

**Nos. 12-15404-BB, 12-15690-BB**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**GAYLORD CHEMICAL COMPANY, LLC**

**Respondent/Cross-Petitioner**

**and**

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

**Intervenor**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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v.	*
	* Board Case No.
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and	*
	*
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	* * * * *
	*
Intervenor	*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. R. 26 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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## **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that oral argument is appropriate in this case. While the unfair labor practices found by the Board involve the application of well-settled legal principles to largely undisputed facts, oral argument may assist the Court in its consideration of Gaylord's challenge to the constitutionality of the President's appointment of Board members pursuant to the Recess Appointments Clause.

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order issued against Gaylord

Chemical Company, LLC (“Gaylord”). The Board’s Decision and Order issued on June 25, 2012, and is reported at 358 NLRB No. 63. (D&O 1-6.)<sup>1</sup> The Board’s Order is final with respect to all parties.

The Board had subject-matter jurisdiction over the unfair-labor-practice proceeding pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over the Board’s application for enforcement and Gaylord’s cross-petition for review pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Tuscaloosa, Alabama. The Board filed its application for enforcement on October 22, 2012, and Gaylord filed its cross-petition for review on November 5, 2012. Both filings were timely because the Act places no time limitation on such filings. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (“the USW International” or “the Union”) has intervened on the Board’s behalf.

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<sup>1</sup> Record references in this brief are to the Board’s Decision and Order (“D&O”), the transcript from the hearing before the administrative law judge (“Tr.”), and the General Counsel’s exhibits (“GCX”) and Joint Exhibits (“JX”). “Br.” references are to Gaylord’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## STATEMENT OF ISSUES

- I. Whether substantial evidence supports the Board's findings that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union, refusing to provide the Union with information it requested, and unilaterally creating a new unit job position without first giving the Union notice and an opportunity to bargain.
- II. Whether substantial evidence supports the Board's finding that Gaylord violated Section 8(a)(1) of the Act when President Marc Smith coercively interrogated of employee Doug Mitchell about his union views.
- III. Whether the President's recess appointments to the Board are valid.

## STATEMENT OF THE CASE

This case concerns Gaylord's refusal to recognize and bargain with the Union following Gaylord's relocation of its plant operations from Bogalusa, Louisiana to Tuscaloosa, Alabama. After investigating charges filed by the Union, the Board's Acting General Counsel issued a complaint against Gaylord, alleging that it violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union, refusing to provide requested information to the Union, and unilaterally creating a new unit position. The complaint also alleged that Gaylord violated Section 8(a)(1) of the Act by interrogating its employees about their union sympathies. (GCX 1(a), (c), (e), (h).) Following a hearing, an administrative law

judge issued a decision and recommended order finding that Gaylord committed the alleged violations. (D&O 1 & n.1, 5.) On review, the Board adopted the judge's rulings, findings, and conclusions, with slight modification. (D&O 1 & n.1.) The facts supporting the Board's Decision, as well as its Conclusions and Order, are summarized below.

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

The salient facts in this case are undisputed due to the parties' extensive stipulations of fact at the hearing before the administrative law judge. (D&O 2.) The following facts are based primarily on those stipulations.

### **A. Background; the Union's Structure and Gaylord's Operations**

Under the USW International's structure, there are two types of locals: a full-fledged independent local and an amalgamated local, which is a smaller member organization that is part of a "mother local" that handles the amalgamated local's finances. Locals report to districts, which in turn report directly to the USW International. Overall, there are 13 districts nationwide. Alabama is in District 9, and Louisiana is in District 13. (D&O 2; Tr. 79-84, GCX 13 pp. 5-6.) The designated local for employees at the Bogalusa facility is Local 189, also known as Local 13-189; Local 887 is the designated local for the Tuscaloosa facility employees.

Gaylord operates a chemical plant in Tuscaloosa, Alabama, where it manufactures dimethyl sulfoxide (DMSO). (D&O 2; JX 1(a).) Before opening that facility, Gaylord operated a facility in Bogalusa, approximately 238 miles away. For decades, employees at the Bogalusa facility enjoyed continuous union representation.<sup>2</sup> (Tr. 107, 113, JX 1(a).) After purchasing the Bogalusa chemical plant from its predecessor in 2007, Gaylord recognized the Union as the collective-bargaining representative of the production and maintenance employees at Bogalusa. (JX 1(a).) During that time, Gaylord and the Union entered into successive collective-bargaining agreements and multiple memoranda of agreement. (JX 1(a), 1(b), 2-3.)

Around February 2009, Gaylord informed employees that it was closing the Bogalusa facility and opening a new facility in Tuscaloosa. It offered jobs to all Bogalusa unit employees who were willing to relocate to Tuscaloosa. (D&O 2; Tr. 135-41.) Subsequently, Gaylord and the Union bargained over the effects of the closing. The Union also sought bargaining over whether the existing collective-bargaining agreement would apply to the Tuscaloosa facility, but Gaylord declined to address that during bargaining. (D&O 2; Tr. 152-53, 156-57, 161-62, GCX 22, 26, JX 1(a).)

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<sup>2</sup> The employees' collective-bargaining representative has changed over the years due to union mergers. (D&O 2; Tr. 111-15.)

On March 27, the parties entered into a memorandum of agreement providing, in part, that employees would enjoy continued employment through the period of time necessary to relocate. (D&O 2; Tr. 141-44, JX 1(a), 3.) On March 29, incorporating the terms of that memorandum, the parties executed a new labor agreement, effective through the closing of the Bogalusa facility. (D&O 2; JX 2.) USW International Staff Representative Michael Tourné and representatives of Local 189 signed the memorandum. The union representatives who signed the collective-bargaining agreement were: Representative Tourné, the International's president, secretary-treasurer, and vice presidents of administration and human affairs; District 13's director; and Local 189 representatives. (JX 2.) As the Union's chief spokesperson, Tourné participated in all negotiations for the parties' agreements, administered the contracts, and participated in grievances and arbitrations on behalf of the Bogalusa unit. Gaylord never challenged the Union's representational status before it began the relocation process. (D&O 2; Tr. 120-21, 126-27, 130-31.)

**B. The Union Requests Bargaining and Information on Unit Employees, but Gaylord Refuses; Gaylord Relocates Its Operations to Tuscaloosa, and Creates a New Unit Position, Without Giving the Union Notice and an Opportunity To Bargain**

On August 31, 2010, at Representative Tourné's request, District 9 Director Daniel Flippo sent a letter to Gaylord, requesting bargaining as well as information necessary for bargaining, such as the names, job classifications, seniority dates,

rates of pay, and benefits for unit employees. Gaylord did not respond. (D&O 3; Tr. 91-92, GCX 14, JX 4.) On September 23, Flippo sent a similar letter requesting bargaining and the same information. On September 30, Gaylord finally responded, but only to ask for an explanation of District 9's involvement in the representation of the employees. (D&O 3; JX 5-6.)

