, interfering with its employees' Section 7 rights. Affirmatively, the Board's Order directs DEMCO to: rescind the December 1, 2010 elimination of the unit CSO and SO positions, and consequent transfer of the work performed by such employees outside of the bargaining unit; recognize the Union as the exclusive collective-bargaining representative of the employees occupying the CSO and SO positions and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment; apply the existing collective-bargaining agreement between the Union and DEMCO to employees occupying the nonunit CSO and SO positions, in the absence of any agreement to the contrary; notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees; and make whole any unit employees for any loss of wages and benefits they may have suffered as a result of DEMCO's unlawful actions. DEMCO is also required to post a remedial notice and distribute the notice electronically. (D&O1,6-7.) Lastly, the Board ordered the dismissal of DEMCO's unit clarification petition dated July 21, 2011 as untimely. (D&O7.) The Board dismissed the petition without prejudice to DEMCO's right to re-file it at an appropriate later date. (D&O6n.20.)

## SUMMARY OF ARGUMENT

1. This case involves DEMCO's unilateral midterm change to its collective-bargaining agreement with the Union. Under settled principles, DEMCO's actions violated the Act. To begin, it is unlawful for an employer to unilaterally modify the scope of an existing bargaining unit. The facts plainly demonstrate that this occurred. DEMCO and the Union had a contract that specifically recognized a bargaining unit including the CSO and SO classifications. The unit was clearly defined, and under Board law, any attempts to modify its scope would thus require the Union's or the Board's consent. Instead of obtaining consent, however, DEMCO simply announced that it was eliminating the classifications from the unit and transferring the work to nonunit positions. Shortly thereafter, it implemented the changes. On these facts, the Board reasonably found that DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the scope of the unit. Additionally, by modifying the collective-bargaining agreement during its term without the Union's consent, DEMCO independently violated Section 8(d) of the Act. DEMCO does not contest the Board's application of settled principles to find that an employer cannot unilaterally modify the scope of an established, agreed-upon unit. Instead, DEMCO simply argues that it made the CSO and SO positions supervisory, a contention that misses the point. Even if they were supervisors, that

would not justify DEMCO's unilateral changes to the unit scope and the collective-bargaining agreement.

Alternatively, the Board found that DEMCO failed to bargain with the Union over the decision to transfer work out of the unit and the effects of that decision. DEMCO errs in asserting that it was privileged to act unilaterally because the Union waived its right to bargain. As the Board reasonably found, because DEMCO presented its decision as a *fait accompli*, it would have been futile for the Union to request bargaining. And DEMCO failed to meet its burden of showing that the Union, by assenting to a management rights clause in the parties' collective-bargaining agreement, clearly and unmistakably waived its right to bargain over the transfer of work. Thus, substantial evidence supports the Board's finding that DEMCO violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over its decision to transfer work from the unit and the effects of that decision.

Finally, the Board did not abuse its discretion in dismissing DEMCO's untimely unit clarification petition without prejudice to re-filing at a later appropriate time. To prevent disruption of established bargaining relationships, the Board will process such petitions only if they are filed shortly before the parties' agreement is due to expire. Although a limited exception permits an employer to file a petition "shortly after" the execution of a collective-bargaining agreement,

DEMCO did not do that. Instead, it waited longer than Board precedent allowed. The Board therefore properly dismissed the petition.

2. DEMCO also contends on the basis of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), 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 its order. *Noel Canning* is an outlier decision, and conflicts with the decisions of three other courts, two sitting *en banc*. Indeed, the claims approved in *Noel Canning* are wrong as a matter of constitutional text, history, and purpose. They conflict with the conclusions of every other court of appeals to address such challenges. And they would throw out nearly two centuries of long-accepted Executive Branch practice.

### **STANDARD OF REVIEW**

When the Board engages in the “difficult and delicate responsibility of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is ‘subject to limited judicial review.’” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957)). In particular, “classification of bargaining subjects as ‘terms or conditions of employment’ is a matter concerning which the Board has special expertise,” and its judgment is entitled to considerable deference. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-

86 (1965)); *see also* *Local 2179, United Steelworkers of America v. NLRB*, 822 F.2d 559, 566 (5th Cir. 1987) (construing and applying the duty to bargain is a task at the heart of the Board's function). As such, the Board's construction of the Act should be upheld if it is "reasonably defensible." *Id.*

This Court recognizes "the Board's expertise in labor law" and will "defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo." *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998) (quotations omitted). The Board's factual findings are conclusive "if supported by substantial evidence on the record considered as a whole." *Mobil Exploration & Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)). As this Court has observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).

Finally, this Court gives the Board broad discretion in resolving matters relating to unit clarification petitions. *NLRB v. Magna Corp.*, 734 F.2d 1057, 1061 (5th Cir. 1984) (citing *Boire v. Int'l Brotherhood of Teamsters*, 479 F.2d 778, 797 (5th Cir. 1973)). This Court will defer to the Board's resolution of the issue as long

as the Board did not act in an “arbitrary and capricious” manner. *NLRB v. Baton Rouge Waterworks Co.*, 417 F.2d 1065, 1067 (5th Cir. 1969).

