No. 12-1514

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ENTERPRISE LEASING COMPANY-SOUTHEAST, LLC

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement of an Order issued against Enterprise Leasing Company-Southeast, LLC ("Enterprise") for failing to bargain with the International Brotherhood of Teamsters, Local 391 ("the Union") in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 158(a)(5) and (1)). The Board had subject matter jurisdiction over the unfair labor practice proceeding pursuant to Section 10(a) of the Act (29 U.S.C. §

160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

On April 18, 2012, the Board issued its Decision and Order, which is reported at 358 NLRB No. 35. (A. 463-65.)[1] Because the Board's Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 11-RC-6746), the record in that proceeding is part of the record before the Court, pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) of the Act does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board . . . ." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999) (citing cases).[2]

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[1] "A." references are to pages of the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy*'s holding that the Board lacks the above-described authority to resume processing the representation case, however, rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor

The Board's application for enforcement filed on April 24, 2012, was timely because the Act places no time limit on the initiation of enforcement proceedings. The Board's Order is final with respect to all parties. The Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. § 160(e)) because Enterprise committed the unfair labor practice in Raleigh, North Carolina.

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board reasonably found that Enterprise violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of its employees following an election. Resolution of this issue is dependent upon two subsidiary issues:

1. Whether the Board acted within its broad discretion in overruling three of Enterprise's election objections concerning an alleged threat by a union

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practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair labor practice claim when an earlier court decision implicitly rejected that claim).

organizer, the Union's use of an employee's photograph on a campaign flyer, and inclement weather on the first day of the two-day election.

2. Whether the President's recess appointments of three Board Members during a 20-day period in which the Senate had declared by order that "no business would be conducted," occurred within a "Recess of the Senate" under the Constitution's Recess Appointment Clause.

STATEMENT OF THE CASE

The Board found that Enterprise violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of an appropriate unit of its employees at its car rental facility at the Raleigh-Durham International Airport. (A. 464.) Enterprise does not dispute (Br. 7) that it refused to bargain with the Union to contest the Board's certification of the Union. Before the Court, Enterprise also contends that the Board lacked a quorum to issue its Decision and Order in this case. Thus, if the Court upholds the Board's overruling of Enterprise's election objections and rejects its challenge to the validity of the Board's Order, the Order is entitled to enforcement.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

Enterprise operates a car rental facility located at the Raleigh-Durham International Airport. (A. 329, 334.) On November 9, 2010, the Union filed with

the Board a petition for an election seeking to represent a unit of Enterprise's employees. (A. 1.)

On December 16 and 17, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election. (A. 2-3.) Specifically, the polls were open and employees had the opportunity to vote on December 16 from 7:00 p.m. to 9:00 p.m., and on December 17 from 10:00 a.m. to 12:00 p.m., and again from 3:00 p.m. to 5:00 p.m. (A. 9.)

In a unit of 101 employees, the Union won the election by a vote of 44 to 41, with 2 challenged ballots, an insufficient number to affect the election results. (A. 215; 25, 53.) The Regional Director, in response to six election objections filed by Enterprise alleging that the Union had engaged in conduct that warranted overturning the election, directed a hearing. (A. 13-14, 26-30.)

After the hearing, the Board's hearing officer issued a report on February 7 recommending that the Board overrule all six of Enterprise's election objections. (A. 226-37.) Enterprise then filed with the Board exceptions to the hearing officer's report, but only raised three of Enterprise's objections, an alleged threat by a union organizer, the Union's alleged misuse of an employee's photograph, and the alleged impact of inclement weather. (A. 242-44.) On December 29, the Board (Chairman Pearce and Member Becker, Member Hayes dissenting, in part) issued its Decision and Certification of Representative adopting the hearing

officer's findings and recommendations and certifying the Union as the employees' collective-bargaining representative. (A. 322-26.)

