

No. 13-1688

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

INSTITUTO SOCIO ECONOMICO COMMUNITARIO, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STUART F. DELERY
Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

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

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

JULIE B. BROIDO
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2965

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce a final Board Decision and Order (359 NLRB No. 28) that issued on December 10, 2012 against Instituto Socio Economico Communitario, Inc. (“INSEC”). (Add. 12-17.)¹ The Board found that INSEC

¹ “Add.” references are to the Addendum that INSEC attached to its opening brief (“Br.”). “A.” references are to the appendix that INSEC filed with its opening

unlawfully required employees to take vacation leave at times they had not requested, without prior notice to or bargaining with the employees' collective-bargaining representative, Unidad Laboral de Enfermeras(os) y Empleados de la Salud ("the Union").

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case pursuant to Section 10(e) of the Act because the unfair labor practices occurred in Puerto Rico. The Board's application for enforcement was timely filed, as the Act places no time limit on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence on the record as a whole supports the Board's finding that INSEC violated the duty to bargain in good faith under Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally requiring employees to take vacation leave during periods they had not requested.
2. Whether the President's recess appointments to the Board are valid.

brief. "GCX" refers to the exhibits introduced by the Board's Acting General Counsel at the hearing before the administrative law judge. "RX" refers to the exhibits introduced at the hearing by INSEC, the respondent before the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Upon charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that INSEC violated Section 8(a)(5) and (1) of the Act by unilaterally requiring employees to take vacation leave during periods they had not requested. After a hearing, the administrative law judge found—based on the record evidence and the credibility determinations that he made to resolve the conflicting testimony—that INSEC had violated the Act as alleged. (Add. 12-17.) On review, the Board found no merit to INSEC's exceptions and adopted the judge's findings and recommended order. (Add. 12.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; INSEC's Operations and Its Collective-Bargaining Relationship with the Union

INSEC is a non-profit corporation providing services to low-income communities in Puerto Rico. In 2002, its unit employees selected the Union as their collective-bargaining representative, and, thereafter, the parties agreed on several collective-bargaining agreements, the most recent of which expired in October 2009 ("the Agreement"). (Add. 13; GCX 13(b), A. 63-67.)

The Agreement provided for employees to accrue 2 vacation days per month, which they could carry over to the next calendar year by prior written agreement with INSEC. (Add. 13; A. 119.) The Agreement also required employees to take vacation days during the last week of December and the first

week of January,² and six specific holidays.³ Beyond that, the Agreement merely provided that for “the rest of the accumulated vacation days of the employee, prior to the period of December and January, the employee will request it on any other date, within the following nine (9) months . . . ,” i.e., by the end of September. (Add. 13; GCX 13(b), RX 1, A. 58-60; *see* Br. 5, 12.)

B. INSEC Requires Employees To Take Leave in April 2011 at Times They Had Not Requested

In January 2011, while INSEC and the Union were negotiating for a successor agreement, several employees began reporting to Union Representative Arturo Grant that INSEC was requiring them to use their accrued vacation leave before Holy Week (April 18-22, 2011). The employees had not requested to take such leave. The Agreement, whose terms continued in effect after it expired (*see* pp. 12-13, below), did not require employees to take leave before Holy Week, and INSEC had not previously required them to exhaust their leave in this manner. (Add. 13; A. 67-76, 82, GCX 7(b), 13(b).)

² In that two-week period, there are three days that do not count as vacation even though the employees are not working: Christmas Day, New Year’s Day, and King’s Day (January 6). (Add. 13; A. 59, RX 1.)

³ Those six holidays are: the first Monday of January (Martin Luther King’s Birthday), March 22 (Abolition of Slavery Day), the last Monday in May (Memorial Day), October 12 (Columbus Day), November 11 (Veterans’ Day), and November 19 (Discovery of Puerto Rico Day).

Based on the employees' concerns, Grant wrote INSEC's attorney, Carlos George, on February 25, asserting that INSEC Human Resources ("HR") Director Iris Lopez was violating the vacation provisions of the Agreement by telling employees they had to use their excess vacation leave "before . . . April." INSEC's counsel denied Grant's assertions in a March 1 letter, claiming that INSEC had merely requested employees to "coordinate" their vacations. (Add. 13-14; A. 67-76, GCX 7(b), 20.)

On March 8, Grant met with INSEC officials—HR Director Lopez and company counsel George—regarding the vacation issue. Grant reiterated that INSEC was forcing employees to take vacation time before Holy Week. INSEC's officials again denied the Union's assertions and the meeting ended without resolution of the vacation issue. (Add. 14-15; A. 75-76, 80, GCX 9(b).)

On March 10, Grant sent INSEC's counsel another letter, stating that INSEC was continuing to force employees to take vacation leave before April and at times they had not requested. Grant attached to his letter an e-mail sent by INSEC HR Specialist Thayda Munera stating that the 3 named employees "still owed" INSEC their "request[s] for vacation leave," and had "to program" 4, 2 and 5 vacation days, respectively. (*Id.*) As noted, under the expired Agreement, whose terms continued in effect, employees were not required to file their vacation requests until September. Grant concluded his letter by asking INSEC to comply with the

Agreement by ceasing to seek vacation requests from employees who were not requesting vacation time. (*Id.*)

On April 7, Grant sent another letter to INSEC's counsel, listing employee concerns, including that INSEC was still forcing them to take vacation days that they had not requested. (Add. 14; GCX 11(b), A. 71, 77.) INSEC did not respond. INSEC then closed all its offices and required employees to take vacation during the first 4 days of Holy Week.⁴ The closure was contrary to INSEC's practice—which it had followed “since forever” (A. 117), according to its Executive Director, Yolanda Velez—of keeping an office open for employees who desired to work during that time rather than take vacation. (Add. 14-15; A. 76-77, 83-85, 89, 99, 117-18.)

C. After April, INSEC Directs Employees To Liquidate Their Accrued Leave by September, and Disciplines an Employee for Refusing To Take Leave at Times He Had Not Requested

After April, and as early as June, employees informed Grant that INSEC was telling them that they had to “liquidate” their remaining accrued vacation leave before the end of September. (Add. 14; A. 77-79, 81-85, GCX 12(b).) INSEC had never before compelled employees to exhaust their accrued vacation leave in this manner. (Add. 14; A. 79, 84.)

⁴ Because Good Friday of that week was a contractually paid holiday, INSEC did not charge employees leave for that day. (Add. 14; RX 1.)

In late June, INSEC Operations Manager Yadira Guilliani e-mailed HR Director Lopez and other company officials, instructing them that “vacation should be contemplated on or before September 30.” Lopez’s e-mail further stated that the “Vacation Plan [for certain employees] is incomplete [and] there are employees missing to comply [sic].” (Add. 14; A. 135.)

On July 26, Grant met with INSEC counsel George and HR Director Lopez to discuss INSEC’s requirement—contrary to the expired Agreement’s terms, which were still in effect—that employees use their accrued vacation leave before the end of September. (A. 14; GCX 12(b).) On August 2, Grant wrote Lopez, stating that, despite INSEC’s insistence that it was merely asking employees to “coordinate” their vacation times, Operations Manager Guilliani had recently instructed company HR officials that employees must exhaust their vacation leave, and was forcing employees to immediately go on vacations at times they had not requested. (*Id.*) Grant concluded his letter by asking that INSEC restore the leave it had forced employees to take. (*Id.*)

Meanwhile, employee Ronny Paoli had requested, was granted, and took vacation leave from July 18-22, returning to work on July 26.⁵ Upon his return, his immediate supervisor, Zuma Rivera, “requested” that he go back on vacation on August 1 for the balance of his accrued vacation leave without “fractioning” it.

⁵ July 25 is a contractually paid holiday. (*See* RX 1.)

Paoli refused and, on August 4, HR Director Lopez issued Paoli a written disciplinary action for refusing to take vacation as instructed by his supervisor, which stated that INSEC “will terminate” him “effective immediately” if he “persist[s] in this behavior.” (A. 14; GCX 15(b), A. 91-93.)