## ARGUMENT

### I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT DEMCO VIOLATED SECTION 8(a)(5) AND (1), AND 8(d) OF THE ACT BY UNILATERALLY REMOVING THE CHIEF SYSTEMS OPERATOR AND SYSTEMS OPERATOR CLASSIFICATIONS FROM THE BARGAINING UNIT

#### A. DEMCO Violated Section 8(a)(5) and (1) of the Act by Altering the Scope of the Bargaining Unit Without the Union’s Consent

##### 1. Applicable principles

It is well settled that a party cannot unilaterally implement a change to the “scope of the employees’ bargaining unit.” *Local 666, International Alliance of Theatrical Stage Employees v. NLRB*, 904 F.2d 47, 50 (D.C. Cir. 1990); *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 963 (10th Cir. 1980). *See also Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); *NLRB v. Operating Eng’rs*, 532 F.2d 902, 907 (3d Cir. 1976). An employer therefore violates Section 8(a)(5) and (1) of the Act by modifying the scope of the unit without the approval of the union or the Board.<sup>4</sup> *See, e.g., Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Beverly Enters.*, 341 NLRB 296, 307 (2004).

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<sup>4</sup> Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” An employer who violates Section 8(a)(5) also commits a

The reasons why an employer may not force a change in bargaining unit composition are “as simple as they are fundamental.” *Boise Cascade Corp v. NLRB*, 860 F.2d 471, 475 (D.C. Cir. 1998). “[I]f an employer could vary unit descriptions at its discretion, it would have the power to sever the link between a recognizable group of employees and its union[,] . . . in turn[,] . . . undermining a basic tenet of union recognition . . . and greatly complicating coherence in the negotiating process.” *Id. Accord Douds v. Longshoremen ILA*, 241 F.2d 278, 282 (2d Cir. 1957). *See also Hill-Rom Co.*, 957 F.2d at 457; *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979); *Hess Oil and Chemical Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969).

Once an appropriate bargaining unit has been established, “the statutory interest in maintaining stability and certainty in bargaining obligations requires adherence to that unit in bargaining.” *Shell Oil Co.*, 194 NLRB 988, 995 (1972), *enforced sub nom. OCAW v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973). *See also Newspaper Printing Corp.*, 625 F.2d at 963-64. Allowing the alteration of existing units only through mutual consent or through the Board’s administrative processes encourages rather than disrupts collective bargaining. *Douds*, 241 F.2d at 282 (footnote omitted). On the other hand, when an employer, over the

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derivative violation of Section 8(a)(1). *Sara Lee Bakery, Inc. v. NLRB*, 514 F.3d 422, 426 n.3 (5th Cir. 2008) (citations omitted).

objection of the union, demands a change in the bargaining unit, the “demand interferes with the required bargaining ‘with respect to rates of pay, wages, hours and terms and conditions of employment’ in a manner excluded by the Act.” *Id.* at 283. Accordingly, once a specific job has been included within the scope of the bargaining unit, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board. *Hill-Rom Co.*, 957 F.2d at 457; *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989).

## **2. DEMCO violated the Act by unilaterally removing the CSOs and SOs from the bargaining unit**

Substantial evidence supports the Board’s finding (D&O3) that “DEMCO unlawfully modified the unit’s scope, when it eliminated the unit CSO and SO positions, and converted the incumbents into nonunit workers.” Indeed, the basic facts of the case are not in dispute. As the Board pointed out, the CSO and SO positions were specifically and unambiguously included as part of the recognized unit in the parties’ collective bargaining agreement that was set to expire on February 28, 2011. (D&O1;GCX3(see p.3 incorporating Exhibit A).) On December 1, 2010, before the agreement expired, DEMCO removed the positions from the bargaining unit, without obtaining the Union’s or the Board’s consent. It follows that DEMCO, by unilaterally modifying the scope of the agreed-upon unit, violated 8(a)(5) and (1) of the Act. *See Mt. Sinai Hospital*, 331 NLRB 895,

895 n.2 & 907-08 (2000) (unlawful to unilaterally reclassify unit sous chef employees as nonunit assistant culinary manager positions), *enforced*, 8 F. App'x 111 (2d Cir. 2001); *Facet Enterprises*, 290 NLRB 152, 159-60 (1988) (elimination of classification resulted in unlawful reduction in the composition and scope of established bargaining unit), *enforced in relevant part*, 907 F.2d 963, 975-76 (10th Cir. 1990). *See also Holy Cross Hospital*, 319 NLRB 1361, 1361 n.2 (1995) (unilateral elimination of unit house supervisor position found unlawful where specific job had been included in scope of the unit).

Before the Court, DEMCO does not attack the principle that it is unlawful to modify the scope of the bargaining unit without the union's consent; instead it argues at length (Br.7-21) that the CSO and SO positions were supervisory. But the Board did not make any finding as to whether these employees were statutory supervisors because the Board did not need to do so. (D&O5n.17.) As the Board found (D&O3), even if the disputed positions were supervisory, DEMCO would still not be privileged to alter the unit's scope unilaterally. The Board has consistently held that, where parties to a collective-bargaining relationship have agreed to include supervisors in a bargaining unit, it will order the application of the terms of the collective-bargaining agreement to such supervisors. *Wackenhut Corp.*, 345 NLRB 850, 852-53 (2005); *Mt. Sinai Hospital*, 331 NLRB 895, 895 n.2 (2000); *Gratiot Community Hospital*, 312 NLRB 1075, 1075 n.2 (1993); *Arizona*

*Electric Power*, 250 NLRB 1132, 1132 (1961). In its brief, DEMCO ignores these cases and completely fails to address the Board's rationale for finding that the scope of the unit was unlawfully modified. DEMCO misses the point by arguing (Br.21) that the employees took on supervisory roles, and it offers nothing more than general assertions without legal support for its position that, if the employees are supervisors, it was privileged to modify the scope of the unit unilaterally.