B. The Unfair Labor Practice Proceeding

Following the Board's certification of the Union, the Union requested that Enterprise begin negotiating for a collective-bargaining agreement, but Enterprise refused. Based upon the Union's amended unfair labor practice charge, the Board's Acting General Counsel issued a complaint alleging that Enterprise's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A. 463; 327-33.) In its answer, Enterprise admitted its refusal to bargain, but disputed the validity of the Board's certification of the Union. (A. 463; 335.)

In light of Enterprise's admission, the Board's Acting General Counsel moved for summary judgment, and the Board issued a notice to show why the motion should not be granted. (A. 463; 337-46.) Enterprise filed a combined motion in opposition to summary judgment and to disqualify three Board members from ruling on the Acting General Counsel's motion for summary judgment. (A. 463; 459-62.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 18, 2012, the Board (Chairman Pearce, Members Hayes and Griffin) issued its Decision and Order granting the General Counsel's motion for summary judgment. (A. 463-65.) The Board found that all issues raised by Enterprise were or could have been litigated in the prior representation proceeding, that it had not offered to adduce any newly discovered or previously unavailable evidence, and that it had not alleged any special circumstances that would require the Board to reexamine its Decision and Certification of Representative. (A. 463.) Accordingly, the Board found that Enterprise violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (A. 463-65.)

The Board's Order requires Enterprise to cease and desist from engaging in the unfair labor practice found and from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 464.) Affirmatively, the Board's Order requires Enterprise to bargain with the Union upon request and embody any understanding reached in a signed agreement. The Order also requires Enterprise to post a remedial notice and, if appropriate, distribute copies of the notice electronically. (A. 464.)

SUMMARY OF ARGUMENT

1. Enterprise admittedly refused to bargain with the Union to challenge the Board's certification which it claims was based on the Board's erroneous overruling of its election objections. On review, Enterprise has the heavy burden of showing that the Board abused its discretion in overruling the objections and in finding that Enterprise failed to prove that the employees' free choice in the election was materially affected. Enterprise failed to meet that burden, and the Board's findings are supported by the credited evidence and consistent with law.

First, the Board reasonably overruled Enterprise's objection alleging that union organizer Jones threatened employee Knowles by telling him not to "burn his bridges." The context of Jones' comment demonstrates that it was merely an innocuous statement and not a physical or otherwise coercive threat. Second, the Board reasonably overruled Enterprise's objection alleging that the Union wrongly used a photo of employee Henriquez on a campaign flyer. There is no evidence that Henriquez objected to having his photo taken, which was done by a third-party union supporter, no evidence that the Union misrepresented his support for the Union, or even evidence that he objected to the photo's use. He was one of eight employees depicted on the flyer, and the Union had apparently secured the consent of all others. Third, Enterprise's objection alleging that inclement weather caused a determinative number of eligible voters to be unable to vote in the election was

not demonstrated by the evidence presented. Accordingly, there was no basis warranting overturning the election.

2. Finally, Enterprise argues that the President lacked the power to make recess appointments of three Board Members on January 4, 2012. The President made the appointments during a 20-day period in which the Senate had declared itself closed for ordinary business. A continuous 20-day period with (in the Senate's own words) "no business conducted" is unquestionably a "Recess" within the meaning of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. Enterprise's contrary position rests on the proposition that the Senate can somehow transform a 20-day recess into a series of short non-recess periods, and thereby unilaterally block the President from exercising his constitutional authority to make recess appointments by having a lone Senator gaveling in an empty Senate chamber for a few seconds every three or four days for what the Senate itself formally designates "*pro forma* sessions only, with no business conducted." That proposition is utterly misconceived.

The term "Recess of the Senate" as used in the Recess Appointments Clause has a well-understood meaning that has long been employed by both the Legislative and Executive Branches: the term refers to a break from the Senate's usual business. Here, by its own order, the Senate took a break from its usual business for the entire 20-day period between January 3 and January 23, and the

periodic *pro forma* sessions did nothing to interrupt or alter the character of that recess. And all other available evidence demonstrates that the Senate as a body regarded its 20-day January break to be functionally indistinguishable from other breaks at which *pro forma* sessions are not held, and during which the Senate is clearly away on recess.