On August 9, HR Director Lopez e-mailed HR Assistant Claudette Sanchez, instructing her to take certain actions regarding the unused accrued vacation balances of 19 employees. In this message, entitled “program additional days vacation leave (extensions),” Lopez instructed Sanchez to ascertain whether the vacation balances listed for the employees had already been scheduled, and to determine the status of employees who still had a balance. For example, Lopez noted in her e-mail that employee Rafael Torres had 22 days of accrued vacation as of August 9, but had requested leave for only 14 of those days. Lopez directed that Sanchez schedule the remaining 8 days of Torres’ unused vacation as soon as he returned from leave on August 12. Further, Lopez noted that employee Yolanda Soto had one additional vacation day remaining, and stated that her current vacation was being “extended.” In addition, Lopez stated that employee Wanda Torro’s vacation—Torro had 5.73 vacation days to use—was being “extended” until August 22, that she was to report to work that day for 2.5 hours, and that the remainder of the day would be charged to her as vacation leave. Lopez’s e-mail added that Torro had already been notified of the changes. (Add. 14; A. 133-34.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Griffin and Block) affirmed the administrative law judge's finding that INSEC violated Section 8(a)(5) and (1) of the Act by requiring employees to take vacation leave during periods they had not requested without negotiating over the change in policy. (Add. 12 & nn.1-2.)

The Board's Order requires INSEC to cease and desist from the unfair labor practice found, and from, in any like or related manner, interfering with its employees' rights under the Act. Affirmatively, the Board's Order requires INSEC to reinstate all vacation leave that employees were compelled to take at times they had not specifically requested; and to post and electronically distribute a remedial notice. (Add. 16.)

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Hotel and Restaurant Employees and Restaurant Employees Int'l Union Local 26*, 446 F.3d 200, 206 (1st Cir. 2006). A

reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp.*, 340 U.S. at 488; *accord Hotel Employees and Restaurant Employees*, 446 F.3d at 206.

Thus, this Court will “sustain inferences that the Board draws from the facts and its application of statutory standards to those facts and inferences so long as they are reasonable.” *McGraw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 7 (1st Cir. 1997).

In particular, credibility determinations made by the Board’s administrative law judge—who saw and heard the witnesses testify—are entitled to “great weight,” and this Court will not disturb them unless the judge “overstepped the bounds of reason.” *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6-7 (1st Cir. 2001); *accord 3-E Co., Inc. v. NLRB*, 26 F.3d 1, 3 (1st Cir. 1994).

SUMMARY OF ARGUMENT

Substantial and credited evidence supports the Board’s finding that INSEC violated Section 8(a)(5) and (1) of the Act by directing employees to use their accrued vacation leave at times they had not requested, without notifying or bargaining with the Union over this unilateral change in the collectively-bargained vacation-scheduling policy. INSEC does not dispute the legal principles underlying the Board’s findings. Instead, it only attacks the administrative law judge’s decision to credit the testimony of Union Representative Grant that INSEC

was engaging in this misconduct, over the discredited denials of INSEC's officials. The judge reasonably found, however, that Grant was credible based on his demeanor, and because his testimony was corroborated by his conduct and the documentary evidence. The corroborating evidence included INSEC's own written communications, one of which showed that it had disciplined an employee for refusing its demand that he take vacation at times he had not requested. Thus, INSEC cannot prove, as it must, that the judge's decision to credit Grant "overstepped the bounds of reason." *Ryan Iron Works, Inc.*, 257 F.3d at 6-7. Accordingly, the Board's findings are supported by substantial evidence and must, therefore, be affirmed.

INSEC also fleetingly contends that the President's recess appointments to the Board were invalid. But that understanding of the Recess Appointments Clause is wrong as a matter of text, history, and purpose. Indeed, the settled understanding of the political branches, for nearly a century, is in direct contravention to INSEC's arguments.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT INSEC VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY REQUIRING EMPLOYEES TO TAKE VACATION AT TIMES THEY HAD NOT REQUESTED

A. An Employer Violates Section 8(a)(5) and (1) by Making Changes to Mandatory Subjects of Bargaining, Including Vacation-Scheduling Policies, Without Affording Its Employees’ Union Notice and an Opportunity To Bargain

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively” with the Section 9(a) (29 U.S.C. § 159(a)) representative of its employees.⁶ *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Section 8(d) of the Act (29 U.S.C. § 158(d)) defines “the duty to bargain collectively” as “the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Thus, an employer violates Section 8(a)(5) and (1) when it makes a material and substantial change to mandatory subjects of bargaining without notice to or an opportunity to bargain

⁶ An employer that violates Section 8(a)(5) also “derivatively” violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act. *See Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

with the employees' union, and in the absence of an impasse or agreement in bargaining. *Katz*, 369 U.S. at 743; *Visiting Nurse Servs. of W. Mass., Inc. v. NLRB*, 177 F.3d 52, 57-58 (1st Cir. 1999).

The scheduling of vacation days and related policies are undisputedly terms and conditions of employment subject to mandatory bargaining, so that unilaterally imposed changes violate Section 8(a)(5) and (1). *See, e.g., Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 137-38 (D.C. Cir. 1999) (changes to vacation-scheduling policy); *accord Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 593-94 (2d Cir. 1994); *United Cerebral Palsy of New York City*, 347 NLRB 603, 606-07 (2006) (citing *Blue Circle Cement Co., Inc.*, 319 NLRB 954 (1995), *enforced mem. in relevant part*, 106 F.3d 413 (10th Cir. 1997)); *cf. Visiting Nurse Serv. of W. Mass.*, 177 F.3d at 56 (changes to scheduling of paid holidays).

Moreover, mandatory terms that are set forth in a collective-bargaining agreement continue in effect after it has expired. Accordingly, the Act prohibits unilateral changes to such terms, not only during the agreement's life, but also after its expiration. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198-99 (1991); *Visiting Nurse Serv. of W. Mass.*, 177 F.3d at 57-58.

B. INSEC Violated the Act by Unilaterally Requiring Employees To Take Vacations at Times They Had Not Requested

Applying the foregoing settled law, the Board found (Add. 15-16) that INSEC violated Section 8(a)(5) and (1) when, without affording the Union notice

and an opportunity to bargain, it required employees to take vacations at times they had not requested. Specifically, INSEC unilaterally imposed mandatory employee use of accrued vacation leave before and during Holy Week (April 18-22, 2011), and again, after April, when it sought to force employees to exhaust their remaining accrued vacation leave before September. As the Board explained, INSEC's actions, which concerned a mandatory subject of bargaining, were not privileged by the parties' expired Agreement or by their past practice. Those unilateral changes were therefore unlawful under settled law. (*Id.*; *see* cases cited at pp. 12-13, above.) As shown below, the Court should affirm the Board's findings because they are supported by substantial evidence, namely, the credited testimony of Union Representative Grant, and the corroborating documentary evidence, including INSEC's own communications. In response, INSEC largely attacks the administrative law judge's decision to credit Grant's testimony, but fails to meet its heavy burden of showing that the judge's decision "overstepped the bounds of reason." *See* cases cited at p. 10, above.

As Grant credibly testified, several employees began contacting him in January 2011 to complain that INSEC was directing them to use accrued vacation leave before Holy Week (April 18-22). As the administrative law judge emphasized (Add. 15), Grant's subsequent actions corroborated his testimony, thereby supporting his credibility. Thus, consistent with his testimony, Grant, over

the next few months, wrote several letters to and met with INSEC officials, relaying the employees' concerns, and asking INSEC to cease directing employees to take vacations at times they had not requested. (Add. 14-15; *see* pp. 4-7, above.) As Grant explained, INSEC's conduct was contrary to the terms of the Agreement, which did not require employees to use their accrued leave in April (or during Holy Week, in particular). Nor was INSEC's conduct encompassed by the parties' past practice, as INSEC had not previously required its employees to exhaust their accrued leave in this manner. (*Id.*)

INSEC, however, failed to comply with Grant's repeated requests that it cease unilaterally forcing employees to take vacation at times they had not requested. Instead, it closed all its facilities during Holy Week, and required employees to take vacation during that period, regardless of whether or not they had requested such leave. This departed from INSEC's practice, "since forever" according to its Executive Director, of keeping an office open during Holy Week so that employees could choose to exercise their collectively-bargained right to work rather than take leave. (Add. 15; *see* p. 6, above.)

Moreover, after April, and despite Grant's continued written and verbal protests to INSEC, employees informed him that INSEC was now directing them to liquidate their balances of accrued vacation leave "before September" and on days they had not requested. As with its prior mandates, INSEC had not

previously directed employees to exhaust their leave in this manner. Nor was any such direction authorized by the expired Agreement's terms, which, INSEC admits (Br. 5, 12), required employees to schedule, but not to complete, their vacations by the end of September. Thereafter, Grant once again repeated the employees' complaints to INSEC's management and counsel, and asked INSEC to restore the leave that it had forced employees to take. INSEC, however, again failed to do so, in further derogation of its employees' collectively-bargained rights regarding vacation scheduling. (Add. 15; *see* pp. 6-7, above.)