DEMCO also errs in relying (Br.11-13) on *Entergy Gulf States, Inc., v. NLRB*, 253 F.3d 203, 205-08 (5th Cir. 2001). There, the question whether certain employees were statutory supervisors was properly before the Court because in the underlying agency case, the Board had conducted a representation proceeding addressing the issue. And the representation proceeding took place only because the employer had timely filed a unit clarification petition immediately prior to expiration of the parties' collective-bargaining agreement. By contrast, in the instant case, there was no underlying representation proceeding because, as shown below at pp. 29-31, DEMCO failed to file a timely unit clarification petition that could have initiated a representation proceeding before the Board. Accordingly, contrary to DEMCO's apparent suggestion, *Entergy* is inapplicable here. The case most certainly does not stand for the proposition that an employer can unilaterally modify the scope of an established bargaining unit without the union's consent or the Board's imprimatur. Under settled Board precedent, even if the CSOs and SOs

were supervisors, DEMCO was bound to honor its voluntary agreement to include them in the unit, and DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally reneging on its agreement.

**B. DEMCO Violated Section 8(d) of the Act by Modifying the Existing Collective-Bargaining Agreement During Its Term**

The Board also found (D&O6n.20) that DEMCO, by unilaterally eliminating the CSO and SO positions, violated the proviso to Section 8(d) of the Act (29 U.S.C. § 158(d)), which imposes specific, non-waivable obligations on “the party desiring . . . termination or modification” of a collective-bargaining agreement during its term. Among other requirements, a party seeking mid-term contract modifications must notify the Federal Mediation and Conciliation Service (“FMCS”) within 30 days after timely notifying the union, and continue in full force and effect all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later. 29 U.S.C. § 158(d)(1-4). Moreover, during the effective period of a collective-bargaining agreement, “the employer commits an unfair labor practice if it changes . . . [a] condition *without the permission of the union.*” *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1315 (5th Cir. 1988) (emphasis added). As *Standard Fittings* further explains (*id.*), this is so because:

Section 8(d) of the [Act] prohibits either party from insisting upon a modification of the agreement during its term. While a contract is in force, Section 8(d) permits the union to refuse, even unreasonably, an employer's proposal to modify the terms established by the collective bargaining agreement.

Even if DEMCO had complied with the notification requirements noted above (and there is no evidence that it notified the FMCS), it still violated the proviso to Section 8(d) by failing to obtain the Union's consent before modifying the collective-bargaining agreement, and by failing to continue the agreement's terms in full force and effect until it expired on February 28, 2011. In its brief, DEMCO ignores Section 8(d), and provides no argument that would overcome the Board's finding. Moreover, its waiver arguments are unavailing. Absent an express reopener in the contract, not present here, "neither the union nor the employer ever waives the statutory right to refuse to consider, or to continue to consider, changes in the collective bargaining agreement while the agreement is still in force." *Standard Fittings*, 845 F.2d at 1315 (citations omitted).

### **C. Alternatively, DEMCO Violated Section 8(a)(5) and (1) of the Act by Unilaterally Transferring Work Out of the Unit**

#### **1. Applicable principles**

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962)). *Accord Strand*

*Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007).

Courts have long held that “the allocation of work to a bargaining unit is a ‘term and condition of employment’” under the Act. *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009) (quoting *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982)); *Regal Cinemas, Inc.*, 317 F.3d 300, 311 (D.C. Cir. 2003); *Citizens Publ. & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3rd Cir. 2001). As a result, “an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.” *Road Sprinkler Fitters*, 676 F.2d at 831.

An employer that does unilaterally change terms and conditions of employment without notifying and bargaining with the union must show that it was exempted from the duty to bargain. *See Cypress Lawn Cemetery Ass’n*, 300 NLRB 609, 628 (1990) (employer must demonstrate why its refusal to bargain was privileged); *see also Van Dorn Plastic Machinery Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) (“It is an accepted proposition of law that proof on matters which relate to justification for the employer’s actions rest with the employer.”).

As discussed below, the Board found that DEMCO unlawfully transferred the CSO and SO work out of the unit without bargaining with the Union. Because DEMCO presented its decision to remove the CSO and SO classifications as a fait accompli, it would have been futile for the Union to request bargaining. The

Board, thus, reasonably rejected DEMCO's argument that the Union waived its right to bargaining by its inaction. Furthermore, the Board reasonably rejected DEMCO's claim that the Union, by assenting to a management rights clause, clearly and unmistakably waived its right to bargain over DEMCO's transfer of work from the unit.

## **2. DEMCO unlawfully transferred work out of the unit without bargaining**

As the Board found, even assuming *arguendo* that DEMCO did not improperly modify the scope of the unit by reclassifying the CSO and SO positions, its unilateral action was still unlawful because its transfer of the work away from the unit directly affected employees' terms and conditions of employment. (D&O 4.) It is settled that the decision to transfer unit work to nonunit personnel, and the effects of such a decision, are mandatory subjects of bargaining. *Road Sprinkler Fitters*, 676 F.2d at 831. *Accord Seaport Printing*, 589 F.3d at 816. *See also NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012); *Hampton House*, 317 NLRB 1005, 1005 (1995). Accordingly, prior to initiating any changes, DEMCO was required to bargain with the Union and afford it a reasonable opportunity for counter arguments or proposals. *Seaport Printing*, 589 F.3d at 816 (quotations and citations omitted).

As the Board found (D&O4), DEMCO instead presented its decision as a *fait accompli*. (D&O2.) The Vice President of Engineering and Operations

admitted that DEMCO made its decision in August, months before DEMCO notified the Union. He also testified that he told CSO and SO employees about their impending transfer a week before DEMCO informed the Union.