Enterprise's position, if adopted, would upend a long-standing and carefully calibrated constitutional balance of power between the Senate and the President with respect to presidential appointments. The Constitution has long been understood as giving the Senate the choice between remaining continually in session to conduct business, in which case the ordinary advice-and-consent requirement applies to presidential nominations, or suspending the conduct of business and freeing Senators to return to their respective States, in which case the President is authorized by the Constitution to make recess appointments that do not require advice and consent of the Senate but that last only until the end of the Senate's next session. Under Enterprise's view, however, the Senate need not make any such choice—it can suspend its conduct of any Senate business and thus not be available to provide advice and consent to the President on nominations but at the same time block the President from making any appointments under the Recess Appointments Clause through the simple expedient of holding periodic "sessions" attended by a single Senator for only a few seconds, and during which

the conduct of business has been expressly prohibited. Enterprise offers no justification for allowing the Senate to use such an artifice as a novel means to aggrandize its power while effectively eliminating the President's constitutional recess appointment power.

ARGUMENT

I. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING ENTERPRISE'S ELECTION OBJECTIONS AND THEREFORE PROPERLY FOUND THAT ENTERPRISE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly-certified collective-bargaining representative of a unit of its employees.[3] In the instant case, the Center admits (Br. 7) that the Board certified the Union, but claims (Br. 21) that the certification was invalid because the Union engaged in objectionable pre-election misconduct. As we now show, Enterprise's contentions, however, provide no basis to warrant setting aside the election. *See NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 441, 445-46 (4th Cir. 2004).

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[3] An employer that violates Section 8(a)(5) of the Act also commits a "derivative" violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

A. Applicable Principles and Standard of Review

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Therefore, this Court "presume[s]" the validity of a Board-supervised election, and will "overturn such an election only if the Board has clearly abused its discretion." *Media Gen.*, 360 F.3d at 441.

A party seeking to have an election set aside "bears a heavy burden" and "must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election." *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000). Specifically, if the alleged misconduct is made by a party to the election or its agent, the objecting party must show that the conduct occurred and that it "materially affected" the employees' free choice in the election. *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). Less weight, however, is accorded the conduct and statements made by third parties because "third parties are not subject to the deterrent of having an election set aside, and third party statements do not have the institutional force of statements made by the employer or the [u]nion." *Id*. Thus, an election will be set aside for third-party misconduct only if "the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might

reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representative." *Id*.

When evaluating whether a party has met its heavy burden of demonstrating conduct sufficient to warrant the Board's setting aside an election, this Court is "mindful of the real world environment in which an election takes place." *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1003 (4th Cir. 1997). "Although the Board strives to maintain laboratory conditions in elections, clinical asepsis is an unattainable goal. An election is by its nature a rough and tumble affair, and a certain amount of exaggerations, hyperbole, and appeals to emotion are to be expected." *Id*.; *see Case Farms of North Carolina, Inc. v. NLRB*, 128 F.3d 841, 844 (4th Cir. 1997).

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, 493 (1951). As a result, this Court will not "displace the Board's choice between two conflicting views" of the evidence, even where it "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488; *accord Grinnell Fire Protect. Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000).

B. The Board Reasonably Overruled the Election Objection Alleging a Threat by a Union Organizer

Enterprise claims that the election should be set aside because union organizer Steve Jones threatened employee Damion Knowles in the presence of other employees. (A. 13.) The Board overruled the objection, finding that Enterprise failed to show that Jones' statement to Knowles "reasonably tend[ed] to interfere with employee free choice in the election." (A. 230, 322 n.2.) That conclusion was reasonable.

