No. 13-1162, 13-1806

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LIFESOURCE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

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

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

USHA DHEENAN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2948
(202) 273-1042

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases –Cont'd **Page(s)**

Cases –Cont'd **Page(s)**

Cases –Cont'd **Page(s)**

United States Constitution: **Page(s)**

State Constitutions: **Page(s)**

Statutes: **Page(s)**

Attorney General Opinions: **Page(s)**

Office of Legal Counsel Opinion: **Page(s)**

Other Authorities: **Page(s)**

Other Authorities-Cont'd **Page(s)**

Legislative Materials **Page(s)**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 13-1162, 13-1806

LIFESOURCE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of LifeSource to review, and the application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued on December 21, 2012. The Board's Order, which is final as to all parties and is reported at 359 NLRB No. 45, held that LifeSource violated the National Labor Relations Act ("the Act") by refusing to bargain with Local 881, United Food and Commercial Workers ("the Union"). The Board applied for

enforcement of its Order with this Court on January 14, 2013. Following transfer from the Third Circuit on April 16, the Court consolidated LifeSource's petition for review with the enforcement action on April 22.

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act. 29 U.S.C. § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f). *Id.* §160(e), (f). Venue is proper in this circuit because the unfair labor practice occurred in Rosemont, Illinois. *Id.*

Because the Board's unfair-labor-practice Order is based partly on findings made in the underlying representation proceeding, the record in that case (Board case number 13-RC-74795) is also before the Court pursuant to Section 9(d) of the Act. *Id.* § 159(d). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." *Id.* The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case. *Id.* § 159(c); *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that LifeSource failed to show that procedural irregularities rendered the Union's election victory invalid, or that an evidentiary hearing was warranted, and thus that LifeSource unlawfully refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

2. Whether the President's January 4, 2012 recess appointments to the Board were consistent with the Recess Appointments Clause.

STATEMENT OF THE CASE

The Board found that LifeSource violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union, its employees' certified collective-bargaining representative. Because LifeSource admits its refusal to bargain, this case turns on its defense that the Board should not have certified the Union due to election improprieties.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

LifeSource provides services related to whole and processed blood products, including blood-donor recruitment, donation collection, and product testing and

management, in the Chicago area. (App. 1.)[1] On February 17, 2012, the Union filed a petition (App. 11) to represent LifeSource's full-time and part-time Account Managers and Team Account Managers in the Recruitment department at its Rosemont, Illinois facility. (App. 1.) On March 20, the Board held a representation election at LifeSource's offices, with polls open from 9 am to 1 pm. (Supp. App. 1.) LifeSource and the Union each selected one employee to serve as its election observer. The Union won the election 11 to 9. Twenty-one of the twenty-two eligible voters cast ballots, with one void ballot; there were no challenged ballots. (App. 12.)

LifeSource filed objections to the election, claiming that the Board Agent overseeing the election "fail[ed] to maintain the integrity of the voting area, by, *inter alia*, (1) permitting the [election] Observers to leave the voting place without securing or taping the ballot box, (2) allowing voters to view the Excelsior list to see who voted; and (3) leaving the voting place herself without securing the ballots." (App. 13.) In support, LifeSource submitted an affidavit from employee J. Hall, its election observer. (Supp. App. 4-5.) Hall stated that she and the Union's observer left the voting area together on two occasions—for ten minutes to visit the cafeteria and for five minutes to go to the restroom—and that the Board

[1] "App." and "Supp. App." refer to the appendices filed by LifeSource and the Board, respectively.

Agent left on a separate occasion for ten minutes and took the ballot box with her; Hall did not notice if the Agent also took the ballots. Hall also stated that the *Excelsior* list—the list of eligible voters—was on the table between the two observers during the election. (Supp. App. 4-5.)

After an investigation, the Board's Regional Director for Region 13 issued a report recommending that the Board overrule the objections and certify the Union. (App. 6.) The Regional Director concluded that LifeSource failed to provide any evidence of irregularities that interfered with employee choice or the election. (App. 7-10.) The report noted that the number of ballots cast matched the number of voters marked off on the *Excelsior* list, no one other than the observers was present in the voting area while the Board Agent was away, neither observer handled the ballots during the Agent's absence, and voter check-in procedures were consistent with the Board's Casehandling Manual. (App. 8-9.) LifeSource filed exceptions to the report before the Board. (App. 16.) On September 19, the Board (Chairman Pearce and Members Griffin and Block) adopted the Regional Director's findings and recommendations, and issued a Certification of Representative. (App. 4-5.)

B. The Unfair-Labor-Practice Proceeding

The Union requested bargaining on October 3. (App. 1-2.) On October 15, LifeSource refused, contending that the Union's certification was invalid. (App.

2.) The Regional Director issued an unfair-labor-practice complaint based on LifeSource's refusal to bargain, and moved for summary judgment. (App. 54-56, 68.) LifeSource's opposition again challenged the validity of the Union's certification, reiterating its representation-case arguments. (App. 74.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 21, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order finding that LifeSource violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (App. 1-3.) The Order directs LifeSource to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Order requires LifeSource to bargain with the Union on request, embody any understanding that the parties reach in a written agreement, and post a remedial notice in hard copy and electronically if LifeSource customarily communicates with its employees that way. (App. 2.)

SUMMARY OF ARGUMENT

LifeSource unlawfully refused to bargain with the Union, advancing baseless election objections. LifeSource ignores its heavy burden of proving the election invalid, distorts the Board's findings, and offers speculation instead of evidence. Having failed to proffer any evidence of actual impropriety,

LifeSource's defense rests on theories that irregularities such as vote tampering and keeping voter lists could have occurred. The closeness of the election and any cumulative effect do not transform otherwise insubstantial objections into grounds for reversal.

LifeSource likewise fails to prove that the Board should have held an evidentiary hearing on its objections. This Court defers to the Board's decision not to hold a hearing, recognizing the Board's expertise in conducting elections. The Board and this Court have long held that, as here, objections based on conjecture do not warrant a hearing.

Finally, LifeSource challenges the Board's authority to issue its order, contending that the Board lacked a quorum because the President made invalid recess appointments of two of the three Board Members acting at the time. Specifically, LifeSource 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 the challenged 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. Indeed, nearly all Senators had departed the capital for their yearly winter break. Under the traditional understanding of the constitutional text, this break was a recess.

LifeSource challenges the President's conclusion on three grounds: (1) that the Senate's *pro forma* sessions transformed the Senate's 20-day recess into a series of three- and four-day breaks that were each too short to constitute a Senate recess; (2) that the President cannot make appointments during recesses that occur in the middle of the Senate's annual legislative session; and (3) that the President may not use his recess appointment power to fill vacancies that happen to exist during a recess, but can only fill those that happen to *arise* during a recess. As we

discuss in further detail below, all of these claims suffer from the same basic defects: that they are inconsistent with the text, purpose, and historical understanding of the Recess Appointments Clause.