(D&O2;Tr.62-63.) Moreover, in its November 17 letter notifying the Union of its decision, DEMCO unequivocally described its planned course of action as a final decision that it had already made. DEMCO did not invite bargaining or input from the Union in any manner. (D&O4;GCX6.)<sup>5</sup>

Even if, as DEMCO asserts (Br.7-21), it converted the CSO and SO positions to supervisory classifications, that unilateral action would not relieve it of its obligation to bargain over the change. As the Board explained (D&O4), when an employer promotes an employee to a supervisory position, removing the work from the bargaining unit, and the new supervisor continues to perform former bargaining unit work, the employer makes a change in terms and conditions of employment that triggers a bargaining obligation. *Hampton House*, 317 NLRB 1005, 1005 (1995). As shown above, the record amply supports the Board's finding that the CSOs and SOs continued to perform the same functions that they performed as unit employees. Such changes to the unit's terms and conditions of employment require bargaining under the Act. *Id.*

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<sup>5</sup> DEMCO's November 17 letter to the Union stated that effective December 1, the CSO and SO positions "*will be* eliminated and new management positions having the same titles *will be* utilized." (D&O2;GCX6(emphasis added).)

The facts of this case cannot be meaningfully distinguished from the many similar cases in which the Board has found an unlawful unilateral transfer of bargaining unit work when promoted employees continue to perform the same tasks they performed before their promotions out of the unit. For example, in *Hampton House*, the Board found an unlawful transfer of bargaining unit work when the employer, without bargaining, promoted some of its nurses to the position of nurse supervisor and the nurse supervisors performed the same patient care tasks as before. *Id.* at 1005. *See also Luther Manor Nursing Home*, 270 NLRB 949, 959-60 (1984) (unlawful transfer where LPNs promoted to supervisory nurse status continued same LPN duties), *enforced*, 772 F.2d 421, 424 (8th Cir. 1985); *Lutheran Home of Kendallville, Indiana*, 264 NLRB 525, 536-37 (1982) (same); *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979) (violation where group leaders whom employer promoted to supervisor continued bargaining unit work), *enforced*, 609 F.2d 267, 270 (6th Cir. 1979); *Kendall College*, 228 NLRB 1083, 1088 (1977) (division chairs, who were reclassified as supervisory division director positions, unlawfully continued bargaining unit work), *enforced*, 570 F.2d 216 (7th Cir. 1978). Consistent with numerous other cases, the Board here reasonably found that DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the CSO and SO work out of the bargaining unit. (D&O4.)

**3. The Board correctly determined that the Union did not waive its right to bargain over DEMCO's transfer of work**

**a. DEMCO presented its decision to transfer the CSO and SO positions out of the bargaining unit as a fait accompli, thus relieving the Union of an obligation to request bargaining**

DEMCO errs in arguing (Br.25-32) that the Union waived its rights by failing to request bargaining over the decision to remove the CSO and SO positions from the unit. It is well-settled that an employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals. *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009). And to prove that the Union waived its bargaining rights, the employer must show that it presented the union with a timely and *meaningful* notice of its proposal that afforded a reasonably opportunity for counter arguments or proposals. *Id.* (citing *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007) (unlawful to present union with a “fait accompli . . . unilaterally inform[ing] the [u]nion that [a] position had already been eliminated”). *See also Intersystems Design & Tech. Corp.*, 278 NLRB 759, 759-60 (1986) (quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983)); *Ciba Geigy Pharm. Div.*, 264 NLRB 1013, 1017-18 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983). A union has no duty to request bargaining where management resolutely communicates that its decision is a fait accompli. *See, e.g.,*

*Asher Candy*, 348 NLRB 993, 996 (2006), *enforced*, 258 F. App'x. 334 (D.C. Cir. 2007); *Westinghouse Electric Corp.*, 313 NLRB 452, 453 (1993).

As discussed above, pp. 21-22, DEMCO presented its decision to transfer the CSO and SO work outside of the unit to the Union on November 17 as a “done deal.” (D&O2,4.) In these circumstances, the Board reasonably found that the Union did not waive its rights by failing to request bargaining.<sup>6</sup>

DEMCO errs in relying (Br.6) on *NLRB v. Pinkston-Hollar Constr. Servs., Inc.*, 954 F.2d 306 (5th Cir. 1992), for the general principle that a union has a duty to request bargaining following an employer’s notice of a desired change. It also errs in citing (Br.28) *Kansas Nat’l Educ. Assoc.*, 275 NLRB 638 (1985), and *City Hosp. of East Liverpool, Ohio*, 234 NLRB 58 (1978). None of these cases involved an employer presenting a change to a union as a *fait accompli*. Indeed, in *City Hospital of East Liverpool*, the Board noted that critical distinction in rejecting the administrative law judge’s recommended finding. *Id.* at 60 n.8.

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<sup>6</sup> DEMCO wrongly conflates (Br.26-27) notice to the Union with its earlier notice to the employees. *See Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999) (“Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative. There is a legal distinction between employees and their selected representative.”) (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (“only the union may contract the employees’ terms and conditions of employment”)). *See also NLRB v. Walker Construction Co.*, 928 F.2d 695, 696 (5th Cir. 1991) (the employer is required to notify the union itself, not just bargaining unit employees, of a new wage and health and benefits program).

DEMCO also wrongly argues (Br.32) that the Union was required to do more than protest the change. In support of its position, DEMCO cites *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir. 1995), but fails to note that it is relying on the dissenting opinion. The majority's holding clearly supports the Board's position here: notice of a fait accompli is simply not the sort of notice on which the waiver defense may be predicated. *Id.* at 1260 (citations and quotations omitted).