The credited evidence upon which the Board overruled the objection is undisputed. On June 16, at approximately 6:30 p.m., union organizer Jones arrived at the customer service building for the preelection meeting with the Board agent who would be conducting the 7:00 p.m. session. (A. 228, 229; 80-81, 138, 142-43, 167.) While waiting for the Board agent to arrive, Jones spoke to Knowles, a customer service representative, who was seated behind the counter. (A. 228-29; 73-74, 131-32, 142-43, 167.) Jones, who had met Knowles a few weeks earlier, asked Knowles how his interview had gone for a management position that Knowles had mentioned in that earlier conversation. Knowles replied that the interview went well, and that with more experience he would receive his own store in Dallas, Texas. Jones noted that the Union had members in the Dallas area and asked Knowles if he still had Jones' business card. (A. 229; 76-78, 133-35, 140, 143-44.) After Knowles answered affirmatively, Jones stated, "[w]ell, keep it, you

know, you never know, you might need me sometime. You never want to burn any bridges." (A. 229; 134-35, 140-41, 143.) The Board agent then arrived, and the parties left for the pre-election meeting. (A. 143-44, 167.) Employee Gloria Mayo, who was standing nearby, heard "a little bit" of the conversation, but "wasn't paying much attention." (A. 228-29; 108-09.)

On these facts, the Board (A. 229-30) reasonably evaluated Jones' comment to Knowles not to "burn any bridges" in the context of Jones' discussing Knowles' potential move to a management position, and for the undisputed reason that "Knowles may need Jones sometime in the future." Given those circumstances, the Board explained (A. 230) that Jones merely "implie[d] that Knowles should not forsake a good relationship with Jones, even if Knowles is moving into management, because no one knows what the future may bring." Therefore, the Board reasonably found (A. 230) that an employee would not "reasonabl[y] interpret[] Jones' comment as a threat of physical harm." Indeed, even when a union agent has directly told employees that they "'had to' vote for the union,'" something that Jones did not do here, the Board, with court approval, has found such conduct "innocuous." *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003). Similarly, this Court has held that a union agent did not engage in coercive conduct when he told employees that they should sign a petition stating

they would vote for the union to "separate the men from the boys." *NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 438 (4th Cir. 2004).

Moreover, Knowles' testimony that he felt physically threatened by Jones' words (A. 229; 90-91, 93) is not dispositive. Not only is it contrary to the Board's assessment of Knowles' credibility (A. 229, 322 n.1), but Jones' true feelings are not determinative given that the "'subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Media Gen.*, 360 F.3d at 442 (quoting *K Mart Corp.*, 322 NLRB 1014, 1015 (1997)).[4]

Moreover, contrary to Enterprise's contention (Br. 16, 21-24), the Board also reasonably found (A. 230) that even if, at best, Jones' statement could be viewed as a threat to withhold future union assistance from Knowles, the evidence would still be insufficient. As shown above, Enterprise was required to show not only that improper conduct occurred, but that the conduct materially impacted the election. Here, the Board found (A. 230) that objectively, it was highly unlikely that a voter who expected to enter a management program at a distant location, and

[4] The Company disingenuously argues (Br. 15, 21-24) that the Board misunderstood its objection and incorrectly assessed Jones' comment as if it were only alleged to be a threat of physical violence. In addition to Jones' testimony that he felt physically threatened, however, the Company's letter brief to the hearing officer only argued that the facts here were analogous to a case involving a physical threat. (A. 230; 224.) Therefore, it was hardly "inexplicabl[e]," as the Company now claims (Br. 21), for the Board to "analyze[] the comment as an [alleged] threat of physical violence."

who believed that he had no need for any union representation, would change his vote based on the potential withholding of future union assistance. Nor is there any objective evidence that Jones' comment could have impacted other voters, as only one other disinterested employee was present when Jones made the comment. Knowles' general testimony (Br. 23, A. 83) that he widely disseminated Jones' statement to other employees is devoid of any specifics.

C. The Board Reasonably Overruled the Objection Alleging that the Union's Use of an Employee's Photograph on a Campaign Flyer Warranted Overturning the Election

Next, Enterprise claims that the election must be overturned because the Union used a photograph of employee Roberto Henriquez on a campaign flyer that had been taken previously by a third-party union supporter without his prior authorization. (A. 13.) The Board (A. 322-24) reasonably overruled the objection.