ARGUMENT

I. LifeSource Failed to Produce Evidence To Invalidate the Election or Warrant a Hearing, and Thus Violated Section 8(a)(5) and (1) of the Act By Refusing To Bargain

A. The Objecting Party Bears the Heavy Burden of Proving That the Board Should Overturn an Election or Hold an Evidentiary Hearing

LifeSource admits that it refused to bargain with the Union. Because an employer's "refus[al] to bargain collectively with the representatives of [its] employees" is an unfair labor practice, 29 U.S.C. § 158(a)(5), the Board's Order is entitled to enforcement if the election and the Board's certification of the Union was valid. *See NLRB v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 657-58 & n.1 (7th Cir. 2004).[2]

This Court will "presume the validity of a Board-supervised election and will affirm the Board's certification of a union if that decision is supported by substantial evidence." *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 937 (7th Cir. 2000). Accordingly, "[t]he party challenging the election [h]as the formidable burden of demonstrating that the election is invalid." *NLRB v. Erie Brush & Mfg.*

[2] A refusal to bargain in violation of Section 8(a)(5) derivatively violates Section 8(a)(1). *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989).

Corp., 406 F.3d 795, 801 (7th Cir. 2005); *see also Louis-Allis Co. v. NLRB*, 463 F.2d 512, 518 (7th Cir. 1972) ("[E]lections and their policing [are] wisely left to the Labor Board.").

The Board will overturn an election on the basis of Board Agent conduct if the objecting party shows that "the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969); *accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000) (court will uphold election absent evidence that Board Agent's conduct raised "a reasonable doubt about the fairness or validity of the election"); *see generally NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144, 1149 (7th Cir. 1994) (the objecting party must show conduct that "'interfered with the employees' exercise of free choice to such an extent that [it] materially affected the results of the election'" (citation omitted)). The party challenging the election cannot present the mere possibility that the vote was compromised; "conjecture and speculation are insufficient to establish a prima facie case of misconduct sufficient to set aside the election." *Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1012 (7th Cir. 1998); *accord Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998) ("[S]peculation about the possibility of irregularity . . . do[es] not raise a reasonable doubt as to the fairness and validity of the election."), *enforced*, Nos. 99-5176, 99-5307, 2000 WL 799313

(6th Cir. June 6, 2000); *Trico Prods. Corp.*, 238 NLRB 380, 381 (1978) ("It is not every conceivable possibility of irregularity which requires setting an election aside but only reasonable possibilities.").

A similarly demanding standard governs the need for a Board hearing on election objections. The objecting party must raise "substantial and material factual issues" to warrant a hearing. *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 797 (7th Cir. 1991). Speculation and conjecture do not suffice. *Clearwater Transp.*, 133 F.3d at 1012. Instead, the objecting party must proffer evidence that is "'sufficient to support a prima facie showing of objection[able] conduct, that is, of misconduct sufficient to set aside the election under the substantive law of representation elections.'" *Id.* at 1011 (citation omitted).

As with the certification of a union, Board decisions "not to hold a hearing on a company's objections receive similar deference and will be affirmed if supported by substantial evidence." *AmeriCold Logistics*, 214 F.3d at 937; *see also NLRB v. Lovejoy Indus.*, 904 F.2d 397, 402 (7th Cir. 1990). Indeed, this Court has held that its "role in deciding when a hearing is appropriate is small." *AmeriCold Logistics*, 214 F.3d at 939. The Court affords such great deference because "[t]he decision of whether to hold an evidentiary hearing requires the Regional Director to draw upon a great deal of expertise about the labor relations

environment." *Chicago Tribune*, 943 F.2d at 794; *see also AmeriCold Logistics*, 214 F.3d at 937.

B. LifeSource Failed To Meet Its "Formidable Burden" of Producing Evidence Sufficient To Require Overturning the Election

LifeSource's three objections are unfounded. It contends that the election was invalid because (1) the two election observers visited the cafeteria for ten minutes and the restroom for five minutes without the Board Agent's sealing the ballot box, (2) the *Excelsior* list was visible to voters, and (3) the Board Agent went to the restroom for ten minutes, without securing the unmarked ballots. None of these claims are sufficient to overturn an election. Lacking supporting evidence, LifeSource hypothesizes that vote tampering or other improprieties could have occurred. This conjecture displays a healthy imagination, but an anemic evidentiary foundation. Accordingly, LifeSource failed the "formidable burden" needed to overturn a representation election. *Erie Brush & Mfg. Corp.*, 406 F.3d at 801.

LifeSource subverts the burden of proof in this case by repeatedly characterizing the Board's conclusion that no evidence of impropriety was presented as "wholly speculative" or "pure surmise" (Br. 21, 27). It is LifeSource's burden to prove that the election was compromised, not the Board's burden to prove that it was not. *See Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) ("[I]t is not the Board that bears the burden of

demonstrating the validity of an election; rather, it is 'the party challenging the results of a Board-certified election [that] carries a heavy burden' of showing the election's invalidity." (citation omitted)).

1. LifeSource Presents No Evidence That the Observers' Five- and Ten-Minute Breaks Resulted In Any Impropriety

LifeSource's objection that the Board Agent allowed the two observers to leave the voting area together twice during the four-hour election—for ten minutes to visit the cafeteria and for five minutes to go to the restroom—without sealing the ballot box is insufficient to overturn the election. LifeSource does not proffer any evidence that anything that compromised the election occurred while the observers were briefly absent. Instead, LifeSource questions "who knows and with what certainty can predict what occurred or did not occur during those absences." (Br. 23.) In the same vein, LifeSource posits that "it is unknown" or "[i]t cannot be determined" whether anything improper occurred when the observers were away. (*Id.* at 23-24.) Such quintessential speculation hardly warrants overturning the election. *See Clearwater Transp.*, 133 F.3d at 1011-12.

Moreover, LifeSource's conjecture that employees may have voted while the observers were away (Br. 23-24) is undermined by the fact that the number of votes cast matched the number of voters that the observers marked off on the voting list. (App. 9-10.) The fact that no extra ballots were cast weighs in favor of the election's validity. *See T.K. Harvin & Sons*, 316 NLRB 510, 537 (1995);

Queen Kapiolani Hotel, 316 NLRB 655, 655, 669 (1995). LifeSource's objection has not moved the required distance from the merely conceivable to the reasonably possible to warrant reversal. *Clearwater Transp.*, 133 F.3d at 1011-12; *Trico Prods. Corp.*, 238 NLRB at 381.

Where there is no evidence of other impropriety, the Board has held that a Board Agent's failure to seal a ballot box in the observers' absence is not objectionable when, as here, the box was not left unattended. *Sawyer Lumber*, 326 NLRB at 1332 & n.8 (overruling objection because "[t]he Board agent stayed in the voting room and maintained control over the box while the observers were out of the voting room"); *Cadillac Steel Prods. Co.*, 149 NLRB 1045, 1050-51 (1964). Like in *Sawyer Lumber*, the Board Agent remained with the ballot box while the observers were away. (App. 7.)