**b. The Union did not waive its rights in the collective-bargaining agreement**

The Board properly rejected DEMCO's further assertion (Br.22-24) that it was not required to bargain with the Union over the transfer of the CSO and SO classifications out of the unit because the Union purportedly waived its bargaining rights in the management rights clause of the parties' collective-bargaining agreement. Although the Board's legal conclusions regarding the interpretation of a collective-bargaining agreement are subject to de novo review, *Coastal Int'l Sec. Inc. v. NLRB*, 320 F. App'x 276, 280 (5th Cir. 2009), a waiver of statutory bargaining rights nevertheless must be "clear and unmistakable," *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). *Accord United Broth. of Carpenters & Joiners of Am., Local 2848 v. NLRB*, 891 F.2d 1160, 1164 (5th Cir. 1990). As the Board found, DEMCO failed to meet its burden of showing that the

Union, by agreeing to the management rights clause, clearly and unmistakably waived its right to bargain over transferring work out of the unit. (D&O4.)

In reviewing the management rights clause, the Board correctly found that it did not specifically address the subject at issue. Indeed, nothing in the parties' collective-bargaining agreement clearly or unmistakably waived the Union's right to bargain over work being transferred out of the unit. Although the management rights clause stated that DEMCO retained the right to "establish job[s] . . . and discontinue job classifications" and "assign and reassign . . . work," it in no way granted DEMCO the right to unilaterally remove work from the bargaining unit. (D&O4;GCX3.) And DEMCO did not discontinue the jobs that the CSO and SOs were doing. It is undisputed that, as DEMCO concedes (Br.20,22), the employees continued to perform largely the same duties. Nothing in the management rights clause granted DEMCO the right to simply attach a new label to a group of workers in order to remove them from the bargaining unit and the protections of the collective-bargaining agreement. DEMCO's overly broad reading of the provision recognizing its right to "discontinue classifications" would improperly allow it to eviscerate the unit. In short, the Board correctly found that the management rights clause did not constitute a clear and unmistakable waiver of the Union's right to bargain over removal of CSO and SO positions. *See Regal Cinemas*, 334 NLRB 304, 313-15 (2001), *enforced in relevant part*, 317 F.3d 300,

314 (D.C. Cir. 2003) (management rights clause that expressly authorized employer to “change or eliminate existing . . . procedures or work” did not encompass employer’s transfer of employees’ work to managers).<sup>7</sup>

DEMCO argues (Br.24) that the Board must consider the surrounding circumstances, but it offers no evidence that would shed light on the meaning of the contract language. The Board considers bargaining history only if the matter was fully discussed and consciously explored during negotiations, and the union consciously yielded or clearly and unmistakably waived its interest in the matter. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). DEMCO fails to demonstrate how this standard is met. Indeed, during the hearing, the union representative involved in contract negotiations resulting in the agreement expiring February 28, 2011, testified that there were no discussions about the general language in the management rights clause. (Tr.113-14.) Accordingly, DEMCO failed to establish that the Union clearly and unmistakably waived its right to bargain over the transfer of work. (D&O4.)

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<sup>7</sup> DEMCO attempts to imply (Br.23-24) that its past transfers of work indicate the Union has waived its rights here. But as the Board found, the Union’s prior acquiescence to a transfer of work—work not at issue here—does not constitute a waiver of its bargaining rights over all succeeding work transfers. *See Regal Cinemas*, 334 NLRB at 315; *Colgate-Palmolive Co.*, 323 NLRB 515, 516 (1997).

**D. The Board Properly Exercised Its Discretion in Finding DEMCO's Unit Clarification Petition Was Untimely, Filed 4-plus Months After the Parties Executed Their Collective-Bargaining Agreement**

DEMCO (Br.32-33) challenges the Board's determination to dismiss the unit clarification petition that it belatedly filed on July 21, 2011, more than 4 months after signing a successor collective-bargaining agreement that took effect on February 28. Preliminarily, it must be noted that a unit clarification petition would not in any way excuse DEMCO's unlawful alteration of the unit scope, or its failure to bargain over the transfer of work from the unit. In any event, DEMCO cannot seriously dispute that its petition was untimely even under a narrow exception allowing petitions that are filed "shortly after" the execution of an agreement. Accordingly, as shown below, the Board appropriately exercised its discretion in dismissing DEMCO's untimely petition without prejudice to re-filing at an appropriate time.

As a general rule, the Board will not entertain a petition for a unit clarification during the term of a collective-bargaining agreement that "clearly defines" the unit, because conducting a representation proceeding at that time would disrupt the parties' collective-bargaining relationship. *Wallace-Murray Corp.*, 192 NLRB 1090, 1090 (1971). *Accord Consol. Papers, Inc. v. NLRB*, 670 F.2d 754, 757-58 (7th Cir. 1982) (citing cases). In such circumstances, the Board's consistent practice has been to dismiss the unit clarification petition without

prejudice to re-filing “at an appropriate time,” which is shortly before the agreement’s expiration. *Wallace-Murray*, 192 NLRB at 1090; *Shop Rite Foods, Inc.*, 247 NLRB 883, 883 (1980). In considering to whether a contract will bar such petitions, this Court gives the Board considerable discretion in deciding how to apply its rules to a particular case and in formulating the contours of the rule. *NLRB v. Mississippi Power & Light Co.*, 769 F.2d 276, 280-81 (5th Cir. 1985) (citations omitted).