On October 19, Flippo replied that the USW International was the employees' certified bargaining representative, and again requested bargaining and the same information as before. (JX 7.) Further, Flippo requested additional unit-related information, including the criteria used to transfer employees, compensation packages for relocated employees, wage rates and classifications at both facilities, wages paid to each employee, job descriptions and duties, Gaylord's compliance with health and safety standards and other reporting requirements, plant rules and regulations, and workers' compensation programs. (D&O 3; Tr. 97-98, JX 7.) On October 25, Gaylord again refused to provide the information, claiming that "neither the International nor District 9 is the certified bargaining representative" for employees at the Tuscaloosa facility. (JX 8.)

By October 30, a majority of unit employees from the Bogalusa facility—12 out of 18—had permanently relocated to the Tuscaloosa facility, where they performed job functions substantially similar to those they performed in Bogalusa. On December 16, the Tuscaloosa facility began producing DMSO, the sole product

manufactured at the plant, and operated in form basically unchanged from Bogalusa. In January 2011, Gaylord closed the Bogalusa facility. (D&O 2-3; JX 1(a).) About that same time, Gaylord also created a new unit position of “lead shipper,” without first notifying the Union or affording it an opportunity to bargain. (D&O 3-4; GCX 1(h), (k).)

**C. Vice President Smith Questions Employee Mitchell About His Union Views**

In September 2010, shortly after Bogalusa employees began relocating to Tuscaloosa, Vice President of Manufacturing Marc Smith summoned employee Doug Mitchell, who had transferred from Bogalusa, to his office for a one-on-one meeting. Smith asked Mitchell “why [he] thought [employees] needed a union,” to which Mitchell responded, “why not?” Smith then described his “team leadership philosophy,” and stated that there would be more flexibility and fewer expenses without a union. Mitchell asked Smith what expenses he meant. Smith stated that employees would have to pay union dues and Gaylord would have to hire attorneys to negotiate and review labor agreements. (D&O 3-4; Tr. 176-80.)

**II. THE BOARD’S CONCLUSIONS AND ORDER**

The Board (Chairman Pearce and Members Hayes and Griffin) found, agreeing with the administrative law judge, that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union and its designated local, by failing and refusing to provide the information requested by

the Union, and by unilaterally creating the lead shipper position without giving the Union notice and an opportunity to bargain. It also found that Gaylord violated Section 8(a)(1) by interrogating employee Mitchell about his union views.<sup>3</sup>

The Board's Order requires Gaylord to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, it requires Gaylord, upon request, to recognize and bargain with the Union and to furnish the Union with the information it had requested. The Order also requires Gaylord, upon request, to rescind or bargain with the Union over the lead shipper position, to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral creation of that position, and to post a remedial notice. (D&O 1, 3-5.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union following Gaylord's relocation to Tuscaloosa. As the Board reasonably found, the undisputed, stipulated facts solidly demonstrate the continuity of the bargaining unit and the Union's status as unit employees' representative at the

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<sup>3</sup> However, Chairman Pearce and Member Hayes found it unnecessary to pass on the judge's additional finding that Gaylord unlawfully interrogated employee Ronald Talley because that finding would be cumulative and not affect the remedy. Member Griffin would have adopted the judge's finding. (D&O 1 & n.1.)

Tuscaloosa plant. A majority (12 of 18) of the Bogalusa employees relocated to Tuscaloosa where they performed substantially similar work, and Gaylord operated the Tuscaloosa facility in basically unchanged form. Moreover, the record evidence confirms that Gaylord's collective-bargaining relationship was with the USW International, and not separately with its locals, because USW International Representative Tourné signed, negotiated, and administered all agreements between the parties.

In its defense, Gaylord repeats several meritless challenges that the Board properly rejected and the Court should likewise reject for the same reasons. Given Gaylord's duty to bargain with the Union, the Court must affirm the Board's remaining, and otherwise uncontested, violations that Gaylord refused to provide requested information and unilaterally created a new lead shipper position.

Additionally, substantial evidence supports the Board's finding that Gaylord violated Section 8(a)(1) of the Act when Vice President Smith coercively interrogated employee Mitchell, after summoning Mitchell to his office, inquiring about his views on union representation, and seeking to persuade him to abandon his support for the Union. Accordingly, Gaylord has presented no basis for disturbing the Board's findings.

Finally, Gaylord challenges the Board's authority to issue its Order, contending that the Board lacked a quorum because the President made invalid

recess appointments of three of the five Board Members acting at the time.

Specifically, Gaylord urges that the Senate was not in “recess” within the meaning of the Recess Appointments Clause when those appointments were made. That claim is mistaken.

The President made these recess appointments on January 4, 2012, during a 20-day period from January 3 to 23, 2012, in which the Senate had declared itself closed for business and ceased all usual business. To facilitate that break, the Senate adopted, by unanimous consent, an order that it would not engage in any business whatsoever during the 20-day January break. At the same time, the Senate issued orders declaring its break to be a “recess.” In an effort to allow for this extended suspension of business without the consent of the House of Representatives under the Adjournment Clause, U.S. Const. art. I, §5, cl.4, the Senate also had a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designated “pro forma sessions only, with no business conducted.” But under the unanimous consent order governing the 20-day January break, even at the pro forma sessions the Senate could only conduct business by unanimous consent, such that a single Senator could have blocked the conduct of any business—even a speech.

As per the Senate’s order, between January 3 and 23, no legislation was passed, no votes were held, and no nominations were considered. Senators made

no speeches and no debates occurred; indeed, nearly all Senators had departed the capital for their yearly winter break. In short, the Senate was unavailable as a body to conduct business, including the giving of advice and consent. The President properly concluded that the Senate was in “recess” during this period under ordinary meaning of the Recess Appointments Clause.

### STANDARD OF REVIEW

The Court affords “considerable deference” to the Board’s findings and will sustain the Board’s factual findings if they are supported by “substantial evidence on the record considered as a whole.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997) (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). And “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact . . . is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).<sup>4</sup> The Board’s determination that an employer must recognize its employees’ collective-bargaining representative following a relocation is reviewed under the substantial evidence standard. *Westwood Import Co. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982).

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<sup>4</sup> Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Moreover, “Congress [] made a conscious decision” in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board “the primary responsibility of marking out the scope . . . of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Accordingly, given the Board’s “competence in this area” of assessing an employer’s duty to bargain after a relocation, the Board’s determination is entitled to deference. *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 743 (8th Cir. 2001).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT GAYLORD VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION, REFUSING TO PROVIDE THE UNION WITH REQUESTED INFORMATION, AND UNILATERALLY CREATING THE LEAD SHIPPER POSITION**

As the Board reasonably found (D&O 1, 3-4), the stipulated facts fully establish that the Union was the bargaining representative of the unit employees at the Bogalusa facility, that a majority of those employees transferred to Tuscaloosa, and that Gaylord operated the Tuscaloosa facility in basically unchanged form. (JX 1(a), GCX 1(h) pp.3-5, 1(k) p.2.) Indeed, Gaylord explicitly states that it “does not dispute the factual underpinnings” (Br. 12) of those findings, nor the facts underlying the information request and unilateral change violations. Rather, Gaylord challenges the Board’s Section 8(a)(5) findings only by asserting (Br. 9-10) that it had no duty to continue recognizing and bargaining with the Union after

relocating its plant operations. Its contentions, however, are either unsupported by law or contrary to the undisputed, stipulated facts of this case.