2. LifeSource Has Not Shown That the Visibility of the *Excelsior* List to Voters Affected the Election

The Board properly rejected LifeSource's claim that the election was invalid because voters could see the *Excelsior* list of eligible voters, on which the observers had marked who had voted. To the extent that LifeSource suggests that leaving the *Excelsior* list where voters could see it was inconsistent with the Board's Casehandling Manual, this argument is both incorrect and irrelevant. Section 11322.1 of the Manual, which LifeSource cites (Br. 26), does not prohibit leaving the *Excelsior* list in view of voters. NLRB Casehandling Manual, Part II:

Representation Proceedings § 11322.1 (2007) (reproduced in LifeSource's Addendum at Br. 40). In any event, the Board has explained that the Casehandling Manual "provides guidelines rather than procedural rules" and, thus, that any deviations do not constitute per se grounds for overturning an election. *Sawyer Lumber*, 326 NLRB at 1331-32 nn.6, 8; *see also L.C. Cassidy & Son, Inc. v. NLRB*, 745 F.2d 1059, 1063 (7th Cir. 1984) (upholding election despite "deviation from the Manual").

LifeSource presents no evidence that the visibility of the *Excelsior* list affected voters, or that anyone "stud[ied]" or otherwise meaningfully "interact[ed]" (Br. 26) with the list. Contrary to LifeSource's assertion, the Regional Director's report did not "admit[]" (*id.*) any such conduct, but found simply that some voters pointed to their names on the list when they came to vote (App. 8).

LifeSource illogically contends (Br. 27-28) that voters' viewing the *Excelsior* list is somehow equivalent to keeping a prohibited unofficial list of who had voted. LifeSource cites no evidence that voters made their own list of who had voted after seeing the *Excelsior* list. Accordingly, and contrary to LifeSource's contention (*id.*), the Board's decision in *Sound Refining, Inc.*, 267 NLRB 1301 (1983), is inapposite. Unlike here, it was uncontested in *Sound Refining* that an observer made a list of who voted. 267 NLRB at 1301-02. LifeSource's speculation that "a list of voters *could* be kept" (Br. 28) (emphasis added) is thus

insufficient to meet its "formidable burden" for overturning the election. *Erie Brush & Mfg. Corp.*, 406 F.3d at 801.

3. The Board Agent's Ten-Minute Absence From the Voting Area, Assertedly "Without Securing the Ballots," Does Not Warrant Overturning the Election

LifeSource's final individual objection is equally unsubstantiated. It has shown no impropriety from the Board Agent's ten-minute absence to go to the restroom, purportedly "without securing the ballots" (Br. 5). LifeSource claims that the Agent either left the unmarked ballots in the voting area with the observers or took the ballots with her while she was away. (*See id.* at 29) ("the Board Agent left the voting room without taking and securing the ballots"); (*id.*) (speculating about what could occur "if the ballots left with the Board Agent"). Under either scenario, the Board's decision to uphold the election was reasonable and supported by precedent.[3] There simply was no evidence that anyone improperly handled any unmarked ballots. (App. 9.) The Board Agent sealed the ballot box, both observers were present in the voting area while the Board Agent was gone, no one

[3] LifeSource incorrectly asserts that the Regional Director "admit[ted]" that the ballots "were missing" (Br. 28) during the Board Agent's ten-minute restroom break. The Regional Director noted only that LifeSource's election observer "does not recall if the Board Agent took the unmarked ballots with her" (App. 9). That statement accurately represents the affidavit (Supp. App. 5) ("I did not notice [the Board Agent] take the ballots themselves with her.").

else entered the voting area during this period, and neither observer handled the ballots. (*Id.*)

The Board Agent's leaving the ballots with the observers would not be grounds for overturning the election; indeed, the Board has frequently upheld elections under such circumstances. *See Sawyer Lumber*, 326 NLRB at 1332 (Board Agent may have left blank ballots in the voting area with the observers during a restroom break); *Benavent & Fournier, Inc.*, 208 NLRB 636, 636 & n.2 (1974) (Board Agent left unmarked ballots with the observers during a restroom break); *Gen. Elec. Co.*, 119 NLRB 944, 945 (1957) (blank ballots remained "in full view" of all observers during Board Agent's absence); *cf. Elizabethtown Gas*, 212 F.3d at 267-68 (Board Agent left ballot box with observers during a restroom break).

Although having the Board Agent retain custody of unmarked ballots is the preferred practice (App. 9), not every departure from recommended election procedure warrants setting aside the election. *See Elizabethtown Gas*, 212 F.3d at 263 ("Where . . . an NLRB Agent's conduct does not raise a reasonable doubt about the fairness or validity of the election, even actions that are contrary to NLRB policy do not constitute grounds for setting aside the results of the election."); *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005) ("[T]here is not a 'per se rule that representation elections must be set aside following any procedural

irregularity.'" (citation omitted)); *cf. Lovejoy Indus.*, 904 F.2d at 402 ("The statute does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination.").

The second possibility—of the Board Agent's taking the unmarked ballots with her—would comport with the preferred practice and precedent such that upholding the election is again reasonable. *See Benavent & Fournier*, 208 NLRB at 636 n.2 ("[I]t is better procedure for the Board Agent to retain custody of the unmarked ballots at all times."). Yet, even in this circumstance, LifeSource speculates that "*if* the ballots left with the Board Agent, and the Board Agent inadvertently set one or more ballots down somewhere, the *possibility* of real or perceived chain voting exists." (Br. 29) (emphasis added.)[4] This theory calls for multiple layers of speculation: (1) the Board Agent may have left the voting area with unmarked ballots; (2) the Board Agent may have misplaced those ballots

[4] LifeSource makes several oblique references to "chain voting"—a complicated vote-rigging scheme in which a series of voters submits pre-marked ballots. *See Farrell-Cheek Steel Co.*, 115 NLRB 926, 927 n.3 (1956). Unfounded claims that chain voting "possibly occurred" (Br. 29) fail to overturn the election. *See Roadbuilders, Inc. of Tenn.*, 244 NLRB 293, 294 (1979) ("In support of its argument on the possibility for chain voting, Respondent has presented no facts and no supporting evidence other than its assertions. . . . Those assertions do not, contrary to Respondent's argument, add up to a reasonable likelihood that chain voting occurred." (internal quotation marks omitted)), *enforced mem.* 633 F.2d 579 (Table) (5th Cir. 1980). Indeed, chain voting is largely a phantom menace. *See Newport News Shipbuilding & Dry Dock Co.*, 243 NLRB 99, 109 n.31 (1979) ("In the thousands of election[s] conducted by the NLRB since 1935, with more than 50 million voters, there has never been any evidence, or even any hint, of chain voting."), *enforced*, 608 F.2d 108 (4th Cir. 1979).

while away from the voting area; (3) someone may have tampered with those ballots while they were misplaced; and (4) the tampered ballots may have been cast. Even assuming that the first three hypotheticals occurred, the possibility that the fourth also occurred is undermined by the uncontested facts that the ballot box was never unattended and the number of votes cast matched the number of voters that the observers marked off on the *Excelsior* list. *See Queen Kapiolani Hotel*, 316 NLRB at 655, 669. Like LifeSource's speculations regarding the ballot box and the *Excelsior* list, this objection is doomed by lack of evidence.