The Board reasonably rejected (Add. 15-16) INSEC's claim, which it repeats to this Court (Br. 11-22), that it was merely assisting employees in scheduling their vacations, and not forcing them to take vacations against their wills. As the Board explained (Add. 15), INSEC's contention is refuted not only by Grant's credited testimony—and his conduct—but also by INSEC's own actions and written communications, which confirm that it was compelling employees to take leave before September 30 and at times they had not requested.

For example, INSEC's discipline of employee Ronny Paoli shows that it was requiring employees to take leave at times they had not requested. Thus, INSEC admittedly "requested" that Paoli extend his vacation beyond the days he had asked for, and that he exhaust his remaining accrued vacation leave in late July. When he refused, INSEC HR Director Lopez promptly (and admittedly)

issued Paoli a written disciplinary notice on August 4 that warned him that he would be fired if he continued to refuse to extend his leave as ordered. (Add. 16; GCX 15(b), A. 91-93.) Given this threat, INSEC cannot credibly deny that it was forcing employees to use their vacation time in a manner contrary to their rights under the expired Agreement.

INSEC's other actions and communications, when viewed in context, further undermine its claim that it was merely assisting employees in scheduling their vacations. That INSEC compelled employees to take vacation before September 30 is further shown, for example, by HR Director Lopez's August 9 e-mail to HR Assistant Sanchez directing that employee Torres take the remaining 8 of 22 accrued vacation days as soon as he returned from the leave he had in fact requested. Lopez also directed that employee Soto's requested vacation be extended to include a day she had not requested. (Add. 16; *see* p. 8, above.) The judge's determination that Lopez was requiring Torres and Soto to take additional leave is supported by her act, just a few days before, of disciplining employee Paoli for refusing to extend his leave to include days he had not requested. As the judge reasonably concluded (Add. 16), INSEC's "actions, taken as a whole," refute its claim that it was merely helping employees schedule vacations rather than compelling them to take leave at specific times.

In sum, INSEC's conduct and communications, and Grant's own conduct, confirm his credited testimony that INSEC was compelling employees to take vacations on days they had not requested. INSEC's conduct was contrary to the terms of the Agreement and the parties' past practice regarding the scheduling and use of vacation leave, and therefore amounted to a change in the employees' established employment terms. Further, INSEC made these changes unilaterally, as it failed to notify and bargain with the Union over the changes. Accordingly, this Court should affirm, as supported by substantial evidence, the Board's finding that INSEC violated Section 8(a)(5) and (1) of the Act by making these unilateral changes.

C. INSEC Fails To Meet Its Heavy Burden in Seeking To Overturn the Board's Reasonable Credibility Determinations

In light of the substantial evidence addressed above, INSEC fails to provide any basis for setting aside the Board's well-supported findings. INSEC primarily attacks (Br. 11-21) the administrative law judge's decision to credit Union Representative Grant's testimony that INSEC had forced employees to take leave at times they had not requested, over the discredited denials of company officials. As discussed below, however, INSEC fails to meet its heavy burden of showing that the judge's resolution of the conflicting testimony "overstepped the bounds of reason." *See* cases cited at p. 10, above. Indeed, INSEC founds its attack on the false premise (Br. 11-13, 17, 21) that the Board found violations based "solely" on

Grant’s “uncorroborated hearsay” testimony, which INSEC mischaracterizes as “contradicted” by the record evidence. Rather, as detailed below, the judge carefully explained (Add. 15) that he found Grant to be credible based on his demeanor, and because his testimony was corroborated by his own conduct and the documentary evidence, including INSEC’s own communications. INSEC’s failure to acknowledge, let alone counter, the judge’s solid bases for his credibility ruling dooms INSEC’s challenge.

Thus, the judge explained that Grant “impressed” him as a “thoughtful witness” who specifically named the various employees who had raised concerns with forced vacations. (*Id.*) INSEC provides no basis for rejecting this demeanor-based finding. *See* cases cited at p. 10, above (noting that because the judge is there to observe the witness’s demeanor, his credibility determinations should rarely be disturbed). Further, the judge observed that Grant was credible because the actions he took—in repeatedly writing to and meeting with INSEC’s officials and counsel to discuss the employees’ complaints about forced vacations—are consistent with his testimony that employees had contacted him to raise those complaints. (Add. 15.)

Moreover, Grant’s testimony is further corroborated by INSEC’s own written communications, including, as discussed, a company document indicating that INSEC had disciplined employee Paoli for refusing to take leave in August at

times he had not requested. (Add. 15-16; *see* pp. 7-8, above.) This documentary evidence (along with INSEC's other written communications, *see* pp. 6-8, 16-17, above) corroborates Grant's credited testimony, and amply supports the Board's finding that INSEC was forcing employees to take vacation at times they had not requested.

Indeed, Grant's testimony is even corroborated by a key INSEC witness, Executive Director Velez, who testified that it was INSEC's practice, "since forever," to keep an office open during Holy Week so that employees could chose to work rather than take leave. Her admission corroborates Grant's testimony that, previously, INSEC had not closed all its offices or required employees to take vacation during that week. (Add. 13-14; *see* p. 6, above.)

INSEC plainly errs in mischaracterizing (Br. 17, 21) Grant's well-corroborated testimony as "uncorroborated hearsay" that was "contradicted" by the record evidence. Based on this mischaracterization, INSEC erroneously relies (Br. 17-18) on clearly distinguishable cases, like *E.S. Sutton Realty Co.*, 336 NLRB 405, 406-07 (2001), where the Board rejected the judge's reliance on testimony that was, unlike Grant's, "repeatedly inaccurate" and "completely" contradicted by documentary evidence. The opposite is true of Grant's testimony, which is corroborated by the documentary evidence, including INSEC's own written communications.

Accordingly, INSEC also errs in relying (Br. 21) on cases holding that “mere uncorroborated hearsay,” standing alone, is insufficient to support a finding of a violation. INSEC not only mischaracterizes Grant’s testimony as “uncorroborated,” it also fails to acknowledge the applicable law. The cited cases quote dicta from *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938), that the Supreme Court limited in *Richardson v. Perales*, 402 U.S. 389, 407 (1971). Specifically, the Supreme Court explained in *Perales* that this 1938 dicta: “[W]as not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.” *Id.* at 407-08. In other words, the perceived problem was not uncorroborated hearsay *per se*, but using hearsay that was unreliable or lacked “rational probative force.” *Perales*, 402 U.S. at 408 (quoting *Consolidated Edison Co.*, 305 U.S. at 229-30). *See also Echostar Communications Corp. v. FCC*, 292 F.3d 749, 752 (D.C. Cir. 2002) (applying *Perales* to hold that uncorroborated hearsay testimony can constitute substantial evidence if it is reliable and has probative value). Thus, under the applicable law, substantial evidence—including Grant’s reliable and probative testimony—supports the Board’s findings of fact.⁷

⁷ In these circumstances, the judge was not compelled to hear testimony from the affected employees, contrary to INSEC’s claim (Br. 7-8, 11-13). Nor was the judge required to have “certainty” (Br. 20) as to what the employees told Grant about forced vacations. Rather, the relevant point is that the administrative law

Nor did the administrative law judge err in discrediting (Add. 16) the testimony of INSEC officials, like Executive Director Velez, who professed that they were merely assisting employees in scheduling their vacations, and not instructing them to take vacations at times they had not requested. INSEC fails to grapple (*see* Br. 11-12, 19) with the judge's decision to credit Grant's contrary testimony based on his favorable demeanor and corroborating evidence. That evidence included documents indisputably establishing that INSEC even went so far as to discipline an employee (Paoli) for refusing to agree to take vacation at times he had not requested. In these circumstances, INSEC provides no grounds for displacing the administrative law judge's decision to credit Grant over the conflicting testimony of INSEC officials. *See NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985) (explaining that deference to the judge's findings is particularly appropriate where the "record is fraught with conflicting testimony and essential credibility determinations have been made").

Finally, and for similar reasons, INSEC gains no ground in attacking (Br. 13-14) the Board's finding (Add. 15-16) that HR Director Lopez's August 9 e-mail to her assistant was one piece of the evidence showing that INSEC was telling employees to take vacations on days they had not requested. The e-mail states that

judge's decision to credit Grant's testimony on this subject was not beyond "the bounds of reason."

certain employees' vacations are being "extended" and that others must "schedule" their vacations. As shown, the context of Lopez's e-mail—she sent it within days of having disciplined Paoli—supports a finding that it was part of INSEC's efforts to compel employees to take leave at times they had not requested. In any event, the e-mail was merely one piece of the evidence supporting the Board's findings. Thus, as the Board explained (Add. 16), INSEC's actions "taken as a whole," refute its "just assisting" claim.