**A. Following Relocation, An Employer's Duty To Continue To Bargain with the Union Depends on the Continuity of the Bargaining Unit**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). It has long been recognized that an employer violates that provision if it fails to bargain with the established bargaining representative after relocating its operations,<sup>5</sup> unless the relocation fundamentally changes the employer's operations.<sup>6</sup> *Leach Corp. v. NLRB*, 54 F.3d 802, 810 (D.C. Cir. 1995); *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995); *Westwood Import Co. Inc. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982); *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982). Absent such a fundamental change, the interests of industrial stability and the protections afforded employees under the

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<sup>5</sup> An employer's duty to bargain with its employees' bargaining representative continues "where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Adv. Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)).

<sup>6</sup> A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights (29 U.S.C. § 157).

Act prohibit employers from diminishing employees' rights to union representation through a relocation that leaves the "job situations [of employees] essentially unaltered." *Leach Corp.*, 54 F.3d at 810. Otherwise, an employer could push "the Union . . . out the door" whenever the employer opts to relocate its operations. *Molded Acoustical Prods., Inc. v. NLRB*, 815 F.2d 934, 940 (3d Cir. 1987).

Specifically, in determining whether an employer must continue to bargain with the union after relocating its operations, the Board assesses the continuity of the bargaining unit and the employer's operations by considering a number of factors. Those include whether the operations at the new facility are substantially the same as those at the old facility, whether transferees from the old plant constitute a substantial percentage (about 40 percent) of the employee complement at the new location, and the distance of the move. *Harte & Co.*, 278 NLRB 947, 948 (1986) (citing cases); *see Rock Bottom Stores, Inc.*, 312 NLRB 400, 402 (1993), *enforced*, 51 F.3d 366 (2d Cir. 1995); *Westwood Import Co.*, 681 F.2d at 666.

**B. The USW International Is Employees' Collective-Bargaining Representative, Not Any Particular Local**

Here, the Board properly assessed the continuity of the bargaining unit and Gaylord's operations in determining that Gaylord had a duty to bargain with the Union. (D&O 3.) Before the Board, Gaylord stipulated that it "continued to operate Tuscaloosa facility in basically unchanged form and that a majority of its

Tuscaloosa employees were previously employed at the Bogalusa facility.” (JX 1(a).) Indeed, at the Tuscaloosa facility, Gaylord continued manufacturing DMSO, the sole product manufactured at Bogalusa, in the same manner. Moreover, 12 of the 18 unit employees at the Bogalusa facility permanently transferred to Tuscaloosa, where they “perform[ed] job functions substantially similar to those they performed at Bogalusa.” (D&O 2; JX 1(a), 11.) Given those explicit stipulated facts, the Board’s finding of a duty to bargain is beyond doubt.

Moreover, based on the undisputed facts of this case, the Board reasonably found that Gaylord’s “collective-bargaining relationship has been with the USW International, not separately with its subordinate components, whose bargaining authority and representational authority derived entirely from their affiliation with the USW International.” (D&O 4.) As shown (pp. 6-7), USW International Staff Representative Tourné informed District 9 Director Flippo of the relocation and instructed him to seek bargaining with Gaylord, given that a majority of employees at Bogalusa would be transferring to Tuscaloosa. Despite Flippo’s multiple bargaining requests, Gaylord indisputably refused to bargain with the Union based on its bare assertion that neither the International nor District 9 was the bargaining representative of the Tuscaloosa employees.

Gaylord continues to maintain that claim (Br. 8-11), but it is belied by settled law and the facts of this case. Illustrative of the relevant settled law is *UAW*

*v. NLRB*, 394 F.2d 757 (D.C. Cir. 1967). There, where the labor agreements were between the employer “and the International and its Local 940,” the court held that, though “the International and Local ‘as an integral part’ of the joint bargaining agent negotiated and signed the contracts,” the local was never “an independent bargaining entity; at most it was a de facto agent.” *Id.* at 761 (internal quotation marks omitted). Likewise, here, the agreements were between Gaylord and “[the USW International] and its Local No. 13-189,” and the USW International was a signatory to all contracts. Indeed, it is undisputed that International Representative Tourné was the “chief spokesman” for the Union in bargaining and arbitrated grievances on behalf of the Union, and that the Union’s structure requires locals to report to districts, which ultimately report to the International. Moreover, the employer in that case did not refuse to bargain with the International, but only refused to negotiate with a local union newly seeking to establish its bargaining authority. *Id.* at 761. By contrast, Gaylord utterly repudiated its established duty to bargain with the USW International, as well as with District 9, an established agent that reports to the International and to which Local 887 reports. Thus, the Board reasonably concluded that Local 189 was not an independent bargaining entity, as Gaylord insists, but rather, its representational authority “derived entirely from [its] affiliation with the USW International.” (D&O 4.)

### C. Gaylord's Contentions Are Without Merit

In its opening brief, Gaylord attempts to defend its position that it had no duty to recognize or bargain with the Union by repeating (Br. 7-11) arguments that the Board reasonably rejected (D&O 3-4), and which this Court should likewise reject. In particular, Gaylord places undue emphasis on the language of its labor agreement with the Union, the distance of the move, the absence of animus behind its decision to relocate, and a nonexistent Union “internal requirement” that employees continue to express a desire for unionization. Each claim fails either under settled law or the facts of this case.

For instance, Gaylord relies heavily (Br. 7-9) on the “conjunctive phrasing” of the parties to the CBA—“[the International] and its Local No. 13-189”—in asserting that it need not recognize the Union or its local in Tuscaloosa. But, as explained above, the Board reasonably found that “[Gaylord’s] collective-bargaining relationship has been with the USW International, not separately with its subordinate components, whose bargaining [and] representational authority derived entirely from their affiliation with the [International].” (D&O 4.) Gaylord ignores the fact that the International and *its designated local* have been the exclusive bargaining representative of the Bogalusa employees, since the “local union’s number designation and the ownership of the facility have changed through the years.” (D&O 2.) Accordingly, the International and Local 887, the

designated Tuscaloosa local, represent the employees who transferred from Bogalusa. Thus, contrary to Gaylord's claim (Br. 8), the Board did not "manufacture a new certified bargaining representative."

Further, Gaylord mistakenly insists (Br. 9-10) that the distance of the move—238 miles—justifies its refusal to bargain. In doing so, it exaggerates the importance of distance in the Board's analysis, as it wrongly assumes that distance outweighs whether a substantial percentage of employees transferred to the new facility and whether the employer's operations are substantially unchanged. The Board has long held that the distance of a relocation is not singly determinative of whether the duty to bargain exists. *See Hydro-Air Equip.*, 277 NLRB 85, 89-90 (1985) (finding employer had duty to bargain despite "substantial change in geographic location," where 23 of 47 unit employees relocated to new plant and production "methods, tools, and techniques" remained the same). As the Board explained here, if the distance of the move, in and of itself, were sufficient to strip the Union of its representational status, that "would allow an employer to evade its collective-bargaining obligations simply by moving further away." (D&O 4.) Indeed, the fact that over 60 percent of employees transferred to Tuscaloosa demonstrates that the distance of the move was not so significant as to eradicate majority support for the Union, and consequently, that Gaylord's obligation to recognize and bargain with the Union continued. (D&O 4.)