4. The Cumulative Effect of Insubstantial Objections and the Election's Closeness Do Not Warrant Reversal

Although LifeSource argues (Br. 30-33) that the Board erred by failing to consider the cumulative impact of its objections, multiple wholly insufficient objections do not transform into grounds for overturning the election when considered in the aggregate. As this Court has held, "the cumulative impact argument 'may not be used to turn a number of insubstantial objections to an election into a serious challenge.'" *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349 (7th Cir. 1986) (citation omitted).

LifeSource relies (Br. 31-32) on *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), but that case involved distinguishable conduct. There, the Board overturned an election because the Agent failed to display the marked ballots for the observers' inspection during the vote count, refused to allow the

observers to examine the ballots, took the ballots home with him over the weekend, and, because he was colorblind, twice misidentified a color-coded ballot. *Id.* at 679-81. This case involves no similar claimed irregularities. Moreover, although the Board in *Fresenius* relied on the cumulative effect of the multiple errors, it noted that it was not deciding whether any errors individually warranted reversal, *id.* at 681; here, as described above, Board precedent holds that none of the conduct to which LifeSource objects warrants setting aside the election.

LifeSource also repeatedly invokes (Br. 20, 33) the closeness (11 votes to 9) of the election, but this Court has explained that, "[w]hile the size of the unit and the closeness of the vote may be relevant considerations[,] . . . neither fact is sufficient to raise a presumption that the conduct had an impact on the election results." *Browning-Ferris Indus.*, 803 F.2d at 349. Moreover, the closeness of the election is irrelevant here because there is no evidence that any impropriety occurred in the first place. Even if a close election may merit heightened scrutiny, insubstantial objections remain insubstantial.

Indeed, this Court has upheld an election decided by a one-vote margin despite "a disturbing pattern of activity permitted by the Board representative during the election." *NLRB v. WFMT*, 997 F.2d 269, 279-80 (7th Cir. 1993); *accord NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319-20 (9th Cir. 1982) ("The closeness of the vote is simply one factor the board and courts

consider in scrutinizing pre-election conduct. It is not the controlling factor."); *NLRB v. Southern Metal Serv., Inc.*, 606 F.2d 512, 515 (5th Cir. 1979) (affirming Board's decision not to overturn, or hold a hearing on, an election won by one vote); *CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977) (same).

C. LifeSource Failed To Satisfy Its Burden That an Evidentiary Hearing Was Warranted

LifeSource has failed to meet its burden of showing that the Board was required to hold a hearing on its election objections and grant it compulsory process to gather evidence of impropriety. LifeSource's argument for a hearing rests on its conjecture as to what could have happened when the observers left the voting area, what might have happened to the ballots when the Board Agent went to the restroom, and the possibility of unlawful list-keeping. (*See* Br. 36.) Merely speculating that something may have happened does not "raise[] substantial and material factual issues," *Chicago Tribune*, 943 F.2d at 797, "establish a prima facie case of misconduct sufficient to set aside the election," *Clearwater Transp.*, 133 F.3d at 1012, or "'point to specific events and specific people,'" *NLRB v. Serv. Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988) (citation omitted). Moreover, contrary to LifeSource's suggestion (Br. 30), the Regional Director did not make credibility determinations, resolve factual disputes, or draw inferences in recommending that the Board overrule LifeSource's objections—nor did he need to do so; he simply noted the lack of evidence of any impropriety.

LifeSource largely ignores the one piece of evidence that it did produce—an affidavit that proves nothing about the alleged improprieties. (Supp. App. 4-5.) An objecting party need not prove that its objections will be sustained in order to receive a hearing, but it "is not entitled to a hearing just because it wants one, just because it claims that the election was tainted, [or] just because it says it could really pin things down if it were granted a hearing." *AmeriCold Logistics*, 214 F.3d at 939. LifeSource's inability to produce any evidence of electoral taint is not grounds for it to gain a hearing in order to gather such evidence. *See NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001) ("We do not think . . . that [the employer's] lack of proof entitled it to a hearing."); *see also id.* (explaining that an objecting party "is not entitled to a hearing to engage in a fishing expedition for possible election improprieties").[5]

Service American Corp., 841 F.2d at 197, the only case that LifeSource cites in which this Court found that a hearing was warranted, is distinguishable. That case turned on the factual issue of whether two employees who allegedly threatened voters were union agents, a "substantial and material" issue because of

[5] Under LifeSource's position, the Board essentially would have to hold a hearing every time a party files objections, even where it proffers little to no evidence. Neither precedent nor policy supports such a rule. *See Louis-Allis Co.*, 463 F.2d at 520 (the requirement of substantial and material issues of fact "precludes 'the opportunity for protracted delay' by preventing 'dilatory tactics by employers or unions disappointed in the election returns'" (citations omitted)).

differing standards for conduct by third parties. *Id.* at 194-95. Here, rather than the applicable standard for evaluating a concrete allegation of impropriety, the issue is whether improprieties occurred at all. Moreover, in *Service American*, the Court found that the Board erred in discounting the employer's evidence—a letter from the union and six affidavits—in favor of rebuttal evidence obtained *ex parte* in the investigation. *Id.* at 194, 197. By contrast, the Board here did not credit other evidence over what LifeSource offered, but considered LifeSource's single affidavit, which simply restates the objections, and found that LifeSource provided no evidence that anything improper occurred.

LifeSource's reliance on *Clearwater Transport* (Br. 22, 25, 35) is equally flawed. That case only detracts from its argument that the Board needed to hold an evidentiary hearing, and that the Board deviated from this Court's precedent in not doing so. There, this Court *upheld* the Board's decision not to hold a hearing on the employer's election objections. *See* 133 F.3d at 1011-12. No hearing was necessary because the objecting employer failed to proffer evidence that an employee's racist remark prior to the election undermined its fairness. *Id.* Although the employer "cite[d] a litany of possible repercussions from [the employee's] statement and subsequent actions," there was "a complete dearth of *evidence* to back up these claims." *Id.* at 1012; *see also id.* at 1011 ("Clearwater's brief . . . is replete with such accusations and hypotheticals, but there is no

evidence in the record to establish that they are true."). LifeSource likewise traffics in unsupported hypotheticals. As in *Clearwater Transport*, LifeSource "provided only speculation and conjecture about the effect of [the alleged conduct] on the election," and, because "conjecture and speculation are insufficient to establish a prima facie case of misconduct sufficient to set aside the election," no hearing was warranted. *Id.* at 1012.