The credited evidence establishes that prior to the election, Chafik Omerani, an employee and union supporter, took employee Henriquez's photograph in a food court at a mall near their workplace. (A. 233 & n.8; 105-06.) A few days prior to the election, the Union mailed a campaign flyer to all eligible voters with the pictures of eight employees, including Henriquez. (A. 233& n.8, 322; 170, 221-23.) One side of the flyer contained the words, "Yes. Everybody can make the right choice!! To end Unfair treatment & Unfair pay!!" (A. 322; 221.) The words were surrounded by the photographs of the eight employees. (A. 322; 221.)

The other side of the flyer had a "Dear Colleagues" note that asked employees to let the Union be their "voice" for better pay, benefits, and treatment. (A. 322; 223.) Prior to the election, the Union also distributed at least one other flyer that contained pictures of employees, but not Henriquez's picture. (A. 52-53, 201.) Although the Union had a general policy of not using employees' images without their prior consent and had apparently obtained consent from seven of the employees depicted on the flyer (A. 324 & n.5; 109-11), it failed to obtain Henriquez's permission (A. 233 & n.8, 322; 104).

Under the Board's holding in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), approved by this Court in *Case Farms of North Carolina, Inc.*, 128 F.3d 841 (4th Cir. 1997), the Board will not "probe into the truth or falsity of the parties' campaign statements," and does not "set elections aside on the basis of misleading campaign statements." *Case Farms*, 128 F.3d at 844 (quoting *Midland*, 263 NLRB 127at 133). As this Court explained the Board's *Midland* policy reasonably presumes that employees are "mature individuals" who are generally capable of determining for themselves the extent to which they should rely on partisan election propaganda. *Id*.

On these facts, and the settled principles that the Board will to set aside an election merely because a party to the election has made a misleading statement, the Board (A. 322-23) reasonably found that, at most, "the Union implicitly

misrepresent[ing] that Henriquez authorized the use of his image in the flyer," would not warrant overturning the election. Moreover, as the Board explained (A. 322, 324), there is no evidence that the Union in fact misrepresented Henriquez's support for the Union, or (A. 324) that he objected to the Union's use of his photo on the flyer. Nor, as the Board found (A. 322-23), is there any evidence of pervasive misrepresentations regarding employee authorization for use of photographs, or any claim that this case falls under an exception to *Midland*, which would apply where a party's use of forged documents "render[s] the voters unable to recognize propaganda for what it is." *Midland*, 263 NLRB at 133. Accordingly, the Board reasonably concluded (A. 322-23) that, even assuming that "a reasonable reader of the flyer would understand it to suggest that Henriquez had authorized the use of his image," such a misrepresentation would not serve as a basis for setting aside the election.

The Board's application of its *Midland* rule here is fully consistent with prior Board precedent upholding elections and overruling election objections in circumstances where unions circulated campaign literature that contained the names of employees, or attributed quotes to employees without their consent. *See Somerset Valley Rehab. & Nursing Center*, 357 NLRB No. 71, 2011 WL 4498270, at*1(2011) (overruling objection where a union falsely quoted union supporters as actually stating that they would vote for the union), petition for review pending

Case Nos. 12-1031 and 12-1505 (3rd Cir.); *Champaign Residential Servs*. *Inc*., 325 NLRB 687, 687 (1998) (overruling objection where two employees did not know that their signatures in support of a union would be shared with others on a flyer); *BFI Waste Servs.*, 343 NLRB 254, 254 n.2 (2004)(overruling objection where a union arguably misrepresented quotes from two employees); *Findlay Indus. Inc.*, 323 NLRB 766, 766 n.2 (1997) (overruling objection where a union, at most, misrepresented that two employees would vote for it). As the Board explained in *BFI Waste*, which applies with equal force here, it is not condoning a union's representing employees' union views without proper verification, but "simply find[ing] under the circumstances" of a particular case that a union's conduct did not warrant overturning the election, particularly where "the alleged misrepresentations were not 'pervasive.'" 343 NLRB at 254 n.2. Tellingly, Enterprise (Br. 28) does not dispute that the Union's single unauthorized use of employee Henriquez's photo in a union flyer did not warrant overturning the election under the settled principles of *Midland*.