In sum, substantial evidence supports the Board's findings that INSEC compelled employees to take vacation leave at times they had not requested, and that INSEC's action was contrary to, and amounted to a material change in, employment terms established by the parties' Agreement and past practice. It is undisputed that INSEC failed to notify and bargain with the Union over this alteration in a mandatory subject of bargaining. The Court should, therefore, affirm the Board's finding that INSEC violated Section 8(a)(5) and (1) of the Act by making this unilateral change.

II. THE PRESIDENT'S RECESS APPOINTMENTS TO THE BOARD ARE VALID

From January 3 until January 23, 2012, a period of 20 days, the Senate was in a recess.⁸ At the start of this recess, the Board's membership dropped below a quorum. Accordingly, on January 4, 2012, the President invoked his constitutional authority under the Recess Appointments Clause and appointed new Board members.

INSEC urges that two of these Board members were appointed in violation of the Recess Appointments Clause, Art. II, § 2, cl. 3. It apparently bases this contention on two grounds: that the President may not make recess appointments during *intra*-session recesses, and that the President may not fill vacancies that first arose before the recess in question. (Br. 10-11 (invoking *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013), and the divided opinion in *NLRB v. Enterprise Leasing Co. SE, LLC*, 722 F.3d 609 (4th Cir. 2013)). INSEC's assertion is meritless and rests on grounds rejected by multiple courts of appeals. *See Evans v. Stephens*, 387 F.3d 1220, 1224-27 (11th

⁸ Parties in other cases have said that the Senate's use of *pro forma* sessions—at which no business would be done per a prior, unanimous Senate order—transformed the 20-day recess into a series of shorter breaks that preclude recess appointments. INSEC did not raise that point in its brief, and we thus understand it to be conceded that the appointments occurred during an uninterrupted 20-day break.

Cir. 2004) (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).⁹

A. The President’s Recess-Appointment Authority is Not Confined to Inter-Session Recesses of the Senate

A legislative body like the Senate characteristically begins a recess, whether long or short, in one of two ways. By adjourning *sine die* (i.e., without specifying a day of return), the body ends its current session, and the ensuing recess, which lasts until the beginning of the next session, is commonly known as an *inter-session* one. By adjourning, instead, to a specified time or date, the body typically resumes pending business when it reconvenes, and the intervening recess is commonly known as an *intra-session* one.¹⁰

The text and purposes of the Recess Appointments Clause, and long-established practice, cut decisively against excluding intra-session recesses from the Clause’s scope.

⁹ Although not cited by INSEC, a divided panel in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), *petition for reh’g pending* (filed July 1, 2013; stayed July 15, 2013), also held that intrasession recess appointments are invalid. Like the Fourth Circuit’s *Enterprise* opinion, *New Vista* did not reach the question of whether a President may fill vacancies that preexisted the recess in question.

¹⁰ If there is no adjournment *sine die*, a session will end automatically at the time appointed by law for the start of a new session. See Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 166 (2d ed. 1812) (*Jefferson’s Manual*).

1. The constitutional text authorizes appointments during intra-session recesses

The Recess Appointments Clause authorizes the President to make temporary appointments “during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, Cl. 3. That unqualified reference to “the Recess of the Senate” attaches no significance to whether a recess occurs during a session or between sessions.

a. As understood both at the time of the Framing and today, a “recess” is a “period of cessation from usual work.” 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); *see also* 2 Webster, *An American Dictionary of the English Language* 51 (1828) (“[r]emission or suspension of business or procedure”); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. “recess” (1755) (“remission or suspension of any procedure”). That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

The Third Circuit has suggested that other, less-apposite definitions of “recess” “contain some connotation of permanence or, at least, longevity.” *New Vista*, 719 F.3d at 221-22. But any such connotation cannot possibly support a categorical distinction between inter- and intra-session recesses for purposes of the Clause. The Senate has had many inter-session recesses that were zero, one, or two days long, including a substantial number in the 18th and 19th centuries. *See*

S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-535 (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf. And in the British Parliament, inter-session recesses were “sometimes only for a day or two.” 1 Blackstone, *Commentaries on the Laws of England* 180 (1765). The Senate’s intra-session recesses are often much longer than that, and since 1867 have frequently been several weeks or even months long. *Congressional Directory* at 525-38.

b. In the legislative context, the Founding generation understood that the term “recess” applies to breaks both during and between sessions. The term described both kinds of breaks in British Parliamentary practice. *See, e.g.*, 13 *OED* 323 (quoting request about a “Recess of this Parliament” that was during a session) (citing 3 H.L. Jour. 61 (1620)); 33 H.L. Jour. 464 (Nov. 26, 1772) (King’s reference to a “Recess from Business” that was between sessions); *Jefferson’s Manual* § LI, at 165 (describing the procedural consequences of a “recess by adjournment,” which did not end a session).

Founding era American legislative practice was in accord. The Articles of Confederation authorized Congress to convene a “Committee of the States” during “the recess of Congress.” Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1. Congress invoked that power only once, for a scheduled intra-session recess. *See* 26 *J. Continental Cong. 1774-1789*, at 295-96 (Gaillard Hunt

ed., 1928); 27 *id.* at 555-56.¹¹ Similarly, the Constitutional Convention of 1787 adjourned intra-session from July 26 to August 6, and delegates referred to that break as “the recess.”¹²

Early state legislative practice was similar. For example, legislatures in New York, New Jersey, Massachusetts, and New Hampshire used “the recess” in the 1770s and 1780s to refer to breaks prompted by adjournments to a date certain.¹³ Similarly, revolutionary-era constitutions in Pennsylvania and Vermont authorized the Executive to issue embargoes “in the recess” of the legislature, and those

¹¹ *New Vista* thought this example lacked weight because Congress failed to reconvene on schedule, *see* 709 F.3d at 226 n.18, but when Congress appointed the Committee it could not have known of the future scheduling issue.

¹² 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1966) (*Farrand*) (letter from George Washington to John Jay); 3 *Farrand* 191 (speech of Luther Martin); 2 *Farrand* 128 (July 26 adjournment), 649 (“Adjournment sine die” in September).

¹³ 2 *A Documentary History of the English Colonies in North America 1346-1348* (Peter Force ed., 1839) (New York Provincial Congress’s 1775 appointment of a committee to act “during the recess,” a 14-day intra-session break); N.J. Legis. Council Journal, 5th Sess., 1st Sitting 70 (1781); *id.*, 2d Sitting 9 (legislature’s 1781 direction to purchase ammunition “during the recess,” an intra-session break); Mass. S. Journal, entries for July 11 and October 18, 1783 (on file with the Massachusetts State Archives) (documenting a Committee’s appointment and work “in the recess;” the Committee served during an adjournment from July 11 to September 24, 1783, the equivalent of an intra-session break); 20 *Early State Papers of New Hampshire* 452, 488 (Albert Stillman Batchellor ed., 1891) (1786 New Hampshire legislative journal referring to a period that followed an adjournment to a date certain as “the recess”).

powers were exercised during intra-session breaks. *See New Vista*, 719 F.3d at 225.

This and other historical evidence wholly undermines *Noel Canning*'s reliance on "*the Recess of the Senate*." 705 F.3d at 499-500 (emphasis added). Indeed, after acknowledging that "the" could be used generically (as it is elsewhere in the Constitution), the Third Circuit properly rejected *Noel Canning*'s reliance on that language, finding "the" to be "uninformative." *New Vista*, 719 F.3d at 227-28.

c. *Noel Canning* also noted that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." 705 F.3d at 500. As an historical matter, however, "adjournment" typically referred to the *act* of adjourning, while "recess" referred to the resulting *period* of cessation from work—a distinction reflected in the Constitution itself.¹⁴ Thus, when the Continental Congress convened a committee "during the recess" in 1784, it did so

¹⁴ Compare, e.g., 1 *Oxford English Dictionary* 157 (using "adjournment" to refer to the "act of adjourning"), and U.S. Const. Art. I, § 7, Cl. 2 (Pocket Veto Clause) ("unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law"), with 13 *OED* 322 (using "recess" to refer to the "period of cessation from usual work"), and U.S. Const. Art. II, § 2, Cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate"); see also Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LAWnLinguistics.com, Feb. 19, 2013 (explaining that "recess" was generally not used as a verb because that function was performed by "adjourn"), <http://lawnlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1>.

following an intra-session “adjournment.” *27 J. Continental Cong. 1774-1789*, at 555-56 (Gaillard Hunt ed., 1928).