Unsuccessfully, Gaylord attempts to bolster its argument by analogizing this case to the factually dissimilar case of *NLRB v. Massachusetts Machine & Stamping, Inc.*, 578 F.2d 15 (1st Cir. 1978). There, though the move involved a “substantial change in geographic location,” the court’s ruling that the employer lawfully withdrew recognition rested on the *absence* of continuing majority support for the union, as well as the fact that less than 40 percent of employees had transferred to the new facility. *Id.* at 19-20. In this case, as the Board noted, Gaylord “provided no evidence that the Union has ever lost the support of a majority of unit employees,” and did not refuse to recognize the Union on that basis. (D&O 3.) Thus, Gaylord’s reliance on that case is misplaced.

Despite Gaylord’s eagerness to highlight an “absence of evidence of bias” on its part (Br. 9), the Board’s finding that Gaylord unlawfully refused to bargain with the Union after the relocation does not depend on the presence or absence of union animus. Rather, the General Counsel never alleged nor contended that Gaylord’s decision to relocate was motivated by union animus, so that consideration is irrelevant. *See J.R. Simplot Co.*, 311 NLRB 572, 579 (1993). As such, here, “whether or not the relocation was motivated by antiunion or other unlawful reasons is not determinative of the Union’s right to continued representational status.” *Id.*

Gaylord further erroneously asserts (Br. 11) that the Union “cannot transfer its representation rights” to Tuscaloosa because the collective-bargaining agreement states the geographic location of the unit as the Bogalusa facility. In fact, the very case Gaylord cites is contrary to this assertion. As the court noted in *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598, 600-01 (8th Cir. 1999), unless the agreement contains a geographic limitation clause—a clause specifying “and at no other geographic locations”—a union’s representational status is not limited to a particular facility. Here, the agreement did not contain such a clause. Moreover, as the Board acknowledged (D&O 4), other provisions in the agreement “envisioned a dismantlement of the Bogalusa plant and transfer of its operations elsewhere,” and the parties signed a memorandum of agreement concerning post-relocation employment of Bogalusa employees.

Finally, Gaylord insists (Br. 8-11) that the Union failed to satisfy a nonexistent “internal requirement” that employees express their desire for unionization and that it should have filed a petition for a representation election at the Tuscaloosa facility. But Gaylord cites no evidence that the Union had any such internal requirement, and the Union was not required to establish its majority support because it was already the employees’ certified bargaining representative. (D&O 4.)

In sum, substantial evidence supports the Board's finding that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union, as unit employees' bargaining representative. Accordingly, the Court should affirm the Board's finding and reject Gaylord's attempt to challenge it.

**D. Given Gaylord's Duty To Bargain, the Remaining Factually-Uncontested Bargaining Violations Must Be Upheld**

Since substantial evidence supports the Board's finding that Gaylord was obligated to bargain with the Union, and Gaylord has not otherwise disputed the remaining bargaining violations, the Court must uphold those Board findings.

For example, Gaylord indisputably refused to provide the Union with requested unit employee information that was necessary and relevant to the Union's representational duties. It is settled that, under Section 8(a)(5) and (1) of the Act, an employer has a duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1570 (11th Cir. 1989) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967)). Information pertaining to unit employees is presumptively relevant and must be furnished. *Id.* As discussed (pp. 6-7), the Union submitted multiple requests for presumptively relevant information concerning unit employees' terms and conditions of employment, but Gaylord refused to furnish it, based on its erroneous belief that the Union was not employees' collective-bargaining representative. (D&O 3; JX 6, 8.)

With regard to the unilateral change, Gaylord similarly has explicitly stipulated that, after the relocation, it created the “lead shipper” position in the unit without giving the Union notice and an opportunity to bargain. (D&O 3-4; GCX 1(h) pp.4-5, 1(k) p.2, JX 4-8.) It is well established that an employer violates Section 8(a)(5) and (1) of the Act where, as here, it creates a new bargaining unit position without first giving the Union notice and an opportunity to bargain over them. *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 879 (7th Cir. 2011); *see NLRB v. Katz*, 369 U.S. 736, 743 (1962); *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986) (citing *A.H. Belo Corp. v. NLRB*, 411 F.2d 959, 970 (5th Cir. 1969)). In failing to do so, Gaylord violated the Act.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT GAYLORD VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEE MITCHELL ABOUT HIS UNION VIEWS**

Section 7 of the Act guarantees employees the right to “self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain or coerce employees in the exercise of” those rights. 29 U.S.C. § 158(a)(1); *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987). An employer violates Section 8(a)(1) when its conduct tends to be coercive of an employee’s exercise of his Section 7 rights; a showing of

actual coercion is not necessary. *Id.*; accord *NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 921 (11th Cir. 1982).

Interrogations about employees' union views or activities "present an ever present danger of coercing employees in violation of their Section 7 rights." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 416 (5th Cir. 1981). In determining whether an interrogation is coercive, the Board considers a number of factors, such as the nature of the information sought, the rank of the questioning official, the place and manner of the conversation, and whether the employer assures the employees that no reprisals will be taken if they support the union. *Id.* at 416. However, "[t]his list is not exhaustive . . . and coercion may occur even if all of these factors operate in favor of the employer." *Id.*; accord *Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1252, 1256 (5th Cir. 1977).

Here, the Board reasonably found that Vice President of Manufacturing Smith coercively interrogated employee Mitchell. (D&O 3-5.) As shown, shortly after the relocation, Smith, a high-ranking official, called Mitchell into his office and asked him why he wanted a union. It is settled that where such conversations are conducted in a director's office, a place of authority or with "unnatural formality," that factor weighs in favor of finding coercion. *TRW-United Greenfield Div.*, 637 F.2d at 417 (quoting *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965)). Though Smith summoned Mitchell to his office under the guise of

developing employee leadership, the Board reasonably found (D&O 4) that the interrogation centered on persuading Mitchell that employees would not benefit from unionization. Furthermore, in response to Smith's question of why Mitchell wanted union representation, Mitchell replied "why not," which is suggestive of an employee's fear of reprisal for admitting his union support and is further evidence of coercion. *See Sturgis Newport Bus. Forms, Inc.*, 563 F.2d at 1257. Thus, contrary to Gaylord's vague assertion that the record fails to show that Smith's interrogation was unlawful (Br. 11), the circumstances here establish that Smith's interrogation reasonably tended to coerce Mitchell in exercising his Section 7 rights.

### **III. THE PRESIDENT'S RECESS APPOINTMENTS TO THE BOARD ARE VALID**

In addition to challenging the merits of the Board's determination, Gaylord urges that the Board lacked a quorum at the time it issued its June 25, 2012 order, because three members serving at that time—Richard Griffin, Terrence Flynn, and Sharon Block—were appointed in violation of the Recess Appointments Clause, Art. II, § 2, cl. 2. As explained below, the President acted well within his constitutional authority in making these appointments during a prolonged period of Senate absence and inactivity that the Senate itself called a "recess."<sup>7</sup>

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<sup>7</sup> *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), held (1) that the President's recess appointment authority does not extend to intra-session recesses

**A. The Senate Was In Recess At the Time the President Made the Challenged Appointments**

1. After the start of the second session of the 112th Congress, the Senate was closed for business between January 3 until January 23, 2012, a period of nearly three weeks, pursuant to a Senate order adopted the previous December. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Senate referred to its break as “the Senate’s recess.” *Id.* Under the terms of its order, the Senate was unable to provide advice or consent on Presidential nominations. It considered no bills and passed no legislation. No speeches were made, no debates were held, and messages from the President were neither laid before the Senate nor considered. Although the Senate punctuated its 20-day break with periodic “*pro forma* sessions” conducted by a single Senator and lasting for literally seconds, it expressly ordered that “no business” would be conducted even at those times.