Contrary to Enterprise's contention (Br. 16, 25-33), the Board (A. 323-24) did not err by distinguishing this case from inapplicable decisions in which the Board did not apply its *Midland* standard but found objectionable the unauthorized use of photographs or video in other contexts. For example, Enterprise cites (Br. 30-32, 35) *Randell Warehouse of Arizona Inc.*, 347 NLRB 591, 591, 594 (2006), in

which the Board found objectionable a union's unexplained photographing of employees while they were handed campaign literature by union representatives prior to the election. The basis for the Board finding of objectionable conduct in *Randell Warehouse* was that a union's open photographing of employees as they were engaged in the protected activity of deciding to accept or decline union literature would reasonably coerce the affected employees. 347 NLRB at 591, 594. No coercion is present here. Nor, as the Board further explained (A. 323), "does Enterprise assert that the photographer here was an agent of the Union, and the holding in *Randell Warehouse* applies only to union actions, not to the actions of employees."

Similarly mistaken is Enterprise's attempt (Br. 25-27) to compare the Union's conduct to the employer conduct that the Board found objectionable in *Sony Corp. of America*, 313 NLRB 420 (1993), and *Allegheny Ludlum Corp*., 333 NLRB 734 (2001), *enforced*, 301 F.3d 167 (3rd Cir. 2002). In *Sony*, the Board found that an employer committed an unfair labor practice when, during a decertification campaign, it tricked 140 employees into having their photos taken and then, without their consent, used the photos in a videotape that represented them as supporting the decertification petition, and many employees vehemently objected. 313 NLRB at 420, 422-26, 428-29. Similarly, in *Allegheny Ludlum*, the Board found that the employer committed an unfair labor practice by pervasively

videotaping its employees for an antiunion video, with little or no safeguards provided to protect employees' decision to participate, an action that led many employees to complain about the employer's conduct. 333 NLRB at 734-35. Here, as the Board explained (A. 324), even assuming those cases involving different allegations and legal theories could be applied here, unlike the employees in the *Sony* and *Allegheny Ludlum* cases, "there is no evidence that Henriquez did not support the Union, that he asked the Union to cease using his image, or even that he did not want the Union to use his image."[5] At most, this case involves a simple failure by the Union to obtain the prior authorization of a single employee for use of his photo on a single flyer, conduct which the Board in its discretion properly found to be insufficient to warrant setting aside the election.

There is also no merit to Enterprise's unfounded contention (Br. 25-33) that the Board erred in not applying a "per se rule" that any use of an unauthorized photograph warrants overturning an election, and cites the Board's decisions in *Allegheny Ludlum* and *Sony*, which Enterprise mistakenly contends applied such a per se rule. Although the Board in *Allegheny Ludlum* set forth five prerequisites for permissible employer videotaping of employees for a campaign video which

[5] The employer's duplicitous actions in *Valerie Manor Inc.*, 351 NLRB 1306, 1322 (2007) (Br. 27, 29), render that case inappropriate here. There, the employer engaged in objectionable conduct by taking all of the signatures from a "vote yes" union petition, transferring them to a pro-employer leaflet, and informing employees that the signatories had changed their mind.

included assurances that an employee's participation was voluntary (333 NLRB at 733-34), it also explicitly stated that it was not creating a per se rule that "employers must obtain employees' explicit consent before including their images in campaign videotapes." 333 NLRB at 744. Further, *Allegheny Ludlum* stated that its earlier decision in *Sony* had not created such a per se rule. *Id.* Moreover, the test set forth by the Board in *Allegheny Ludlum* was in response not only to pervasive videotaping not present here, but also to its concern that the employer's solicitation of the employees to appear in a videotape constituted an unlawful polling of their union views. *Id*. at 733.