Lastly, having manufactured its case from flimsy objections and no evidence, LifeSource stoops to impugning the integrity of the Board Agent. It insinuated that—assuming that the Board Agent gave evidence in the investigation—she would "'temper' her testimony" so as to avoid blame, and thus undermine the objections investigation out of self-interest. (Br. 22, 25.) Its related conspiratorial allegation of a government "'cover'"-up (*id.* at 25) is similarly beyond the pale. This Court should not countenance LifeSource's *ad hominem* attacks or its effort to avoid bargaining with its employees' chosen representative.[6]

[6] The speculative nature of LifeSource's objections also renders its invocations of its employees' Section 7 rights (Br. 6, 20, 30) disingenuous, given that it continues to delay the vindication of those rights by litigating frivolous claims. *See Lovejoy Indus.*, 904 F.2d at 402 ("Additional hearings mean additional delay. . . [and] [d]uring delay, the entitlements of the employees to representation by the union they elected are frustrated.").

II. The President's Recess Appointments To the Board Are Valid.

In addition to challenging the merits of the Board's determination, LifeSource urges that the Board lacked a quorum when it issued its December 21, 2012 order, because two Board members were appointed in violation of the Recess Appointments Clause, Art. II, § 2, cl.3.

The President acted well within his constitutional authority in making these appointments during a twenty-day Senate recess. The Senate was closed for business between January 3 until January 23, 2012, 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.* And 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 with only two members (Mark Pearce

and Brian Hayes) and unable to fully carry out its congressionally mandated mission. *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 (Terrence Flynn, Sharon Block and Richard Griffin), returning the Board to full membership.[7]

LifeSource challenges the President's appointments on three grounds. *First*, it urges that because the Senate convened periodic and purely "*pro forma*" sessions, the Senate's twenty-day break from business was actually a series of shorter breaks, any one of which individually was too brief to constitute a "Recess of the Senate." (Br. 12-13.) *Second*, it urges that even if the Senate was in recess on January 4, the President was nevertheless barred from making recess appointments on that date because the recess occurred during the Senate's annual legislative session rather than at the conclusion of the session—that is, it was an *intra*-session recess rather than an *inter*-session recess. (Br. 15-17.) *Third*,

[7] 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.* Before the Board issued the decision here, Flynn resigned from the Board and Hayes's term ended. *See* NLRB, *Members of the NLRB since 1935*, at http://www.nlrb.gov/members-nlrb-1935.

LifeSource argues that the President may not in any event use his recess appointment power to fill vacancies that happen to exist during a recess, but can only fill those that happen to *arise* during a recess. (Br. 17-18.) These arguments are meritless.

A. The President Made the Challenged Appointments During a Twenty-Day Senate Recess.

1. 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); 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) ("remission or suspension of any procedure"). *See also Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (relying on dictionary definitions).

The "main purpose" of the Recess Appointments Clause was "to enable the President to fill vacancies to assure the proper functioning of our government." *Evans*, 387 F.3d at 1226. As the Federalist Papers explained, the Clause provides an "auxiliary method of appointment, in cases in which the general method"—Senate advice and consent—"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 vacancies, and by maintaining the continuity of government operations when the Senate is unavailable. 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 of Senate absence, 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.*

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 in 1905, 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 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, the report defined the constitutional phrase in terms that have an explicitly functional element, concluding that Senate recesses

occur "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 1921 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 Evans*, 387 F.3d at 1225 (giving substantial weight to prior executive practice in interpreting the Clause). Since the Founding, 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.[8] For example, President 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. The Eleventh Circuit, sitting *en banc*, upheld that appointment, *see Evans*, 387 F.3d 1220, and the Senate confirmed Pryor to the post.[9] Indeed, Congress has generally acquiesced in these historical exercises of

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

[9] 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.

recess appointment power, including by authorizing the payment of recess appointees.[10]

Thus, 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 thereof must be guided by the purpose, historical understandings, and practical construction given to the Clause throughout history.

2. 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 break was not a brief intermission in business for a weekend, an evening, or lunch. Instead, the Senate ordered that it would not conduct business during the entire period from January 3, the start of the second session of the 112th Congress, until January 23. 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

[10] *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).

> 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).[11] 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).

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 the antithesis of regular working Senate sessions. They were (as the name confirms) mere formalities whose principal function was to allow the Senate to cease all business. 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. This

[11] 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. 39-40. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

period of unavailability to provide advice and consent is twice as long as the period that the Eleventh Circuit 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 referred to its break from business as a "recess" and arranged its affairs during the break based on that understanding. For example, when it scheduled the forthcoming *pro forma* sessions, 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").[12] The Senate has taken similar steps before long recesses that

[12] Because the Senate declared its break a "recess," LifeSource cannot (and does not) invoke the Rules of Proceedings Clause, which provides that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, §5, cl.2. In any event, Congress cannot unilaterally determine whether there is a recess within the meaning of the Recess Appointments Clause, as that question implicates the President's Article II powers. *See 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").

do not contain *pro forma* sessions,[13] further indicating that the Senate viewed its full January 2012 break as a comparable recess.

3. a. Nonetheless, in challenging the President's appointments, LifeSource relies on the Senate's scheduling of periodic "*pro forma* sessions" in its December 17 order, and appears to argue that the *pro forma* sessions transformed the 20-day break into a series of shorter periods that each do not count as a "recesses." LifeSource is incorrect. The *pro forma* sessions did not alter the continuity or essential character of what the Senate itself termed its "recess." As explained, by the terms of the Senate's adjournment order, "no business [was] to be done" during the *pro forma* sessions or in between them.

Indeed, the *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done. 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 adjournment resolution authorizing the Senate to cease business. *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 winter and summer holidays. *See Sessions of Congress*, *Congressional Directory for the 112th Congress* 536-38 (2011)

[13] *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

("*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, U.S. Const. art. I, §5, cl.4, that neither House adjourn for more than three days without concurrence of the other. Whatever the efficacy of the *pro-forma*-session device for Adjournment Clause purposes—a provision that only impacts internal congressional affairs—it cannot control matters outside the Legislative Branch, *see Chadha*, 462 U.S. at 955 n.21, such as the President's recess appointment powers or the official actions of federal Officers appointed under that Clause. *See infra* pp. 38-39.

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 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.