At the start of this lengthy Senate absence, Board member Craig Becker’s term ended, and the Board’s membership fell below the statutorily mandated quorum of three members, leaving the Board unable to fully carry out its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President invoked his constitutional authority

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of the Senate, and (2) the recess appointment authority does not permit the President to fill preexisting vacancies that first arose before the recess in question. Those claims are foreclosed by this Court’s decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005).

under the Recess Appointments Clause to appoint three new members (Flynn, Block, and Griffin), returning the Board to full membership.<sup>8</sup>

2. The Recess Appointments Clause empowers the President to “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, §2, cl.3. At the Founding, like today, “recess” was used to mean a “[r]emission or suspension of business or procedure,” II Webster, *An American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” OXFORD ENGLISH DICTIONARY 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706); *see also* 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (“remission or suspension of any procedure”). *See also Evans*, 387 F.3d at 1224 (relying on dictionary definitions).

The text of the Recess Appointments Clause must also be understood in light of its “main purpose,” which is “to enable the President to fill vacancies to assure the proper functioning of our government.” *Evans*, 387 F.3d at 1226; *see also id.* at 1227 (“[T]he purpose of the Recess Appointments Clause [is] to keep important

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<sup>8</sup> Flynn’s nomination had been submitted to the Senate in January 2011. *See* 157 Cong. Rec. S68 (daily ed. Jan 5, 2011). Block’s nomination had been submitted on December 15, 2011, the same day the President withdrew his previous nomination of Becker, after the Senate had delayed action on Becker’s full-term nomination for over two years. *See* 155 Cong. Reg. S7277 (daily ed. July 9, 2009); 157 Cong. Reg. S8691 (daily ed. Dec. 15, 2011). Griffin’s nomination was submitted that day as well, to fill a seat that had become vacant several months earlier. *See id.*

offices filled and the government functioning.”). As the Federalist Papers explained, the Clause provides an “auxiliary method of appointment, in cases in which the general method” —the process of Senate advice and consent provided by the Appointments Clause—“was inadequate.” *The Federalist No. 67*, at 410 (Hamilton) (Clinton Rossiter ed., 1961). The Recess Appointments Clause thus plays a vital role in the constitutional design by supplying a mechanism for filling vacant offices and maintaining continuity of government operations during periods when the Senate is unavailable to provide advice and consent. The Framers recognized that “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” but that during periods when the Senate is absent, there may be vacancies that are “necessary for the public service to fill without delay.” *Federalist No. 67, supra*, at 410. The Clause addresses this public need by “authoriz[ing] the President, singly, to make temporary appointments” in such circumstances. *Ibid.*

Furthermore, the Executive Branch and the Senate have long shared an understanding of the constitutional language that conforms to its ordinary meaning and purpose. In a seminal report issued more than a century ago, the Senate Judiciary Committee carefully examined the constitutional phrase “the Recess of the Senate.” S. Rep. No. 58-4389, at 2 (1905). It explained that the Clause’s “sole purpose was to render it certain that at all times there should be, whether the

Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.” *Ibid.* The report thus stressed that “[t]he word ‘recess’ is one of ordinary, not technical, signification” and is used in the Recess Appointments Clause “in its common and popular sense.” *Id.* at 1. Accordingly, it defined the constitutional phrase in terms that have an explicitly functional element, concluding that Senate recesses occur “when the Senate is not sitting in regular or extraordinary session,” *i.e.*, periods “when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.” *Ibid.* The Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” *See* Riddick & Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) (“Riddick’s Senate Procedure”).

The Executive Branch’s own firmly established understanding of the Recess Appointments Clause is consistent with the Senate’s understanding. Attorney General Daugherty explained in a 1921 opinion that the relevant inquiry is “whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” 33 Op. Att’y Gen. 20, 21-22 (1921). Paraphrasing the 1905 Senate report, Daugherty explained:

[T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance?

Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

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

The meaning of the Recess Appointments Clause is also informed by “the construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced.” *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929); *see also ibid.* (deferring to “[l]ong settled and established practice” in determining whether a particular break was an “adjournment” under the Pocket Veto Clause); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (same, in a case involving general separation-of-powers principles); *Evans*, 387 F.3d at 1225 (giving substantial weight to prior executive practice in interpreting the Recess Appointments Clause). In the history of the Republic, Presidents have made thousands of recess appointments, including members of the President’s Cabinet, Supreme Court Justices, and other principal officers. Those appointments have occurred in a variety of circumstances in which the Senate was unavailable to provide advice and consent: during intersession and intrasession recesses of the Senate, at the beginning of recesses and in the final days (and hours) of recesses, during recesses of greatly varying lengths, and to fill vacancies that arose during the recesses and those that arose before the recesses.<sup>9</sup> For example, President

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<sup>9</sup> *See, e.g.*, Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 28-32 (Apr. 23, 2004) (listing intrasession recess appointments in recesses as short as nine

George W. Bush recess appointed William Pryor to serve as a court of appeals judge during a 10-day break in the Senate's business. Hogue, *Intrasession Recess Appointments*, *supra*, at 32. This Court upheld that appointment, *see Evans*, 387 F.3d 1220, and the Senate confirmed Pryor to the post.<sup>10</sup> Indeed, Congress has generally acquiesced in these historical exercises of recess appointment power, including by authorizing the payment of recess appointees.<sup>11</sup>

In sum, when the Senate breaks from its usual business in such a manner and for such a duration that it is, as a body, unavailable to provide advice and consent, the Recess Appointments Clause gives the President the power to make temporary appointments to ensure the continuity of government functions. The President's exercise of that power and judicial review must be guided by the purpose, historical understandings, and practical construction given to the Clause throughout history.

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days); Hogue et al., Cong. Res. Serv., *The Noel Canning Decision and Recess Appointments Made from 1981-2013* (Feb. 4, 2013).

<sup>10</sup> Federal Judicial Center, *Biographical Directory of Federal Judges: William Holcombe Pryor, Jr.*, at <http://www.fjc.gov/servlet/nGetInfo?jid=3050&cid=999&ctype=na&instate=na>.

<sup>11</sup> *See, e.g.*, 41 Op. Att'y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the "accepted view" of the Recess Appointments Clause, and interpreting the Pay Act in a consistent manner).

3. The President properly determined that the Senate’s 20-day break in January 2012 fits squarely within the traditional understanding of the Recess Appointments Clause. The Senate had ordered that it would not conduct business during this entire period. The relevant text of the order provided:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).<sup>12</sup> The President made the recess appointments on January 4, a day on which the Senate was not holding a *pro forma* session.