Even if the Constitution were thought to use “adjournment,” like “recess,” to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive’s position is entirely consistent with a distinction between a recess covered by the Recess Appointments Clause and an adjournment. The Adjournment Clause makes clear that the taking of a legislative break of three days or less “during the Session of Congress” is still an “adjourn[ment].” Art. I, § 5, Cl. 4. But as noted below, *see infra* p. 31-32, the Executive has long understood that such short intra-session breaks do not trigger the President’s recess-appointment authority.

2. Intra-session recess appointments are necessary to serve the purposes of the Recess Appointments Clause

Excluding intra-session recesses from the Recess Appointments Clause would undermine its central purposes.

a. The Recess Appointments Clause ensures that vacant offices may be temporarily filled when the Senate is unavailable to offer its advice and consent, and it simultaneously frees the Senate from the obligation of being “continually in session for the appointment of officers.” *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause enables the President to meet his continuous responsibility to “take Care that the Laws be faithfully executed,”

Art. II, § 3, which requires the “assistance of subordinates.” *Myers v. United States*, 272 U.S. 52, 117 (1926).

Those purposes apply without regard to whether a recess occurs during a session or between sessions. The Senate is equally unavailable for advice and consent during intra-session and inter-session recesses. The President is no less in need of officers to execute the laws. And, for the Nation, it will often be equally “necessary for the public service to fill [certain vacancies] without delay.”

Federalist No. 67, at 455. Indeed, the need to fill vacancies may be greater during intra-session recesses, which have often, especially in modern Senate practice, accounted for more of the Senate’s absences than have inter-session recesses. *See Congressional Directory* 529-38.

b. There is no reasonable basis to fear that Presidents will use intra-session recess appointments to evade the Senate. *See Noel Canning*, 705 F.3d at 503. The authority to make intra-session recess appointments has been accepted for nearly a century, yet Presidents routinely seek Senate confirmation when filling vacant offices—and have strong incentives to do so, because recess appointments are only temporary and because seeking Senate consent alleviates inter-Branch friction. Moreover, the Third and Fourth Circuits misapprehended the government’s arguments when they indicated that the government’s position would permit appointments in intra-session breaks shorter than three days. *See New Vista*, 719

F.3d at 230; *Enterprise Leasing Co.*, 722 F.3d at 649. The Executive has long understood that such short intra-session breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the President’s recess-appointment authority. *See, e.g.*, 33 Op. Att’y Gen. 20, 24-25 (1921); 16 Op. O.L.C. 15, 15-16 (1992); *see also Wright v. United States*, 302 U.S. 583, 593-96 (1938) (making similar point in construing Pocket Veto Clause); Art. I, § 5, Cl. 4 (Adjournment Clause, providing that legislative breaks of three days or less do not require the other House’s consent).

INSEC’s position, by contrast, would permit the Senate unilaterally to strip the President of his constitutional authority to make recess appointments despite its unavailability to give advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain near the constitutionally mandated end of the session. *See* Amend. XX, § 2. The Framers could not have contemplated that the President could thus be disabled from filling important positions when the Senate is concededly unavailable.

c. For similar reasons, the Recess Appointments Clause’s purposes are served by the decision to require such appointments—whether they are made during an inter- or intra-session recess—to “expire at the End of [the Senate’s] next Session.” Art. II, § 2, Cl. 3 (emphasis added). Some intra-session recesses last almost until the end of the sessions they interrupt. For instance, in a number of

different years, the Senate returned from an intra-session recess less than three days before the session ended. *See Congressional Directory* 528-29, 533-34, 536. The Framers were also well aware that various vicissitudes might prevent a legislature from returning on schedule, which could shorten, or even eliminate, the part of a session that would otherwise follow an intra-session recess.¹⁵ In such situations, the uniform termination date ensures that there will always be at least one full session during which an appointee may carry out the duties of the office while the President and the Senate engage in the nomination-and-confirmation process.

3. Long-standing practice supports intra-session recess appointments

a. There are no comprehensive records of all recess appointments made throughout history, and information regarding military appointments is particularly difficult to ascertain. *See Hogue, Cong. Research Serv., Intrasession Recess Appointments* 1-2 (2004). Nonetheless, we know that since the 1860s at least 14 Presidents have collectively made more than 600 civilian appointments and

¹⁵ The Constitutional Convention itself was supposed to convene on May 14, 1787, but it “adjourned from day to day” until enough delegates were present on May 25. 1 *Farrand* 1, 3. Smallpox prevented a 1779 session of the North Carolina legislature from convening on schedule. 13 *The State Records of North Carolina* 792 (Walter Clark ed., 1896). The South Carolina legislature adjourned from February to July 1780, but then failed to reconvene until 1782 because of the Revolutionary War. *Journal of the South Carolina General Assembly and House of Representatives 1776-1780*, at xvi, 299 (William Edwin Hemphill et al. eds., 1970).

thousands of military appointments during intra-session recesses of the Senate.

See Appendix A, Petitioner's Opening Brief, *NLRB v. Noel Canning*, No. 12-1281

(S. Ct.) ("*Noel Canning App. A*"), available at

<http://www.justice.gov/osg/briefs/2013/3mer/2mer/2012-1281.mer.aa.pdf>.

The significance of that historical practice cannot be negated based on the lack of intra-session appointments in the Nation's early years, *see* 705 F.3d at 501-02, since during that time, there were no lengthy intra-session recesses. Indeed, before the Civil War only five intra-session recesses exceeded three days in length; each was less than two weeks long and confined to the period around the winter holidays. *See Congressional Directory* 522-25. And until 1943 there were only four years with longer intra-session recesses (at a different time of year). *Id.* at 525-27. In every one, the President made multiple intra-session recess appointments. *See Noel Canning App. A* 1a-11a.

To be sure, for a relatively brief period beginning in 1901, the Executive Branch took a different view. Attorney General Knox concluded that "the Recess" did not include intra-session recesses, in large part because he could otherwise "see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday." 23 Op. Att'y Gen. 599, 600, 603 (1901). In doing so, however, Knox had to reject the only judicial precedent on point. *See Gould v. United States*, 19 Ct. Cl. 593, 595-96 (endorsing

the validity of an 1867 intra-session appointment). And Knox’s approach was short-lived, since in 1905, after controversial appointments made during a putative *inter*-session recess, the Senate charged its Judiciary Committee with determining “[w]hat constitutes a ‘recess of the Senate’ ” for recess-appointment purposes. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905 *Senate Report*). The committee concluded that the word “recess” is used “in its common and popular sense” and means:

the period of time when the Senate is *not sitting in regular or extraordinary session . . .*; 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.

Id. at 1, 2. Per Senate precedent, that report remains an authoritative construction of the term “recess.” *See Riddick’s Senate Procedure: Precedents and Practices* 947 & n.46 (1992). In 1921, Attorney General Daugherty relied on that report and recognized the same considerations for determining whether a “recess” exists for purposes of the Clause. 33 Op. Att’y Gen. at 24-25. Daugherty rejected Knox’s reasoning and concluded that intra-session recesses of sufficient length do trigger the Recess Appointments Clause. *Id.* at 21, 25.

b. The frequency of intra-session recesses—and appointments—increased dramatically during World War II and the beginning of the Cold War. During the 1940s, presidents made thousands of intra-session recess appointments during the

Senate's increasingly frequent months-long recesses, including Dwight D. Eisenhower to be a major general during World War II and thousands of military officers in the Army and Air Force. *See Noel Canning* App. A. at 11a-24a. And in 1948, the Comptroller General (a legislative officer) described the President's ability to make intra-session appointments as "the accepted view." 28 Comp. Gen. 30, 34 (1948).

Since then, Presidents have made, collectively, hundreds of additional intra-session recess appointments. *Noel Canning* App. A at 27a-64a. Throughout that period, opinions of the Attorney General, the Office of Legal Counsel, and the en banc Eleventh Circuit reaffirmed the validity of such appointments. *See, e.g., Evans*, 387 F.3d at 1224-26; 20 Op. O.L.C. 124, 161 (1996); 6 Op. O.L.C. 585, 585 (1982).

c. Such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). Especially in the separation-of-powers context, "[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. 655, 689 (1929); *see also id.* at 690 ("[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 phraseology of which is in any respect of doubtful meaning.”) (internal quotations marks and citation omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).¹⁶

The D.C. Circuit’s reasoning would dramatically upset the long-settled equilibrium between the political Branches, implicating profound reliance interests both within the government and far beyond it. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) (“[O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department.”). This Court should maintain that equilibrium and confirm that future Presidents may, like so many of their predecessors, make recess appointments during intra-session recesses.