Contrary to the dicta[14] in a recent divided opinion of the Third Circuit, this essential conclusion is not altered by the fact that the Senate passed legislation on December 23, 2011—during a session originally scheduled to be *pro forma*. *NLRB v. New Vista Nursing & Rehab.*, 2013 WL 2099742, at *19 (3d Cir. May 16, 2013) (citing 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011)), *pet. for rehearing filed* (July 1, 2013). By enacting that legislation, the Senate transformed a scheduled "*pro forma*" session into a regular working session. Indeed, this is evidenced by the fact that messages the House had sent on December 19 were laid before the Senate after the legislation was passed on December 23—something which did not happen during an earlier *pro forma* session. *Compare* 157 Cong. Rec. S8787 (Dec. 20, 2011), *with id.* at S8789 (Dec. 23, 2011)). Thus, to the extent the actual passage of legislation on December 23 is relevant at all, it would mean at most that the Senate resumed its previously scheduled recess after that date; LifeSource does

[14] These statements were irrelevant because the court 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. *Id.* at *30.

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.

Even if the Senate had wanted to do business in January, it could only have done so by *unanimously* agreeing to override its previous order that no business would be conducted during the January break. As a result, 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. As explained below, that is a *more* demanding standard than is ordinarily required to terminate other indisputable recesses in order to conduct business.

Indeed, 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 LifeSource 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 whenever the public interest warrants it.[15] In this setting, the mere possibility that Senate leadership might reconvene the Senate to conduct

[15] *See generally* Brown, et al., *supra*, at 9.

business during a recess commenced through such a concurrent resolution does not render the President unable to make recess appointments.[16]

b. As noted, it is immaterial that the Senate may regard periodic *pro forma* sessions as fulfilling its obligations under the Adjournment Clause, U.S. Const. art. I, §5, cl.4, which furnishes each House of Congress with the power to ensure the simultaneous presence of the other so that they can together conduct legislative business.[17] We may assume *arguendo* that, 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 use of periodic *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.[18]

The question presented here—specifically, whether the President appropriately determined that the Senate was in recess thereby permitting him to make a recess appointment—is fully answered by the plain meaning of the Recess

---

[16] 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.

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

[18] 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, *supra*, at 15.

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.[19]

LifeSource 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. What is relevant here is that the January 3 *pro forma* session was not necessary to begin the second session of the 112th Congress, as LifeSource appears to believe, because absent a law appointing a different date, the congressional

[19] 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 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).

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).[20]

4. LifeSource'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 the Eleventh Circuit 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 1224-25. 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, LifeSource's position would frustrate the constitutional design by creating prolonged vacuums of appointment authority in which nobody could fill vacancies that are "necessary for the public service to fill without delay."

[20] *See also supra* note 11.

Federalist No. 67, at 410.[21] Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods.[22] 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.[23] 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 LifeSource's position would allow the Senate to use *pro forma* sessions to facilitate even longer breaks, and the absence of its Members from the Capital, without triggering the Recess Appointments Clause. *See New Vista*, 2013 WL at *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?").

Second, LifeSource's position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the

---

[21] 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.

[22] *See, e.g.*, 142 Cong. Rec. 2198 (Feb. 1, 1996).

[23] *See generally Congressional Directory*, *supra*, at 536-38; VanDam, Note, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 374-78 (2012).

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.[24] Under LifeSource'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 session for Recess Appointments Clause purposes, while being actually dispersed and conducting no business as a body. That historical record "suggests an assumed

[24] 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.

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 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).

In contrast, upholding the appointments would not vitiate the advice and consent process. The Senate, as always, can stay in session to conduct business and thereby preclude recess appointments. In any event, the facts of *this* case are clear: the Senate took a twenty-day break during which it was unavailable for advice and consent. Under the practical construction given the Recess Appointments Clause by the Senate, and by Presidents of both parties for nearly a century, that period was a "Recess of the Senate."

B. The President's Recess Appointment Authority Is Not Confined To Intersession Recesses.

LifeSource next argues that the appointments here were invalid because they were made during an *intra*session recess(that is, a recess occurring after the start of the Congressional session) instead of an *inter*session recess (*i.e.*, a recess *between* congressional sessions). Intersession recesses follow a specific type of adjournment known as an adjournment *sine die* (without day), which terminates an enumerated legislative "session." Robert, *Robert's Rules of Order* 109-10, 169-70

(1876). When a legislature instead adjourns to a particular day, rather than *sine die*, the adjournment does not end the session and the resulting recess is commonly referred to as an *intra*session recess.

Although LifeSource's argument that the Recess Appointments Clause applies only to some recesses was accepted recently by the D.C. and Third Circuits,[25] it was rejected nearly a decade ago by the *en banc* Eleventh Circuit in *Evans*. Indeed, restricting Presidential recess appointment authority to intersession breaks is textually unfounded, contrary to history and logic, and would invalidate over 500 appointments from 1867 onwards—including those of a CIA Director, a Federal Reserve Chair, fifteen Article III judges, and numerous other critical government officials.[26] This Court should follow *Evans* and the settled practices of political branches on which *Evans* relied.

1. The Recess Appointments Clause refers to "the Recess of the Senate," Art. II, § 2, cl.3, without differentiating "between inter- and intrasession recesses." *Evans*, 387 F.3d at 1224. That phrase would have been naturally understood at the Framing to encompass both types of recesses. As noted, the plain meaning of "recess" is a "period of cessation from usual work," 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing 17th and 18th Century sources), which is equally

[25] *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); *New Vista*, 2013 WL at *25.
[26] Hogue, *The* Noel Canning *Decision*, *supra*, at 4-28; Hogue, *Intrasession Recess Appointments*, *supra*, at 3-32.

applicable to intrasession and intersession recesses. And in the specific context of legislative usage, the term "recess" encompassed both intrasession and intersession breaks—a point well illustrated by the British Parliament, whose practices formed the basis for American legislative practice.[27] And Founding-era legislative practice in the United States was similar. In the 1770s and 1780s, officials in Pennsylvania and Vermont understood state constitutional provisions referring to "the recess of [the legislature]" to encompass intrasession recesses, and in 1798 New Jersey's governor similarly interpreted that phrase in the federal Constitution's Senate Vacancies Clause. *New Vista*, 2013 WL at *16 & n.16.[28] And, significantly, the Articles of Confederation empowered the Continental Congress to "appoint" a Committee of the States "in the recess of Congress" Arts. IX & X. The only time Congress did so was for a scheduled *intra*session recess in 1784. *See* 26 *J. Continental Cong. 1774-1789*, at 295-96 (Gaillard Hunt ed., 1928); 27 *id.* at 555-56.[29]

---

[27] *See, e.g.,* Thomas Jefferson, *A Manual of Parliamentary Practice,* preface & § LI (1812) (describing a "recess by adjournment" as one occurring during an ongoing "session").

[28] In addition to acknowledging this, the Third Circuit properly rejected *Noel Canning*'s attempt to counter with a North Carolina example. 2013 WL at 15 n.14. *New Vista* also properly rejected a number of other textual points made in *Noel Canning*. 2013 WL at *15 (rejecting reliance on a supposed distinction between the Constitution's use of the words "recess" and "adjournment"); *id.* at *17 (use of the word "the" is "uninformative").