By providing that “no business” could be conducted for 20 consecutive days, even during the intermittent *pro forma* sessions, this order created a 20-day break from usual Senate business. The *pro forma* sessions were nothing like regular working Senate sessions. Instead, they were (as the name confirms) mere formalities whose principal function was to allow the Senate to cease all business.

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<sup>12</sup> This order also provided for an earlier period of extended Senate absence punctuated by *pro forma* sessions for the final weeks of the first Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the second Session of the 112th Congress began, by operation of the Twentieth Amendment. *See* U.S. Const. amend. XX, §2; *infra* pp. 36-37. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

Because it could conduct “no business” at all, the Senate was unavailable to provide advice or consent as part of the ordinary appointments process during this period.<sup>13</sup> This period of unavailability to provide advice and consent is twice as long as the period recognized that this Court recognized as a recess in *Evans v. Stephens*. The 20-day break from business in January 2012 thus constituted a recess under the ordinary, well-established meaning addressed above.

Consistent with the President’s understanding, the Senate *itself* specifically and repeatedly referred to its break from business during this overall period as a “recess” and arranged its affairs during the break based on that understanding. For example, at the same time it adopted the order that it would conduct no business during that period, the Senate made special arrangements for certain matters to continue during “the Senate’s recess.” *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that “notwithstanding the Senate’s recess, committees be authorized to report legislative and executive matters”); *see also ibid.* (allowing for legislative appointments “notwithstanding the upcoming recess or adjournment”). The Senate has taken similar steps before long recesses that does not contain *pro*

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<sup>13</sup> Under Senate procedures, because the order was adopted by unanimous consent of the Senate, recalling the Senate to conduct business would have required unanimous consent as well. Oleszek, Cong.Res.Serv., *The Rise of Unanimous Consent Agreements*, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008).

*forma* sessions,<sup>14</sup> which further indicates that the Senate viewed its full January 2012 break as a comparable recess.

**4. a.** In nonetheless challenging the President’s appointments, Gaylord relies on the Senate’s scheduling of periodic “*pro forma* sessions” in its December 17 order. But those sessions did not alter the continuity or basic character of what the Senate itself termed its “recess”: they did not transform the 20-day break into a series of periods that were too short to qualify as recesses, or somehow remove the 20-day period from the scope of the Recess Appointments Clause. The *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done. By the terms of the Senate’s adjournment order, “no business [was] to be done” during the *pro forma* sessions or in between them. They thus preserve, rather than alter, the essential character of the 20-day January 2012 break as a single, extended recess of the Senate.

Historically, when the Senate wanted to take a break from regular business over an extended period of time, the two Houses of Congress would pass a concurrent resolution of adjournment authorizing the Senate to cease business over that time. *See* Brown, *et al.*, *House Practice* §10, at 8-9 (2011). Since 2007, however, the Senate has begun to hold *pro forma* sessions during breaks when there traditionally would have been a concurrent adjournment resolution, like the

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<sup>14</sup> *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

winter and summer holidays. *See Sessions of Congress, Congressional Directory for the 112th Congress* 536-38 (2011) (“*Congressional Directory*”). These periodic *pro forma* sessions are undertaken in an effort to enable the Senate to break for an extended period without a concurrent adjournment resolution but still claim compliance with the constitutional requirement in the Adjournment Clause that neither House adjourn for more than three days without concurrence of the other.<sup>15</sup> Whatever the efficacy of the *pro-forma*-session device for that purpose, where only matters internal to the Congress are concerned, it does not affect matters outside the Legislative Branch, *see INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983), such as the power of the President under the Recess Appointments Clause, or the official actions of Officers of the United States pursuant to that Clause or private persons regulated by those officers. *See infra* pp. 34-36.

The fact that the Senate sought to facilitate its 20-day break from business by using one procedural mechanism (*pro forma* sessions) rather than another (concurrent adjournment resolution) makes no difference under the Recess Appointments Clause. For purposes of that Clause, adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions, because both are designed to enable the Senate as a body to cease business (including the giving of advice and consent to appointments) for an

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<sup>15</sup> U.S. Const. art. I, §5, cl.4.

extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. That one Senator comes to the Senate Chamber to gavel in and out the *pro forma* sessions, with no other Senator needing to attend and “no business [to be] conducted,” does not change the fact that the Senate as a body is in “Recess” as the term has long been understood.

Gaylord nonetheless implies that the Senate was fully ready to conduct business, and it observes that the Senate enacted legislation on December 23, 2011 and August 5, 2011—during sessions originally scheduled to be *pro forma*. (Br. 21.) *See also* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).<sup>16</sup> In a recent divided opinion, the Third Circuit similarly stated in dicta<sup>17</sup> that the Senate “could

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<sup>16</sup> By enacting legislation during a session that originally was scheduled as “pro forma,” the Senate transformed it into regular working session. This is evidenced by the fact that, on December 23 messages the House had sent on December 19 were laid before the Senate after the legislation was passed, something which did not happen during *pro forma* sessions. *Compare* 157 Cong. Rec. S8787 (Dec. 20, 2011) *with id.* at S8789 (Dec. 23, 2011)). To the extent the actual passage of legislation on December 23 is relevant, it would mean at most that the Senate resumed its previously scheduled recess after that date; Gaylord does not suggest that the Congress passed legislation or conducted any business of any kind during the 20-day break at issue here, which began on January 3, 2012.

<sup>17</sup> This statement was unnecessary to support the court’s holding because the panel majority invalidated only the appointment of Craig Becker, who was appointed in March 2010 during a recess in which the Senate was *not* holding *pro forma* sessions. *New Vista*, 2013 WL 2099742, at \*6. The majority did not rule on the validity of the January 2012 recess appointments challenged here. *See id.* at \*30.

have provided advice and consent during these *pro forma* sessions if it desired to do so” and that the Senate was thus open for business during those *pro forma* sessions. *NLRB v. New Vista Nursing & Rehab.*, 2013 WL 2099742, at \*19 (May 16, 2013); *but see id.* at \*42 (Greenaway, J., dissenting) (“When a *pro forma* session is held for approximately thirty seconds by a single Senator, the Senate is not able to accomplish the function of deliberating about and voting on the President's nominees.”).

But that view ignores the fact that the Senate could have passed legislation or confirmed nominees during the January 2012 recess only by acting

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Thus, *New Vista*'s statements regarding the nature and effect of the *pro forma* sessions were in no way pertinent to the resolution of the case.

In addressing the effect of the *pro forma* sessions, *New Vista* also badly misapprehended the government's arguments when it concluded that the government's position would permit appointments in intrasession breaks shorter than three days. *See id.* at \*19. To be clear, intrasession breaks between working Senate sessions of such short duration do not trigger the President's recess appointment power. Indeed, the Executive has long disclaimed appointment power during such breaks. *See, e.g.*, 33 Op. Att'y Gen. at 24-25. These are not a suspension of the Senate's usual business under the ordinary meaning of the Recess Appointments Clause because, rather than representing a meaningful suspension of ordinary Senate business, including availability for advice and consent, they account for those everyday activities such as meals, rest, and worship days that occur on a regular and recurring basis during the course of the Senate's ongoing business over a period of time. And this standard is an administrable one that is, again, consistent with longstanding Executive practice. It is also textually based because it derives from the ordinary meaning of a legislative recess, and is informed by the Adjournment Clause's premise that certain breaks are *de minimis* and hence not genuine suspensions of business, as the Supreme Court has recognized in interpreting the Pocket Veto Clause. *See Wright v. United States*, 302 U.S. 583, 593-96 (1938).