There is a narrow exception to the foregoing rule, under which the Board permits a petition to be filed “shortly after” a contract is executed. *See St. Francis Hospital*, 282 NLRB 950, 952 (1987) (UC petition filed 48 days after contract execution meets “shortly after” standard). *See also Goddard Riverside Community Center*, 351 NLRB 1234, 1236 (2007) (7 days suffices); *Baltimore Sun Co.*, 296 NLRB 1023, 1024 (1989) (79 days suffices); *WNYS-TV (WIXT)*, 239 NLRB 170, 170-71 (1978) (51 days suffices). Looking to whether DEMCO’s petition fell within this narrow exception, the Board determined that 4-plus months (or no fewer than 121 days) would stretch the limit too far. (D&O5.) The Board, while recognizing that DEMCO reserved its right to file a UC petition “shortly after” the parties’ new collective-bargaining agreement took effect, rationally found that DEMCO’s delay of 4-plus months exceeded the outer limits of the exception to the rule prohibiting unit clarification proceedings during the term of an agreement that

clearly defines the unit. (D&O5.) Accordingly, consistent with its practice, the Board dismissed the petition without prejudice to DEMCO's right to file it at a later appropriate time. (D&O9n.20.) DEMCO (Br.32-33) offers no support, legally or factually, showing exceptional circumstances to justify its delay.<sup>8</sup>

As the Board explained (D&O5), permitting DEMCO to proceed with its untimely petition would have "violate[d] the Board's well-established policy of not permitting the parties to use the unit clarification proceeding in a manner that would disrupt their bargaining relationship." *See Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994). Particularly coming on the heels of DEMCO's unlawful unilateral change in the unit scope and transfer of work from the unit, processing the untimely petition would have improperly rewarded DEMCO for its bad acts. (D&O5n.16.) Especially in these circumstances, it cannot be said that the Board abused its discretion in dismissing the untimely petition.

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<sup>8</sup> DEMCO points out (Br.3-4,33) that it first noted its desire for unit clarification in its July 7 answer to the complaint. (GCX1(j).) DEMCO appears to recognize (Br.3-4), however, that merely stating a desire for a unit clarification in the answer did not constitute a proper unit clarification petition. But even if DEMCO had filed a petition on July 7, it would have been untimely under the precedent noted above.

## II. DEMCO's Recess Appointment Challenges Lack Merit.

From January 3 until January 23, 2012, a period of nearly three weeks, the Senate was in recess. At the start of this period, Board member Craig Becker's term ended, and the Board's membership fell below the statutorily mandated quorum of three members. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, on January 4, 2012, the President invoked his constitutional authority under the Recess Appointments Clause to appoint three new members, bringing the Board to full membership.

DEMCO does not dispute that the Senate was in recess at the time these appointments were made. DEMCO nonetheless contends that the appointments were unconstitutional, and it relies on the D.C. Circuit's recent decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). (Br. 33-34). That decision held the appointments unconstitutional on two alternative theories: (1) they were outside the scope of the Recess Appointments Clause because they were made during an *intrasession* recess, and (2) they improperly filled vacancies that first arose before the recess in question.<sup>9</sup> This Court should reject DEMCO's challenges based on *Noel Canning*, and should instead follow the decisions of the other appellate courts to consider these issues.

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<sup>9</sup> The Board has determined, in consultation with the Solicitor General, to petition the Supreme Court for a writ of *certiorari* in *Noel Canning*. That petition is currently due April 25, 2013.

**A. The President's recess appointment authority is not confined to intersession recesses.**

In common parlance, when the Senate uses a specific type of adjournment known as an adjournment *sine die*, that adjournment terminates a legislative session under long-accepted parliamentary practice, and the ensuing recess until the next session begins is an *intersession* recess. See Robert, ROBERT'S RULES OF ORDER 148, 155 (1876); *Noel Canning*, 705 F.3d at 22. When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session because the session continues when the legislature reconvenes on the particular day, and the resulting recess between the adjournment and the reconvening is commonly referred to as an *intrasession* recess. DEMCO contends the President is powerless to make recess appointments during intrasession recesses. Although this argument was recently accepted in *Noel Canning*, it was squarely rejected by the *en banc* Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005), and should be rejected by this Court as well.

DEMCO's position flies in the face of 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 an opinion by Attorney General Daugherty, relying on the Senate’s own interpretation of the Recess Appointments Clause, confirmed nearly a century ago that such appointments are within the President’s authority. *See* 33 Op. Att’y Gen. 20 (1921); S. Rep. No. 58-4389 (1905). The Legislative Branch itself has acquiesced in the President’s power to make such appointments.<sup>10</sup> Under DEMCO’s view, however, 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. DEMCO’s position founders at the outset on the text of the Recess Appointments Clause, which “does not differentiate expressly between inter- and intrasession recesses.”** *Evans*, 387 F.3d at 1224. The plain meaning of the term

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<sup>10</sup> *See, e.g.*, 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 Appointments Clause, and interpreting the Pay Act in a consistent manner so as to allow payment to intrasession recess appointees); 41 Op. Att’y Gen. 463, 466-69 (1960) (reasoning that the Pay Act constitutes congressional acquiescence under circumstances in which it permits payment).

“recess,” both at the Framing and today, means a “period of cessation from usual work.” 13 OXFORD ENGLISH DICTIONARY 322-23 (2d ed. 1989) (citing sources from the 17th and 18th centuries); *see also* II Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 51 (1828) (defining “recess” as a “[r]emission or suspension of business or procedure”); 2 Johnson, DICTIONARY OF THE ENGLISH LANGUAGE 1650 (1755) (same); *Evans*, 387 F.3d at 1224-25. That definition does not differentiate between recesses that are between sessions of the Senate and those that are within sessions. Consistent with that understanding, the Senate *itself* described the relevant period here as part of its “recess.” 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

Furthermore, in the Framing Era 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, used the term “recess” to encompass both kinds of 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 (citing a usage in 3 H.L. Jour. 61); 3 H.L. Jour. 74 (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.<sup>11</sup> And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”<sup>12</sup>

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 in common parlance.<sup>13</sup> And in 1775, the New York legislature appointed a

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<sup>11</sup> *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 a particular day, which was October 30.