[29] *New Vista* thought this example lacked weight because Congress failed to reconvene on schedule, *see* 2013 WL at *16 n.18, but when Congress appointed

Although *New Vista* acknowledged this extensive evidence regarding the plain meaning of the constitutional text, it nevertheless concluded that the term "recess" was ambiguous. 2013 WL at *16. That conclusion was based solely on the claim that the Framing-era constitutions of Massachusetts and New Hampshire used "recess" to refer only to intersession breaks. 2013 WL at *15. *New Vista* observed that both constitutions allowed the executive to "prorogue" or "adjourn" the legislature during "the session," yet only "prorogue" the legislature when the legislature was "in recess." *Id*. Based on that observation, *New Vista* reasoned that the term "recess" as used by these states could only encompasses intersession breaks. *Ibid.* As an initial matter, constitutional provisions that (unlike the federal Constitution) drew distinctions between concepts like "adjournment" "prorogation," and "dissolution," shed no light on the language used in the Recess Appointments Clause.

Moreover, *New Vista*'s reasoning was based on the unstated and incorrect assumption that "the session" referred to in those constitutions was the formal annual session of the state legislatures. In fact, "the session" generally referred to the shorter periods of time that the legislature was sitting during the annual

---

the Committee it could not have known of the future scheduling issue. Thus, it made its appointment for a planned intrasession recess.

legislative period, and not the annual legislative period itself.[30] So "recess" in those constitutions referred to any period of time that the legislature was not sitting, including those that occur during the legislative year— what would be referred to in the parlance of the Federal Constitution as *intra*session recesses. Consistent with that understanding, Massachusetts legislators in the 1780s referred to periods after an "adjournment" as a "recess" (an impossibility if the Third Circuit's historical understanding were correct),[31] and the Massachusetts Supreme Judicial Court recognized in 1791 that "recess" can encompass breaks during the annual legislative period, s*ee Opinion of the Justices*, 3 Mass. 565, 567 (1791).

Interpreting the Clause to encompass intrasession recesses, as the Executive long has done, also best serves the Clause's purpose. As noted, the Clause ensures that Presidents may fill vacancies when the Senate is unavailable to offer advice and consent on nominations. The Senate is equally unavailable during intrasession

[30] Indeed, the Massachusetts constitution provided for the reimbursement of legislators' travel expenses "once in every session, and no more." Mass. Const. of 1780, pt. I, ch. I, § 3, art. II, cl. iv. Members of the General Court were reimbursed for every sitting, including those following adjournments to a day certain. 1781-1782 Mass. Acts, 665, 755, 857, 991-92. *See also, e.g.*, 20 *Early State Papers of N.H.* 452, 455 (A. Batchellor, ed., 1891) (discussing "communications received since the last session," which were received during a recess precipitated by a non-*sine die* adjournment).

[31] Massachusetts legislative journals from the 1780s are available at the Massachusetts State Archives. As examples, we refer the Court to the entries in the Senate Journal from March 9, 1782; July 11, 1783; and October 18, 1783.

and intersession recesses, and the need to fill vacancies can be identical during both.

By contrast, LifeSource's position would appear to empower the Senate unilaterally to eliminate the President's recess appointment power, simply by recasting an adjournment *sine die* as an equally long adjournment to a date certain. The Framers would not have contemplated depriving the country of a temporary appointment of a key military commander or national security official, for example, during such a period. Rather, the Framers must have intended the Senate's practical unavailability to control in that hypothetical setting, despite any Senate effort to elevate form over substance.

The settled practices and understandings of the political branches further support the government's interpretation. Since 1867, Presidents have made over 500 appointments during intrasession recesses, and Congress has long acquiesced in this practice.[32] *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[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 (a "practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department … is entitled to great regard in determining the true construction of a constitutional provision the

[32] *See supra* n.10.

phraseology of which is in any respect of doubtful meaning" (internal marks and citation omitted)).

The Third and D.C. Circuits dismissed this precept of constitutional analysis on the ground that no intrasession appointment had been documented before 1867, and such appointments were relatively infrequent until the 1940s. *E.g.*, *Noel Canning*, 705 F.3d at 501-03.[33] But before the Civil War there were only five intrasession recesses in excess of three days, all of which occurred in the period around Christmas and New Year's day, and none of which exceeded 14 days. *Congressional Directory*, *supra*, at 522-25. And 1867, 1868, 1921, and 1929 were the only years before the 1940s that the Senate took lengthy intrasession recesses at times other than during the winter holidays. *Id.* at 525-28. All three Presidents in office during those recesses made documented intrasession recess appointments.[34] Thus, the early rarity of intrasession recess appointments likely reflects nothing more than the early rarity of lengthy intrasession recesses, and not (as *Noel Canning* and *New Vista* believed) any historical opposition to intrasession recess appointments.

---

[33] The Third Circuit discounted President Johnson's recess appointments in 1867 on the ground that he was later impeached. But Johnson was acquitted, and the key controversy related to a removal statute and not the Recess Appointments Clause. *See Myers v. United States*, 272 U.S. 52, 166-67, 175-76 (1926).

[34] At least 33 intrasession appointments predate 1947, significantly more than the Third and D.C. Circuits believed. Hogue, *Intrasession Recess Appointments*, *supra*, at 3 (listing 25 such appointments); 9 Comp. Gen. 190, 190-91 (1929) (identifying eight additional appointees).

2. Against all of the above, *New Vista* and *Noel Canning* offered the observation that recess appointments expire at the end of the Senate's "next Session" as evidence that the Framers intended to restrict the recess appointment power to intersession breaks. *E.g. New Vista*, 2013 WL at *22-25. But the Framers' provision of a specified termination point for recess appointments says nothing about whether a recess appointment can occur during a session. Intrasession recesses were a common, recognized practice in the Framing Era for legislative bodies that predated the Senate. If the Framers meant to exclude intrasession recesses from the term "Recess," they would hardly have expressed that intention so obliquely, through the provision setting the termination date for the appointments.

Nor is there any basis to fear that Presidents will 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 intrasession recess appointments are constitutional, Presidents routinely seek Senate confirmation of nominations and have strong incentives to do so because recess appointments are only temporary. Indeed, *New Vista* misapprehended the government's arguments when it concluded that the government's position would permit appointments in intrasession breaks shorter than three days. *See* 2013 WL at *19. To be clear, intrasession breaks of such short duration between working Senate sessions do not trigger the President's

recess appointment power, and the Executive has long disclaimed appointment power during such breaks. *See, e.g.*, 33 Op. Att'y Gen. at 24-25. Breaks of that duration 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, 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 suspensions of ordinary 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)

C. The President May Fill Vacancies During the Senate's Recess That Arose Before That Recess.

Petitioners also contend that because these vacancies first arose before the relevant recess, the President could not fill them with recess appointees. That theory has been considered and rejected by three appellate courts. *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, 709-15 (2d Cir. 1962).