*unanimously*—that is what would have been required for the Senate to override its previous unanimous consent order that no business be conducted during the January break, through application of a more rigorous standard than is required to end other indisputable recesses in order to conduct business. As a result, under the Senate’s procedures for the *pro forma* session with no business to be conducted, a single objecting Senator could have prevented the Senate from conducting any business, even if every other Senator had sought to override the Senate’s prior order. Accordingly, under Gaylord’s view, even if the Senate declares unequivocally that it will not be conducting business and departs the seat of Government for a lengthy period of time, it cannot be deemed to be closed for business so long as there remains some possibility of taking extraordinary measures to engage in business. *See also New Vista*, 2013 WL 2099742, \*19 (suggesting that “the Senate likely could have provided its advice and consent and chose not to do so.”).

That contention is both mistaken and belied by this Court’s precedent. That the Senate retained the ability to reconvene itself to conduct uncontroversial business in a highly restricted manner provides no basis for distinguishing the January 2012 recess from many other recesses that even Gaylord would concede constitute recesses for purposes of the Recess Appointments Clause. Concurrent resolutions of adjournment—including some adjournments that end a Senate

session—now often contain provisions allowing the leadership of the House and Senate to reconvene either or both Houses before the end of a recess if the public interest warrants it.<sup>18</sup> In this setting, the mere possibility that Senate leadership might reconvene the Senate to conduct business during a recess does not render the President unable to make recess appointments. If it were otherwise, President Bush’s appointment of Judge Pryor in 2004—and many others—would have been invalid: prior to the recess in which that appointment was made, the Senate had adjourned under a resolution that expressly provided for the possibility of reconvening. *See* H.R. Con. Res. 361, 108th Cong. (2004), 150 Cong. Rec. 2143; *Evans*, 387 F.3d at 1220; *see also New Vista*, 2013 WL 2099742, at \*50 (Greenaway, J., dissenting) (observing that the majority’s decision would lead to such an “absurd result”). This Court, of course, sustained Judge Pryor’s appointment in *Evans*.

Just as the possibility of reconvening does not alter the nature of recesses by concurrent resolution, the mere possibility that between January 3 and January 23 the Senate could have superseded its adjournment order by unanimous consent

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<sup>18</sup> *See, e.g.*, H. Con. Res. 307, 111th Cong. (passed Aug. 5, 2010) (giving the Senate majority leader the power to reassemble the Senate); H. Con. Res. 295, 107th Cong. (passed Dec. 20, 2001) (providing for reassembly notwithstanding a final adjournment); *see generally* Brown, *supra*, at 9; *New Vista*, 2013 WL 2099742, at \*50 (Greenaway, J., dissenting) (“[T]here is such a thing as a conditional sine die adjournment, which could allow the Senate Majority leader to call the Senate back into session on 24 hours’ notice to resume the previous session.”).

does not change the fact that the Senate was in recess, and likewise did not prevent the President from making recess appointments. In fact, overriding a unanimous consent agreement (as would have been necessary in this case to disrupt the recess) may be more difficult than a simple reconvening—the latter can be done simply at the instigation of legislative leadership, while the former must be done by unanimous consent, *i.e.*, without the objection of *any* Senator.<sup>19</sup>

Gaylord also urges that a ruling in the government’s favor “could permit the President to bypass the Senate if the chamber announces it will not conduct the *particular* business of reviewing nominations for a given period.” (Br. 22.) That is not correct. The Senate here did not merely cease doing some business during the twenty-day period; by unanimous consent, it ceased doing *all* business. Under any proper understanding of the words used in the Recess Appointments Clause, that break was a “recess.”

**b.** In an effort to buttress its contention that the Senate’s three-week break from business was not a recess, Gaylord cites a series of constitutional provisions *other* than the Recess Appointments Clause, but none of these is relevant here.

Gaylord argues that treating the Senate’s 20-day break as a recess would conflict with the Rules of Proceedings Clause, U.S. Const. art. I, §5, cl.2, which

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<sup>19</sup> The *New Vista* majority attempted to distinguish this situation by asserting that the Senate in some sense “has convened” during *pro forma* sessions. It is difficult to fathom what difference that makes, where the Senate is barred by unanimous consent order from conducting business during the *pro forma* sessions.

provides that “[e]ach House may determine the Rules of its Proceedings.” (Br. 17-21). But Gaylord fails to cite any Senate rule that supports its position. To the contrary, the Senate by its own orders declared that its January break was a “recess” and that the purported “sessions” in that period were “*pro forma*” only, in which “no business” was to be conducted. 157 Cong. Rec. S8783. In any event, this Court has squarely held that “when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional.” *Evans*, 387 F.3d at 1222. And an officer of the Legislative Branch itself has similarly recognized that Congress does not have sole authority to determine whether there is a recess within the meaning of the Recess Appointments Clause, because that question implicates the President’s Article II powers. *In re John D. Dingell*, B-201035, 1980 WL 14539, at \*3 (Comp. Gen. Dec. 4, 1980) (“the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate”) (quoting 33 Op. Att’y Gen. 20 (1921)); *see also INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (explaining that the Rules of Proceedings Clause gives Congress authority only to establish rules governing the Senate’s “*internal matters*” and “only empowers Congress to bind itself”).

Nor is that principle altered by Gaylord’s citations to the Congressional Record and *United States v. Ballin*, 144 U.S. 1 (1892). (Br. 20). The question in *Ballin*—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by contemporaneous congressional journal entries. 144 U.S. at 2-3. In that context, the Court stated that the journal “must be assumed to speak the truth.” *Id.* at 4. But the journals here provide no conclusive evidence of Gaylord’s position. To the contrary, the journals reinforce the conclusion that the Senate was in recess, as they contain the Senate’s own description of this period as a recess, include the Senate’s order declaring that no business be conducted, and demonstrate that the Senate in fact conducted no business.

Gaylord likewise misconceives (Br. 13-14) the relevance of the Adjournment Clause, which provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” U.S. Const. art. I, §5, cl.4. The Adjournment Clause relates primarily to the internal operations of the Legislative Branch, by furnishing each House of Congress with the power to ensure the simultaneous presence of the other so that they can together conduct legislative business.<sup>20</sup> We may assume *arguendo* that,

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<sup>20</sup> See Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790) *reprinted in* 17 THE PAPERS OF THOMAS JEFFERSON 195-96 (Julian Boyd, ed. 1965) (explaining the Adjournment Clause was “necessary therefore to keep [the

insofar as the matter concerns solely the interaction of the two Houses, Congress could have some leeway to determine whether a particular practice, like the merely “*pro forma* sessions” here, comports with the Clause. And each respective House has the ability to respond to, or overlook, any potential violation of the Clause by the other.<sup>21</sup>

The question presented here, however, concerns the power of the President under Article II—specifically, whether he reasonably determined that the Senate was in recess thereby permitting him to make a recess appointment. That question is fully answered by the plain meaning of the Recess Appointments Clause and the Senate’s own actions, including its explicit order that it would conduct “no business” during its January break, and its characterization of that break as “the Senate’s recess.” This Court need not and should not reach out to determine whether the Senate complied with the Adjournment Clause.<sup>22</sup>

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

<sup>21</sup> The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick’s Senate Procedure at 15.