<sup>12</sup> *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 (1787 speech by Luther Martin, discussing matters that occurred “during the recess” of the Convention); *see also* 2 FARRAND, *supra*, at 128.

<sup>13</sup> *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

“Committee of Safety” to act “during the recess” of the legislature; the referenced recess was a 14-day intrasession one.<sup>14</sup>

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause. The Clause 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.<sup>15</sup> 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 legislative practices. *See generally* Butler & Wolf, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES: 1793-1990 (1995).

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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.

<sup>14</sup> 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

<sup>15</sup> *See* 8 Annals of Cong. 2197 (Dec. 19, 1798) (appointment); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess).

Furthermore, construing the Recess Appointments Clause to encompass intrasession recesses accords with the common functional definition of “the Recess of the Senate” that both the Executive Branch and the Senate have long employed. *Compare* 33 Op. Att’y Gen. at 21-22, 25 (1921 opinion noting that the “essential inquiry” looks to whether “the members of the Senate owe no duty of attendance”; whether the Senate’s “chamber [is] empty”; and whether the Senate is “absent so that it can not receive communications from the President or participate as a body in making appointments”), *with* S. Rep. No. 58-4389, at 2 (1905) (Senate Judiciary Committee report looking to similar factors).<sup>16</sup>

This interpretation best serves the purpose of the Recess Appointments Clause, which is to ensure that the President may fill vacant offices when the Senate is unavailable to offer advice and consent on nominations, while also freeing the Senate from having “to be continually in session for the appointment of officers.” The Federalist No. 67, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).<sup>17</sup> The Senate is just as unavailable to provide advice and consent

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<sup>16</sup> The Senate’s modern parliamentary precedents continue to cite the 1905 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).

<sup>17</sup> *See also* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (ELLIOT’S DEBATES) (Charles Cotesworth Pinckney) (expressing concern that

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.

DEMCO’s position, by contrast, 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

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Senators would settle where government business was conducted). The Clause also enables the President to meet his continuous constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3; *see also* 4 ELLIOT’S DEBATES 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments . . . can be vested nowhere but in the executive”).

an intrasession recess, during which the President would have been powerless to make recess appointments under DEMCO'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," *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and ellipses omitted), and that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions," *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 501-03. 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.<sup>18</sup> In any event, the Supreme Court has indicated “that a practice of at least *twenty* years duration on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard 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 690 (emphasis added and internal quotations marks and citation omitted). The practice of intrasession recess appointments stretches back at least *ninety* years, and is likewise entitled to “great regard.”

2. The court in *Noel Canning* failed to take proper account of any of the above points, and instead employed its own flawed textual and historical analysis. In examining the Clause’s text, *Noel Canning* reasoned that the Clause’s reference to “*the* Recess of the Senate” confines the Clause to intersession recesses because it “suggests specificity.” 705 F.3d at 500 (emphasis added). 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.*,

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<sup>18</sup> *Noel Canning* misjudged the rarity of early intrasession recess appointments. It claimed that “Presidents made only three documented intrasession recess appointments prior to 1947.” 705 F.3d at 502. That count is well short of the mark. See Hogue, *Intrasession Recess Appointments*, *supra*, at 3 (identifying 25 intrasession recess appointments before 1947).

“The pen is on the table.” *See Evans*, 387 F.3d at 1224-25 (citing dictionary usages). In context and in light of the historical usages described above, 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.<sup>19</sup>

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* 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 of the Senate “in *the Absence* of the Vice President,” Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential

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<sup>19</sup> 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.

absences rather than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* pp. 35-37.

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.

*Noel Canning* also claimed that the structure of the Clause supported its conclusion 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 500-01. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that the term of a recess appointee expires at the end of the Senate’s “next” session, and viewed this provision as conclusive evidence that the Framers anticipated that the recess appointment power could be invoked only between enumerated congressional sessions. *Ibid.* (citing Federalist No. 67). But the Framers’ provision of a specified termination point for the terms of recess appointees says nothing about whether a recess can occur within an enumerated session. 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.”).

Nor is there anything peculiar about the result that an intrasession recess appointee’s term lasts the remainder of the current session and terminates at the end of the next session. An intrasession recess appointee may take office anytime during a session, including during a recess near the very end of a session. In such a situation, the Senate may not have an opportunity before the end of its current session to consider a permanent nominee for the position. Thus, it is perfectly sensible to have the end of the *next* session serve as a uniform terminal date for the terms of recess appointees, as it ensures that the Senate has a full opportunity to consider permanent nominees regardless of when the temporary recess appointees temporarily fill the positions.

Moreover, the fact that intrasession recess appointments may last a significant period of time does not distinguish them from intersession recess appointments. Under the original schedule for legislative sessions prior to the Twentieth Amendment, *intersession* recess appointments could last for an

extended period. For example, on April 18, 1887, President Grover Cleveland recess appointed William Allen to serve as United States district judge.<sup>20</sup> Had he not been confirmed by the Senate, Allen’s temporary commission would have lasted until October 20, 1888, at the end of the Senate’s next session—a span of 552 days. *See Congressional Directory*, *supra*, at 526. And that temporary commission would have continued even longer had the Senate’s session run until the start of the next session in December 1888. *Ibid.*

Looking elsewhere in the Constitution, *Noel Canning* noted that it sometimes uses the verb “adjourn” or the noun “adjournment,” rather than “recess,” and inferred that the term “recess” must have a meaning narrower than “adjournment.” *Noel Canning*, 705 F.3d at 500. But that reasoning presumes that the Constitution uses both the words “adjournment” and “recess” to refer to periods of adjournment. In fact, to the extent that these terms were distinguished from one another in the Constitution, the Framers used “adjournment” to refer to the “*act* of adjourning,” 1 OXFORD ENGLISH DICTIONARY, *supra*, at 157 (emphasis added), and used “recess” to refer to the “*period* of cessation from usual work,” 13 OXFORD ENGLISH DICTIONARY, *supra*, at 322 (emphasis added). *Compare, e.g.*, Art. I, § 7, cl. 2 (Pocket Veto Clause) (“unless the Congress by their Adjournment

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<sup>20</sup> *See* Federal Judicial Center, *Biographical Directory of Federal Judges*, William Joshua Allen, at <http://www.fjc.gov/servlet/nGetInfo?jid=29>.