B. The President May Fill Any Vacancy That Exists During A Senate Recess

INSEC errs in relying on the D.C. Circuit’s conclusion that Presidents may only fill those vacancies that first arise during the relevant recess. That interpretation is not textually required and is inconsistent with the Recess Appointment Clause’s purposes. Since 1823, it has been formally and repeatedly rejected by the Executive. Nor does it bear the historical imprimatur that *Noel Canning* believed. It is therefore unsurprising that the D.C. Circuit stands alone on

¹⁶ *INS v. Chadha*, 462 U.S. 919, 944 (1983), is not to the contrary. Unlike here, there had been a long and repeated history of *objection* to the practice at issue. *See id.* at 942 n.13 (noting eleven Presidents had objected to the legislative veto).

this issue, and that its view has been rejected by the three other courts of appeals that have considered it. *See Evans*, 387 F.3d at 1226-27 (11th Cir.) (en banc); *Woodley*, 751 F.2d at 1012-13 (9th Cir.) (en banc); *Allocco*, 305 F.2d at 709-15 (2d Cir.)

1. The text can be reasonably read as including all existing vacancies

a. The Recess Appointments Clause gives the President “Power to fill up all Vacancies that may happen during the Recess of the Senate.” Art. II, § 2, Cl. 3. President Jefferson recognized in 1802 that the Clause “is certainly susceptible of [two] constructions,” because it “may mean ‘vacancies that may happen to *be*’ or ‘may happen to *fall*’ ” during the recess.¹⁷ That conclusion follows from the plain meanings of the terms “happen” and “vacancy.”

A vacancy is not an instantaneous event. It is, rather, “[t]he fact *or condition* of an office or post *being*, becoming, or falling vacant.” 19 *OED* 383 (emphases added). In 1787, a vacancy was understood as a continuing “state.” 2 Johnson, *Dictionary* s.v. “vacancy” (“State of a post or employment when it is unsupplied.”). Thus, the state of being vacant is something that “may happen,” and continue happening, as long as the office is unfilled. Just as World War II, which

¹⁷ Letter from Thomas Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), in 36 *The Papers of Thomas Jefferson* 433 (Barbara B. Oberg ed., 2009) (emphases added).

began in 1939, can be said to have happened in the 1940s, so too does a vacancy happen for as long as the office's state of being vacant persists.

For those reasons, Attorney General Wirt noted in 1823 that the reference to “vacancies that may *happen* during the recess of the Senate” “seems not perfectly clear.” 1 Op. Att’y Gen. 631, 631. On one hand, “[i]t may mean ‘happen to take place:’ that is, ‘*to originate.*’” *Id.* But it may also mean “‘happen to exist.’” *Id.* at 632. Wirt observed that the former reading “is, perhaps, more strictly consonant with the mere letter” of the Clause, but he concluded that the latter is “the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language.” *Id.* at 633-34.

b. This reading does not render the phrase “that may happen” superfluous. *Cf.* 705 F.3d at 507. Without that phrase, the Clause would let the President “fill up all Vacancies during the Recess of the Senate.” It could then be thought to permit the President to fill a known *future* vacancy during a recess. Construing the text to refer to vacancies that “happen to exist” during the recess confines the President to filling vacancies that actually exist during the recess.¹⁸

¹⁸ The advice-and-consent process can be used to fill future vacancies. *See, e.g.*, 61 Cong. Rec. 5724 (Sept. 21, 1921); *id.* at 5737 (Sept. 22, 1921).

2. The Clause’s purposes are best served by allowing the President to fill a vacancy that exists during a recess

Attorney General Wirt and his successors correctly recognized that the underlying purposes of the Recess Appointments Clause supply compelling reasons to resolve its ambiguity in favor of allowing the President to fill vacancies that exist during a recess.

a. Most fundamentally, the “happen to exist” reading furthers the Clause’s basic object of ensuring a genuine opportunity at all times for vacancies to be filled. *See* 1 Op. Att’y Gen. at 633. If an unanticipated vacancy first arises shortly before a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination before the recess.

Moreover, the relatively slow speed of eighteenth century communication meant that the President might not have even learned of a vacancy until after a recess had begun. If an ambassador died while abroad, the Framers could not have intended for that office to remain vacant for months merely because news of the death reached the President after the Senate began its recess. *See also* Appendix B, Petitioner’s Opening Brief, *NLRB v. Noel Canning*, No. 12-1281 (S. Ct.) (“App. B”), available at <http://www.justice.gov/osg/briefs/2013/3mer/2mer/2012-1281.mer.aa.pdf>, at 69a (noting David Porter’s death near Constantinople less than one day before a recess).

Nor has the underlying problem been eliminated by high-speed communications. In June 1948, the Secretary of Labor died ten days before a lengthy intra-session recess.¹⁹ When the Senate returned for 12 days, President Truman promptly nominated a successor, but Senator Taft opposed a quick confirmation vote, even though the Senate was about to recess again for several months. *See* 94 Cong. Rec. 10,187 (Aug. 7, 1948). Taft explained that the President could make a recess appointment while the Senate followed its usual process of referring the nomination to committee. 94 Cong. Rec. at 10,187. Under *Noel Canning* that sensible course was unconstitutional.

b. The D.C. Circuit's construction would also prevent the President from filling offices created shortly before recesses. For instance, the office of the Solicitor General was created 14 days before a Session's end in 1870.²⁰ The first Solicitor General, Benjamin Bristow, began his tenure as a recess appointee, even though that vacancy pre-existed his appointment.²¹ *See also Noel Canning* App. B (noting numerous recess appointments to newly created positions).

¹⁹ Lewis Schwellenbach Dies at 53, N.Y. Times, June 11, 1948, at 1; Congressional Directory 528.

²⁰ *See* Act of June 22, 1870, ch. 150, §§ 2, 19, 16 Stat. 162, 165; *Congressional Directory* 525.

²¹ 79 U.S. (12 Wall.) iii (1872).

c. *Noel Canning* suggested that problems associated with unfilled vacancies could be ameliorated if Congress were to provide more broadly for officials to be “acting” or to be held over beyond the ends of their terms. 705 F.3d at 511. But hold-over provisions are useless in the case of death or resignation, and the very existence of the Recess Appointments Clause shows that Framers did not think “acting” officials fully solved the problem. Moreover, some offices, such as Article III judgeships, cannot be performed on an acting basis at all. And it may be impractical to rely for significant periods of time on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced.

3. Since the 1820s, the vast majority of Presidents have made recess appointments to fill vacancies that arose before a particular recess but continued to exist during that recess

a. Given the need to ensure that vacant offices can be filled when the Senate is unavailable to provide its advice and consent to nominations, Attorney General Wirt’s conclusion that the President may fill vacancies that “happen to exist” during a recess has been repeatedly reaffirmed by his successors. Indeed, Wirt’s conclusion was reaffirmed by three other Attorney Generals in 1832, 1841, and 1846. *See* 2 Op. Att’y Gen. 525, 528; 3 Op. Att’y Gen. 673; 4 Op. Att’y Gen. 523.

By 1862, Attorney General Bates advised President Lincoln that the question was “settled in favor of the power [to fill a vacancy existing during a recess], as

far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate.” 10 Op. Att’y Gen. 356, 356. Lincoln followed that advice, and recess appointed a Supreme Court Justice to a preexisting vacancy.²²

In 1880, shortly before becoming a Supreme Court Justice, then-Judge Woods endorsed this view as well. *See In re Farrow*, 3 F. 112, 116 (C.C.N.D. Ga.). He relied on the authority of what were then ten Attorney General opinions endorsing the practice, plus the “practice of the executive department for nearly 60 years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress.” *Id.* at 115.

Since then Attorneys General (and Assistant Attorneys General) have repeatedly endorsed Wirt’s reasoning and conclusion, as have the Second, Ninth, and Eleventh Circuits. *See Evans*, 487 F.3d at 1226-27 (11th Cir.) (en banc); *Woodley*, 751 F.2d at 1012-13 (9th Cir.) (en banc); *Allocco*, 305 F.2d at 709-15 (2d Cir.); *see also, e.g.*, 41 Op. Att’y Gen. at 468 (1960); 30 Op. Att’y Gen. 314 (1914); 26 Op. Att’y Gen. 234 (1907); 17 Op. Att’y Gen. 521 (1883); 20 Op.

²² *See* Brian McGinty, *Lincoln and the Court* 117 (2008) (commission date); Federal Judicial Center, *Biographical Directory of Federal Judges*, entry for John Archibald Campbell, available from www.fjc.gov/public/home.nsf/hisj (predecessor’s April 30, 1861, resignation); *Congressional Directory* 525 (intervening sessions); *see also Noel Canning* App. B 71a.