Enterprise's attempt (Br. 27, 29, 33) to characterize *Sprain Brook Manor Nursing Home, LLC*, 348 NLRB 851 (2006), and *Brentwood At Hobart v. NLRB*, 675 F.3d 999 (6th Cir. 2012), as also supporting its notion of a per se rule, is equally unavailing. In *Sprain Brook*, the Board declined to overturn an election because the union had purportedly photographed employees without their consent and then used the photographs in its campaign materials. 348 NLRB at 851. The Board in *Sprain Brook* noted that the union had obtained signed consent forms from employees prior to using their photographs (*id.*), but it did not, contrary to Enterprise's claim, and as the Board stated here (A. 323), "hold that the use of employee photographs without such consent is per se objectionable." Similarly, *Hobart* provides no support for Enterprise's contention, particularly given that

there the Sixth Circuit merely recited an unremarkable proposition that unauthorized photos "may taint" and election, but found that the employer waived its claim by failing to present it to the Board. 675 F.3d at 1001, 1005-07.

Finally, Enterprise again mistakenly points (Br. 32) to *Allegheny Ludlum* to assert that the Board was wrong to apply a different standard to union and employer conduct. As the Board explained (A. 323), while its decision in *Allegheny Ludlum* established rules regarding an employer's use of antiunion material that could constitute an unlawful attempt to solicit employees' views toward the union, "it did not address the issue here—whether a union, which is permitted to question employees about their support for representation, engages in objectionable conduct if it solicits employees to have their photographs appear in campaign literature but includes the image of a single employee who did not so consent."

Moreover, as the Board reasonably noted (A. 323) an employer and a union *are* held to different standards in evaluating the coerciveness of polling. Indeed, as this Court has explained, quoting a sister circuit, "'although pre-election polling by an employer is *per se* objectionable, a union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive.'" *NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 441 (4th Cir. 2004) (quoting *Maremont Corp. v. NLRB*, 177 F.3d 573, 578 (6th Cir. 1999)); *accord Louis-Allis*

Co. v. NLRB, 463 F.2d 512, 517 (7th Cir. 1972). As the Fifth Circuit has explained, "[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). Accordingly, the Board did not abuse its discretion in overruling Objection 4.

D. The Board Reasonably Concluded that Inclement Weather Did Not Affect the Election

In Objection 6, Enterprise claimed that an ice storm on December 16 in the Raleigh-Durham metropolitan area caused a determinative number of eligible voters to not vote in the election held on December 16 and 17. (A. 13.) To the contrary, the Board reasonably concluded that Enterprise failed to show "that the severity of the weather conditions reasonably denied employees an adequate opportunity to vote." (A. 235, 236, 322 n.2.)

At the hearing, Enterprise presented evidence to support its claim that the ice storm had impacted the election. That evidence showed that on December 16, Wake County, the county where the Raleigh-Durham International Airport and Enterprise's car rental facility are located, had between 1/8 and 1/10 of an inch of "glaze" from freezing rain, and 1/2 to 1 inch of snow. (A. 235; 49, 55-56, 63-64, 421-22, 426.) That day, some of Wake County's libraries were closed, while

others had delayed openings or early closings. (A. 235; 423-24.) In addition, schools and business throughout the metropolitan area were closed or had delayed openings. (A. 235; 426-27.) On December 17, a newspaper article stated that "[t]he remnants of snowfall and freezing rain that fell on [December 16th] could ice over early [that] morning, creating black ice on some roadways" (A. 275; 428), while another article referred to "patches of black" ice from freezing temperatures "that could affect roadways during the morning rush" (A. 235; 215). On December 17, "[m]ost school systems," including Wake County's, opened on a two-hour delay (A. 275; 428), and the Wake County Register of Deed's Office had a delayed opening (A. 235; 425). The Raleigh-Durham International Airport, and Enterprise's car rental facility, remained open for regular hours on both days. (A. 235; 54, 65-66, 70.) Neither party requested that the Board postpone the election. (A. 70-71.)