Noel Canning's contrary conclusion is wrong and stands against nearly 200 years of history.

1. The Recess Appointments Clause grants the President "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). Although this language is amenable to different constructions, it has been settled for nearly two hundred years that the Clause encompasses all vacancies that exist during a recess, including those that arose beforehand. *See* 1 Op. Att'y Gen. 631, 632 (1823). Indeed, this understanding finds support in Executive practice dating to the first Administration, as President Washington made appointments in November 1793[35] and October 1796[36] that *Noel Canning* would deem invalid.

---

[35] In 1793 Washington recess-appointed Robert Scot as the Mint's first Engraver—a position statutorily created during a session in April 1792, but filled during a recess. 27 *The Papers of Thomas Jefferson* 192 (J. Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793); 1 Stat. 246. Scot's appointment apparently was occasioned by Joseph Wright's death. 27 *The Papers of Thomas Jefferson, supra*, at 192. Although it appears Wright was never commissioned, even if he had been it would have 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).

[36] In 1796, Washington recess-appointed William Clarke as Kentucky's U.S. Attorney, though the post had gone unfilled for nearly four years. Dep't of State, *Cal. of Misc. Letters Rec'd by The Dep't 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).

That longstanding interpretation thus deserves "great weight" in "determining the true construction of a constitutional provision … which is in any respect" of ambiguous meaning. *The Pocket Veto Case*, 279 U.S. at 688-90 (internal marks omitted). This understanding of the Clause is wholly consistent with the constitutional text. While an event that *causes* a vacancy (*e.g.* death) may "happen" at a single moment, the vacancy itself continues to "happen" until filled.[37] Thus, it is conventional to say that World War II "happened" during the 1940s, even though the war began in 1939.

The government's long-settled interpretation is also more consistent with the Recess Appointments Clause's purpose. If an unanticipated vacancy arises shortly before a recess begins, it may be impossible for the President to evaluate replacements, and for the Senate to act to confirm someone, before the recess. Moreover, 18th century communication obstacles meant the President might not even have *learned* of such a vacancy until the recess had begun. *See* 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended those offices to remain vacant for months-long recesses merely because news of the death did not reach the Nation's capital until after the recess had begun. LifeSource's position, by contrast, makes the

[37] *Accord* Johnson, *supra*, at 2122 (defining "vacancy" in 1755 as the "[s]tate of a post or employment when it is unsupplied"); 12 Op. Att'y Gen. 32, 34-35 (1866).

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."[38]

2. LifeSource's interpretation also creates serious textual difficulties. If 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, such a reading would mean that the President would retain his power to fill vacancies that arose during a recess *even after the Senate returns*, an interpretation that cannot possibly be correct.[39] 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."

---

[38] Herz, *Abandoning Recess Appointments?*, 26 Cardozo L. Rev. 443, 445-46 (2005).

[39] *See* 12 Op. Att'y Gen. at 38-39 (faulting the "arise" interpretation for this reason).

Noel Canning contended that the government's interpretation renders the words "that may happen" superfluous. *See* 705 F.3d at 507.[40] But 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 in advance of its effective date. Construing "that may happen" as the Executive has long read it confines the President to filling up vacancies that exist at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed LifeSource's interpretation. *See* 705 F.3d at 508-09. But Randolph's opinion has been thoroughly repudiated by numerous 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.[41] Further, while *Noel Canning* dismissed Congress's longstanding acquiescence in the Executive

[40] 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[.]").

[41] As noted, even George Washington, to whom Randolph gave his advice, departed from it. Randolph's opinion thus shows at most an early "difference of opinion," Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 *The Works of John Adams* 647 (Charles Francis Adams ed., 1853), regarding how to construe the Recess Appointments Clause. Any such early differences were resolved by Attorney General Wirt's 1823 opinion, which has been adhered to for nearly two hundred years.

Branch's interpretation as a departure from a position supposedly expressed in an 1863 statute, *see* 705 F.3d at 510, that reading is wrong because the 1863 statute acknowledged rather than rejected the Executive's interpretation.[42] Moreover, Congress amended the statute to permit such appointees to be paid under certain conditions. *See* 54 Stat. 751 (1940).

Lastly, *Noel Canning* tried to minimize its harmful effects by claiming Congress could provide for more "acting" officials. *See* 705 F.3d at 511. But the Recess Clause's very *existence* demonstrates that the Framers thought it insufficient to have vacant offices performed by "acting" subordinates. Moreover, some positions (like Article III judgeships) cannot be filled this way, and it may be unworkable or impractical to use such measures to fill other positions (*e.g.* Cabinet seats) for long periods.

[42] *See* 16 Op. Att'y Gen. 522, 531 (1880). The 1863 statute merely postponed, until Senate confirmation, payment of salary (including backpay) to recess appointees who filled vacancies that first arose while the Senate was in session. 12 Stat. 642, 646.

CONCLUSION

The Board respectfully requests that this Court deny LifeSource's petition for review and enforce in full the Board's Order finding that LifeSource violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

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

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Ave. NW
Washington, DC 20530
(202) 514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Joel Heller
JOEL A. HELLER
Attorney

National Labor Relations Board
1099 14th St. NW
Washington, DC 20570
(202) 273-2948
(202) 273-1042

National Labor Relations Board
July 2013

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LIFESOURCE	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 13-1162 &
v.	)	13-1806
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	13-CA-91617

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,799 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3rd day of July, 2013

ADDENDUM:
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Relevant provisions of the United States Constitution are as follows:

Article I, Section 5, cl. 2
Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Article I, Section 5, cl. 4
Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Article II, Section 2, cl. 3
The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Article II, Section 3
He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Amendment XX, Section 2
The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Relevant provisions of the National Labor Relations Act are as follows:

Section 7 of the Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5):

> It shall be an unfair labor practice for an employer--
>
> **(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
>
> . . .
>
> **(5)** to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(c) and (d) of the Act, 29 U.S.C. § 159(c) and (d):

> **(c)** Hearings on questions affecting commerce; rules and regulations
>
> > **(1)** Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--
> >
> > > **(A)** by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

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

(d) Petition for enforcement or review; transcript

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

Section 10(a), (e), and (f) of the Act, 29 U.S.C. § 160(a), (e), and (f):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

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

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the

court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LIFESOURCE	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 13-1162 &
v.	)	13-1806
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	13-CA-91617

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system if they are a registered user or, if they are not, by serving a true and correct copy at their address listed below.

John E. Lyncheski, Esq.
Ronald J. Andrykovitch, Esq.
Ryan W. Colombo, Esq.

Cohen & Grigsby
625 Liberty Avenue
Pittsburgh, PA 15222

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3rd day of July, 2013