O.L.C. at 161 (1996); 13 Op. O.L.C. 271, 272 (1989); 6 Op. O.L.C. at 586 (1982); 3 Op. O.L.C. 314 (1979).

b. As *Farrow* indicated, the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies have long been seen as congressional acquiescence in such appointments, because those restrictions are predicated on the existence of the underlying appointment power. *See Farrow*, 3 F. at 115 (discussing an 1863 statute); *see also* 41 Op. Att’y Gen. at 466. The original Pay Act postponed the payment of recess appointees who filled vacancies that first arose while the Senate was in session, deferring salaries until confirmation. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. But Congress later relaxed the statute, providing conditions under which even such appointees may be paid before confirmation. *See* Act of July 11, 1940, ch. 580, 54 Stat. 751. Had it believed such appointments unconstitutional, Congress presumably would have gone much further to restrict them. *Cf.* Tenure of Office Act, ch. 154, § 3, 14 Stat. 430-431 (purporting to limit the recess-appointment power to vacancies that happen “by reason of death or resignation”).

c. The practice of making an appointment during a recess to fill a vacancy that pre-dated that recess is so well and long established that it is impossible to determine how many such appointments have occurred in the last 190 years. When Presidents nominated recess appointees, their nominations often, but not

always, indicated who previously occupied the position, but they almost never indicated when the predecessor had vacated the office. *See, e.g.*, S. Exec. Journal, 2d Cong., 2d Sess. 125-26 (1792); *id.*, 7th Cong., 2d Sess. 400-04 (1802).

Nevertheless, we may confidently say that at least 35 of President Monroe's 38 successors have, consistent with the long-standing views of their Attorneys General, made recess appointments to preexisting vacancies. *See Noel Canning* App. B at 67a-89a (identifying illustrative appointments). The list includes every President from Buchanan onward.

The D.C. Circuit erred in failing to give any weight to 190 years of Executive practice, in which the Legislature has been seen as acquiescing for nearly 150 years. As discussed above, the long-held positions of the political Branches on a matter of constitutional interpretation are entitled to substantial respect. *See Mistretta*, 488 U.S. at 401. As with all "constitutional provision[s] the phraseology of which is in any respect of doubtful meaning," the Recess Appointments Clause should now be strongly informed by those many decades of "settled and established practice." *The Pocket Veto Case*, 279 U.S. at 689-90 (internal quotation marks omitted).

4. Before 1823, there was no settled understanding that the President was precluded from filling vacancies during a recess that first arose before that recess began

The D.C. Circuit believed its departure from long-established practice was justified by “evidence of the earliest understanding of the Clause,” *Noel Canning*, 705 F.3d at 508. There was, however, no such settled “earliest understanding,” and therefore nothing that could suffice to outweigh the deeply engrained practice discussed above. To the contrary, the issue was repeatedly subject to debate or uncertainty during the administrations of all of Monroe’s predecessors. And each of those Presidents made appointments, or expressed views, that were inconsistent with the D.C. Circuit’s conclusion.

a. During the Washington administration, Attorney General Randolph believed that the President could not make a recess appointment to a vacant office because the vacancy had “commenced” or “may be said to have *happened*” on April 2, 1792, when the office was created, a time when Congress was in session.²³

Yet President Washington himself made at least two recess appointments to fill vacancies that predated the recesses in which they were filled. On November 23, 1793, Washington commissioned Robert Scot as the first Engraver of the Mint—a position created in 1792 by the same statute Randolph had addressed but

²³ Edmund Randolph’s Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti ed., 1990).

that had never been filled.²⁴ And on October 13, 1796, Washington recess-appointed William Clarke to be the United States Attorney for Kentucky, an office that had been vacant for at least two years.²⁵

b. In the Adams administration, the question recurred. Attorney General Lee concluded that statutory authority allowed the President to make such an appointment,²⁶ but Adams explained that his authority stemmed from “the Constitution itself. Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution. . . . I have no doubt that it is my right and my duty to make the provisional appointments.”²⁷

c. President Jefferson appears to have made recess appointments to vacancies first arising before the recess in which he was acting. Indeed, in 1801,

²⁴ See Monroe H. Fabian, *Joseph Wright: American Artist, 1756-1793*, at 61-62 (1985) (explaining that Joseph Wright was performing some engraver duties, but was never commissioned before his death in September 1793); 27 *The Papers of Thomas Jefferson* 192 (John Catanzariti ed., 1997) (noting Scot’s commission); S. Exec. Journal, 3d Cong., 1st Sess. 142-43 (1793) (naming no predecessor in Scot’s nomination); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246.

²⁵ U.S. Dep’t of State, Calendar of the Miscellaneous Letters Received By The Department of State 456 (1897); S. Exec. Journal, 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 70-73 (1978).

²⁶ Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 *The Papers of Alexander Hamilton* 95 n.2 (Harold C. Syrett ed., 1976).

²⁷ Letter from John Adams to James McHenry (Apr. 16, 1799), in 8 *The Works of John Adams* 632-33 (Charles Francis Adams ed., 1853).

he recess-appointed District Attorneys and Marshals for the newly-created District of the Potomac and District of Ohio²⁸—even though all four positions had been created during the Session.²⁹

Moreover, as noted previously, Jefferson acknowledged that the Clause “is certainly susceptible of both constructions” discussed above; he suggested that his administration should eventually attempt to “establish a correct & well digested rule,” but he concluded, in January 1802, that it was “better to give the subject a go-by for the present.”³⁰

d. Similarly, when a district judge left office shortly before the end of the Senate’s session, President Madison issued a recess appointment to fill that

²⁸ See S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802) (commission issued to Walter Jones, Jr., as District Attorney for Potomac during “the late recess”); Letter from Levi Lincoln to Jefferson (Apr. 9, 1801), in 33 *The Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting George Dent’s acceptance of the Marshal position for Potomac); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Washington, D.C.* 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent’s recess appointment); 36 *Papers of Thomas Jefferson* 328, 331, 332 (including “William McMillan” and “James [T]indlaye” in the “vacancies unfilled” portion of a key Jefferson created, and noting their recess appointments to Ohio positions); see also *Noel Canning* App. B 65a-66a.

²⁹ See Act of Feb. 13, 1801, ch. 4, §§ 21, 36-37, 2 Stat. 96-97, 99-100; Act of Feb. 13, 1801, ch. 4, §§ 4, 36-37, 2 Stat. 89-90, 99.

³⁰ 36 *Jefferson Papers* at 433 (letter to Nicholas).

vacancy.³¹ And when legislation signed on the last day of the Senate’s session created new positions, *see* Ch. 95, 3 Stat. 235; S. Journal, 13th Cong., 3d Sess. 689-90 (1815), Madison filled them with recess appointees. *See* S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting the recess appointments of Roger Skinner and John W. Livingston); *see also Noel Canning* App. B 67a. In 1815, Madison also recess-appointed the first United States Attorney and Marshal for the Michigan Territory—more than *two years* after the positions’ creation.³²

e. Thus, the *Noel Canning* court erroneously believed that the overwhelmingly predominant reading of the Recess Appointments Clause since 1823 could be rejected because “early interpreters read ‘happen’ as ‘arise.’” 705 F.3d at 510. This Court should follow the Second, Ninth, and Eleventh Circuits and conclude that the Clause applies to all vacancies that exist during a recess.

C. No Other Recess Appointments Issue Has Been Properly Raised In this Case

As noted above, *see infra* n.8, employers in some other Board cases have articulated an additional recess-appointments challenge beyond the challenges invoked by INSEC here: they have argued that notwithstanding that the Senate

³¹ Edward A. Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 *Cardozo L. Rev.* 377, 400-01 (2005).

³² Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816); *see also Noel Canning* App. B 67a.

itself called its January break a “recess,” *see, e.g.*, 157 Cong. Rec. S8783 (daily ed., Dec. 17, 2011), the Senate was actually not in recess when the President made the challenged appointments because every few days it had been holding seconds-long *pro forma* sessions at which the Senate was prohibited from conducting any business. INSEC in this case, however, has not raised any such challenge.

Accordingly, the argument is forfeited. *See, e.g., Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239-40 (1st Cir. 2013) (“We have repeatedly held, with a regularity bordering on the monotonous, that arguments not raised in an opening brief are waived.” (internal quotation marks omitted)).