<sup>22</sup> To resolve the issue of whether the Senate complied with the Adjournment Clause, the Court would need to decide not only whether the Senate “adjourn[ed] for more than three days” within the meaning of that Clause, but whether it did so “without the Consent” of the House. Art.I, §5, cl.4. Given that the Senate was unavailable to do business between January 3 and 23, 2012, the better view is that the Senate did adjourn for more than three days within the meaning of the

Gaylord also erroneously invokes (Br. 13) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const. amend. XX, §2. The Senate held a *pro forma* session on January 3 in an effort to satisfy what it believed to be the requirements of that Amendment. Whether that effort was successful is not at issue here. The January 3 *pro forma* session was not necessary to begin the Second Session of the 112th Congress, as Gaylord appears to believe, because absent a law appointing a different date, the congressional Session begins at noon on January 3 by operation of law. To hold otherwise would vitiate the Twentieth Amendment’s requirement that the starting date of the annual Session may be changed only “by law,” a requirement that entails presentment to the President of a bill changing the date, rather than unilateral action of Congress or one of its Houses. *See, e.g.*, Pub. L. No. 79-289 (1945). Thus, whatever the significance of the *pro forma* session for purposes of the Senate’s own responsibilities under the Twentieth Amendment, the new Session began by operation of the Twentieth

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Adjournment Clause. The question of consent by the other House would ordinarily be an issue for resolution between the two Houses, not for the courts. And even if the question were judicially cognizable, its answer is not entirely clear. Here, the House was aware of the Senate’s adjournment order, but rather than objecting to that order, the House adopted a corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period. *See* H. Res. 493, 112th Cong. (2011).

Amendment at noon on January 3 and the period of recess that the Senate had ordered commenced at that point and continued until January 23.<sup>23</sup>

5. Gaylord’s position is further undermined by serious separation-of-powers concerns. The Supreme Court has condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). And this Court has eschewed an interpretation of the Recess Appointments Clause that would require offices to go unfilled for an extended period when the Senate was not readily available. *See Evans*, 387 F.3d at 1224, 1225. Allowing the use of “*pro forma* sessions” to disable the President from acting under the Recess Appointments Clause would cause both of these problems.

First, Gaylord’s position would frustrate the constitutional design by leaving prolonged vacuums of appointment authority in which nobody could fill vacancies that are “necessary for the public service to fill without delay.” *Federalist No. 67*,

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<sup>23</sup> *See supra* note 12. In the early days of the Republic, Congress occasionally failed to assemble a quorum on the day set for the beginning of Congress’s annual meeting. *See, e.g.*, 6 Annals of Cong. 1517 (1796); 8 Annals of Cong. 2189 (1798); 8 Annals of Cong. 2417-18 (1798).

at 410.<sup>24</sup> Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods.<sup>25</sup> But since 2007, the Senate has regularly used *pro forma* sessions in an effort to allow for extended suspensions of business without the consent of the House of Representatives under the Adjournment Clause.<sup>26</sup> Indeed, on at least five different occasions in the past few years, the Senate used *pro forma* sessions to facilitate breaks lasting longer than a month. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (listing breaks of 31, 34, 43, 46, and 47 days). And Gaylord’s position would allow the Senate to use the device of *pro forma* sessions to facilitate even longer breaks, and the absence of its Members from the Seat of Government, without triggering the Recess Appointments Clause. *See New Vista*, 2013 WL 2099742, \*43 (Greenaway, J., dissenting) (“[W]hat if the Senate remained in *pro forma* sessions while it broke for six to nine months, as was its routine at the time of ratification, hoping that this would prevent the President from making recess appointments?”).

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<sup>24</sup> Although the President may convene the Senate “on extraordinary Occasions,” Art. II, §3, the adoption of the Recess Appointments Clause shows that the Framers did not regard the President’s convening power as a sufficient solution to the problem of filling vacancies during recesses.

<sup>25</sup> *See, e.g.*, 142 Cong. Rec. 2198 (Feb. 1, 1996).

<sup>26</sup> *See generally Congressional Directory, supra*, at 536-38; VanDam, Note, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 N.W.U. L. Rev. 374-78 (2012).

Second, Gaylord's position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the Senate to make a choice: *either* remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to provide advice and consent; *or* "suspen[d] . . . business," II Webster, *supra*, at 51, and allow its Members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This understanding of the Senate's constitutional alternatives is evidenced by, and has contributed to, past compromises between the President and the Senate over recess appointments.<sup>27</sup> Under Gaylord's view, however, the Senate would have had little, if any, incentive to so compromise, because it could always divest the President of his recess appointment power through the simple expedient of punctuating extended recesses of the Senate as a body, and the extended absence of its Members, with fleeting *pro forma* sessions attended by a single Member.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 even arguably purported to be in

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<sup>27</sup> For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004.

session for Recess Appointments Clause purposes, while being actually dispersed and functionally conducting no business. That historical record “suggests an assumed *absence* of such power.” *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, the Senate’s “prolonged reticence” to assert that the President’s recess appointment power could be so easily nullified by “*pro forma* sessions” would be “amazing if such [an ability] were not understood to be constitutionally proscribed.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

Gaylord incorrectly suggests that a ruling in the government’s favor would inevitably vitiate the ordinary process of advice and consent. (Br. 15.) But the Senate, as always, retains the ability to stay in town to conduct business, thereby removing the condition for the President’s recess appointment power. In any event, the facts of *this* case are clear: the Senate took a twenty-day break during which it was not available to provide advice and consent. Under the practical construction given the Recess Appointments Clause by the Senate, by Presidents of both parties for nearly a century, and by this Court itself in *Evans*, that period was a “Recess of the Senate.”

Finally, Gaylord unavailingly refers to a letter by the Solicitor General to the Supreme Court in 2010. (Br. 21.) That letter was in no way aimed at definitively resolving the issue in this case, and indeed was aimed at addressing other issues. The Department of Justice has since conducted a thorough

examination of the legal implications of the Senate's practice of providing for mere *pro forma* sessions at which no business is to be conducted. That analysis concludes that such *pro forma* sessions do not interrupt a Senate recess for purposes of the President's recess appointment power. *See* Department of Justice, Office of Legal Counsel, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645 (Jan. 6, 2012). The Board's position in this case is entirely consistent with that analysis.

## CONCLUSION

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

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

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 12-15404-BB
	*	12-15690-BB
v.	*	
	*	Board Case No.
GAYLORD CHEMICAL COMPANY, LLC	*	10-CA-38782
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	*	
	*	
Intervenor	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,959 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC  
this 13th day of June, 2013

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

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 12-15404-BB
	*	12-15690-BB
v.	*	
	*	Board Case No.
GAYLORD CHEMICAL COMPANY, LLC	*	10-CA-38782
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	*	
	*	
Intervenor	*	

**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh 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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