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”).<sup>21</sup> This usage was commonplace in the Framing Era. When the Continental Congress convened a committee “during the recess,” it did so under an intrasession “adjournment.” 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. And Thomas Jefferson described intrasession breaks of the British Parliament as “recess by adjournment.” Jefferson, *supra*, § LI. 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,” not in any broader sense. 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, *supra* (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”).

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 necessarily apply to every period following

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<sup>21</sup> 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/>.

an adjournment. 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 are not of sufficient duration to genuinely render the Senate unavailable to provide advice and consent do not trigger the President’s authority under the Recess Appointments Clause. 33 Op. Att’y Gen. at 22. Here it is undisputed that the recess was of sufficient duration to trigger the President’s recess appointment power.

*Noel Canning* also relied on a flawed historical analysis to support its conclusion. It pointed to a provision of the North Carolina constitution. *See* 705 F.3d at 501 (citing N.C. Const. of 1776, art. XX). And it cited *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819), for the proposition that this provision would have been understood to not apply to intrasession recesses. *Ibid.* But that provision does not use the same language as the Recess Appointments Clause. Moreover, *Beard* was decided on unrelated procedural grounds, the language on which *Noel Canning* relied came from a single judge’s summary of the defendant’s argument, and the relevant recess discussed there was not an intrasession one. *See* 7 N.C. 181. *Beard* is no answer to the weight of historical evidence showing that the Framers would have naturally understood “the Recess of the Senate” to encompass inter- and intrasession recesses, and the “great regard” owed to Presidential practice,

acquiesced in by the Senate, spanning at least ninety years. *See The Pocket Veto Case*, 279 U.S. at 690.

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.

**B. The President may fill all vacancies during a recess, not just those vacancies that arise during that recess**

DEMCO also takes the view that the President lacked the authority to make the January 2012 recess appointments because they did not arise during a 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, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). *Noel Canning*'s contrary conclusion is erroneous and should not be adopted by this Court.

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. Although 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).<sup>22</sup> 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

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<sup>22</sup> *See also* Hartnett, *Recess Appointment of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 381-84 (2005) (giving examples of events that “happen” over an extended period).

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, 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 President Monroe, 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 DEMCO 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.<sup>23</sup> Under *Noel Canning*'s interpretation, the vacancy 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.<sup>24</sup> President Washington's immediate successor, John Adams, expressed the same understanding as the government does today,<sup>25</sup> and there is evidence that the Third and Fourth Presidents, Thomas Jefferson and James Madison, also made appointments that are not in accord with *Noel*

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<sup>23</sup> 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 even if he had been, it would have also been during the same recess in which Scot was appointed (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).

<sup>24</sup> 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).

<sup>25</sup> 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.

*Canning's* view.<sup>26</sup> And President Abraham Lincoln rejected *Noel Canning's* approach as well when he recess-appointed David Davis to the Supreme Court of the United States on October 17, 1862, to a seat that had been vacated on April 30, 1861.<sup>27</sup> See 10 Op. Att'y Gen. 356 (1862) (Attorney General advising President Lincoln that he could make this appointment because the question had been “settled in favor of the power, as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate”).

The government's 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 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

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<sup>26</sup> Hartnett, *supra*, at 391-401.

<sup>27</sup> Federal Judicial Center, *Biographical Directory of Federal Judges, David Davis*, at <http://www.fjc.gov/servlet/nGetInfo?jid=573>; Federal Judicial Center, *Biographical Directory of Federal Judges, John Archibald Campbell*, at <http://www.fjc.gov/servlet/nGetInfo?jid=361>.

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. DEMCO'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. DEMCO's position also creates serious textual difficulties. If, as DEMCO 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, DEMCO'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 508-09. Randolph’s opinion has been thoroughly repudiated by a long line of subsequent 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, 1940, 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.<sup>28</sup>

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<sup>28</sup> 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 panel member was Senate-confirmed.

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 erroneously stated 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 Block filled 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 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.

Griffin’s seat, meanwhile, 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 Clause’s text imposes such a limitation.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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April 2013

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

|                                       |                  |
|---------------------------------------|------------------|
| DIXIE ELECTRIC MEMBERSHIP CORPORATION | *                |
|                                       | *                |
| Petitioner/Cross-Respondent           | * Nos. 12-60797  |
|                                       | * 12-60856       |
| v.                                    | *                |
|                                       | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD        | * 15-CA-19954    |
|                                       | *                |
| Respondent/Cross-Petitioner           | *                |

**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth 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 if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Washington, DC 20570

Dated at Washington, DC  
this 12th day of April, 2013

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

|                                       |   |                |
|---------------------------------------|---|----------------|
| DIXIE ELECTRIC MEMBERSHIP CORPORATION | * |                |
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|                                       | * | 12-60856       |
| v.                                    | * |                |
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| NATIONAL LABOR RELATIONS BOARD        | * | 15-CA-19954    |
|                                       | * |                |
| Respondent/Cross-Petitioner           | * |                |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,657 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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