That conclusion is not altered by INSEC’s erroneous assertion, unaccompanied by any argument or citation, that a lack of a Board quorum means “there is no jurisdiction for this Honorable Court to remand or act in any other way than to dismiss this case.” (Br. 11). Truly “jurisdictional” challenges go to *this Court’s* jurisdiction. *See Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (emphasizing that because of the “drastic” consequences and prejudice that can flow from calling something jurisdictional, “a rule should not be referred to as jurisdictional unless it governs *a court’s* adjudicatory capacity” (emphasis added)). A quorum challenge goes only to the Board’s authority to hear an administrative case, and thus does not implicate *this Court’s* jurisdiction.

Indeed, 29 U.S.C. 160(e) squarely gives this Court jurisdiction because it

grants jurisdiction to entertain petitions to enforce a Board “order.” 29 U.S.C. 160(e); *see also* 29 U.S.C. 160(f) (granting jurisdiction over petitions to review “a final order of the Board.”). The decision the Board is seeking to enforce is plainly a Board “order” as it declares that INSEC violated the National Labor Relations Act and directs remedies. *Cf.* 5 U.S.C. 551(6) (defining an “order” under the APA). And the Board’s order here is obviously “final.” Any challenge to Board members’ appointments would not implicate the existence or finality of the Board’s order, but only its legal validity: such a claim would assert, in substance, that the Board entered a final order without the lawful authority to do so.³³

That conclusion is reinforced by recent decisions from the Sixth and Eighth Circuits, both of which expressly held that quorum challenges to Board decisions were not “jurisdictional” and could thus be forfeited. *See NLRB v. Relco Locomotives, Inc.*, ___ F.3d ___, 2013 WL 4420775, at *24-27 (8th Cir. Aug. 20, 2013); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 405-06 (6th Cir. 2013). And a Second Circuit decision is also in accord. *See NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974) (party forfeited argument that the Board

³³ Furthermore, a conclusion that orders issued by invalidly appointed officials are not “orders” would perversely insulate many such orders from judicial review at the behest of aggrieved parties. Unlike the Board’s unfair labor practice orders, which are inoperative until judicially enforced, most other agencies’ order are self-enforcing unless judicially overturned. If such directives ceased to be “orders” because of appointment problems, there would be no “orders” for jurisdictional purposes, and the courts would lack jurisdiction to overturn them. The absurdity of that result speaks for itself.

improperly used staff attorneys in lieu of Board members on a panel).

Noel Canning is not to the contrary. There, the court addressed the separate issue of whether a party is statutorily required to raise quorum challenges before the Board itself in order to preserve them for later judicial review. 705 F.3d at 497-98; *see also* 29 U.S.C. 160(e). And in concluding that a quorum challenge did not need to be raised administratively, *Noel Canning* invoked a special statutory provision that excuses exhaustion in “extraordinary circumstances;” the court found such circumstances present because a quorum challenge goes “to the very power of the Board to act and implicate[s] fundamental separation of powers concerns.” *Noel Canning*, 705 F.3d at 497-98. *Noel Canning* did not find that the *court of appeals*’ jurisdiction was threatened in any way by the Board’s arguable lack of a quorum.³⁴

Finally, this Court should not follow the Third Circuit’s mistaken ruling in *New Vista*, which wrongly held that Board appointment issues are “jurisdictional” in the sense that they require *sua sponte* review by a court of appeals.³⁵ 719 F.3d

³⁴ The Board does not urge that 29 U.S.C. 160(e) bars a *pro forma* challenge here. At the time INSEC’s case was decided, any three-member panel the Board could have provided would have included at least two members who would have had to invalidate his or her own appointments in order to accept a recess appointments challenge based on *pro forma* sessions.

³⁵ The government’s pending rehearing petition in *New Vista* challenges the Third Circuit’s jurisdictional holding, as well as its substantive analysis of the Recess Appointments Clause.

at 210-14. *New Vista*'s holding—offered without the benefit of full briefing on the issue from the parties³⁶—was based on the doubly erroneous belief that (1) anything that implicates an agency's authority to act implicates its "jurisdiction," and (2) appellate courts must *sua sponte* superintend agency "jurisdiction" in the same way they police the jurisdiction of lower federal courts. *Id.*

For one thing, to "ward off profligate use of the term 'jurisdiction,'" the Supreme Court has articulated a clear-statement rule that must be applied before determining that something is "jurisdictional." *Sebelius v. Auburn Reg. Med. Ctr.*, 133 S. Ct. 817, 824 (2013). Under that test, courts inquire "whether Congress has clearly state[d] that the rule is jurisdictional; absent such a clear statement . . . courts should treat the restriction as nonjurisdictional in character." *Id.* (internal quotation marks omitted) (alteration in original). This test does not support the view that Board appointment issues are jurisdictional, as 29 U.S.C. 153(b) sets forth the Board's quorum and delegation authority, and that statute neither uses the word "jurisdiction" nor clearly indicates that Congress intended the severe consequences that attach to that label.

It does not matter that 29 U.S.C. 153(b) speaks more generally to the Board's authority. The Supreme Court has often classified challenges to an agency decisionmaker's "authority" as nonjurisdictional. *See, e.g., Auburn*, 133 S. Ct. at

³⁶ *See NLRB v. New Vista Nursing & Rehabilitation, LLC*, Nos. 11-3440, 12-1027, & 12-1936 (3d Cir.) (order of February 15, 2013).

824-25 (time limit for filing a claim with administrative agency); *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991) (claim that official lacked lawful authority to act); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (alleged defect in agency examiner's appointment). Numerous appellate decisions are in accord.³⁷ And *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010), is not to the contrary as it does not even mention the word "jurisdiction."

Furthermore, even if the recess-appointment issue went to the Board's "jurisdiction," it would not implicate the rule that an appellate court must *sua sponte* consider the jurisdiction of a "lower court[]," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Equation of agency authority with district court jurisdiction is fundamentally mistaken, as the Supreme Court recently recognized in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), just a few days after *New Vista* was decided. In *City of Arlington*, the Court rejected "a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts." *Id.* at 1868. Indeed, because the

³⁷ For example, in *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), a statute required copyright cases to be heard *en banc* by the Copyright Royalty Judges, *see* 17 U.S.C. 803(a)(2), but a party was held to have forfeited an Appointments Clause challenge to the judges' validity. Similarly, in *In re DBC*, 545 F.3d 1373, 1377-80 (Fed. Cir. 2008), a statute required an agency to have three-member panels, *see* 35 U.S.C. 6, but the court refused to consider an untimely claim that panel members were appointed improperly. *See also supra* p. 51 (discussing opinions from the Second, Sixth, and Eighth Circuits in the Board context).

question in a challenge to agency action “is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as ‘jurisdictional.’” *Id.* at 1868-71; *see also id.* at 1870.

Moreover, if this Court were to adopt the Third Circuit’s mistaken analysis, the result would threaten to impose significant and unwarranted burdens on courts within this Circuit, forcing them to consider every issue that goes to numerous different agencies’ statutory authority to adjudicate. Indeed, if the Third Circuit’s analysis were correct, it would seem to mean that whenever this Court encountered such varied entities as the Federal Energy Regulatory Commission, the Federal Communications Commission, the National Transportation Safety Board, the Federal Maritime Commission, the Tax Court, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, and the Benefits Review Board³⁸—to name just a sample—this Court would have to *sua sponte* assure itself that the relevant officials had been properly appointed, that their terms had not expired, and that the agency had met whatever other statutory criteria are viewed as going to its “authority.” It is highly unlikely that Congress intended to impose such a significant and unwanted burden on the courts.

³⁸ *See* 42 U.S.C. 7171(e); 47 U.S.C. 154(h); 49 U.S.C. 1111(f); 46 U.S.C. 302; 26 U.S.C. 7444(d); 42 U.S.C. 5841(a)(1); 29 U.S.C. 661(f); 33 U.S.C. 921(b)(2), (5).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

STUART F. DELERY
Assistant Attorney General

RICHARD F. GRIFFIN, JR.
General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

JENNIFER ABRUZZO
Deputy General Counsel

DOUGLAS N. LETTER
SCOTT R. McINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

s/ Julie B. Broido
JULIE B. BROIDO
Supervisory Attorney

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

/s/ Greg P. Lauro
GREG P. LAURO
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2965

November 2013

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 13-1688
v.)	
)	
INSTITUTO SOCIO ECONOMICO)	
COMMUNITARIO, INC.)	
)	Board Case No.
Respondent)	24-CA-11762

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,215 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, D.C.
this 8th day of November, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First 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.

Alberto J. Bayouth-Montes
Carlos E. George-Iguina
O’Neill & Borges LLC
250 Munoz Rivera Avenue
Ste 800
San Juan, PR 00918-1813

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, N.W.

Washington, DC 20570

(202) 273-2960

Dated at Washington, D.C.

This 8th day of November, 2013