On these facts, the Board reasonably overruled Enterprise's election objection. As noted, neither the airport nor Enterprise's car rental facility closed at any time on December 16 or 17 because of the weather. Moreover, as the Board emphasized (A. 236) on December 17, "there is no evidence or reason to believe that any ice [that developed overnight] on the roadways lasted beyond the early morning hours of December 17 and affected the ability of any employee to vote during the 10:00 a.m. to 12:00 p.m. or 3:00 p.m. to 5:00 p.m. polling periods that

day." Indeed, as shown, schools in the area merely had, at most, delayed openings on the morning of December 17, and local newspaper articles warned only of possible icy roads early that morning, but not later when the election was conducted.

The Board's reasonable finding is not undermined by Human Resources Manager Jill Trout's testimony (Br. 17, 36, A. 235; 60, 67-69) that on December 16 Enterprise received about ten "call outs"—that is, phone calls from employees reporting that they would not be coming to work for their scheduled shift—and four "call outs" on December 17. (A. 235; 60.) As the Board noted (A. 235), Enterprise presented no evidence regarding its normal call-out rate, and thus the meaning of the evidence presented could not be discerned. Moreover, Trout testified that she had no personal knowledge of the reason for the call-outs, nor did she have any knowledge of any employee who did not vote due to the weather. (A. 235; 66-69.) For that matter, Enterprise has not shown that any of the employees who "called out" on December 16 or 17 were scheduled to work during shifts when the balloting was held. In these circumstances, Enterprise's claim that the weather precluded a determinative number of employees from voting is mere speculation at best.[6]

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[6] Of course, some, if not all, of those employees who did not vote might have worked during the polling times, but simply chosen not to vote. Moreover, given the Company's acknowledgment that 11 employees were not scheduled to

Finally, there is no merit to Enterprise's contention (Br. 36-37) that the Board erred (A. 236) in distinguishing *V.I.P. Limousine*, 274 NLRB 641 (1985), and *Goffstown Track Center*, 354 NLRB 359 (2009), cases in which the Board found that employees were denied the opportunity to vote in an election because of extreme weather occurring during the polling period. In *V.I.P.*, for example, 20 inches of snow fell around the election site in Connecticut during the polling period, "making navigation of the roads extremely difficult, if not impossible." 274 NLRB at 641. Similarly, in *Goffstown*, a "severe and extraordinary," "perhaps unprecedented" ice storm led the Governor of New Hampshire to declare a state of emergency, and caused numerous problems that did not occur here, such as downed power lines that blocked the only roads to the polling place, and the loss of heat, electric service, and telephone service to the polling place. 354 NLRB at 359, 360. In addition, the school bus drivers who were to vote in the election had their work cancelled for the day because schools were closed. *Id*.

Here, Enterprise's car rental facility remained open through the ice storm on December 16. Moreover, there is no evidence that any potential ice that might have developed on the roads overnight was an issue when the polls opened at

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work at all on December 16 or 17 (A. 70), and that only 12 employees did not vote, the evidence implicitly establishes that many of the employees, who either were not scheduled to work, or who called out of work on the days the Board conducted the election, nevertheless voted.

10:00 a.m. on December 17. Although the weather might not, as Enterprise characterizes it (Br. 37-38), be typical for North Carolina, there is simply no evidence that it impacted the ability of employees to vote in the election, and certainly does not mandate that the Board set aside the election.

Finally, there is no merit to Enterprise's contention (Br. 38-39) that the Board failed to give proper weight to the close results of the election. Rather, the Board "realize[d] that this case involve[d] a very close election," and it overruled the objections only after it "considered the probability of the events described in each objection," both individually and collectively, regarding their potential impact on the "employees' right to a free and fair choice." (A. 236.) Moreover, while the closeness of an election can be relevant in determining whether *proven* objectionable conduct may have affected the outcome of the election, it is of little value in determining whether objectionable conduct has been proven in the first place. Even assuming some objectionable conduct here—and none was shown—this Court has often declined to set aside close elections in the absence of proof of significant misconduct. *See NLRB v. VSA, Inc.*, 24 F.3d 588, 590, 596, 598 n. 22 (4th Cir. 1994); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334, 336-337 (4th Cir. 1987); *Abbott Labs. v. NLRB*, 540 F.2d 662, 664, 665-67 (4th Cir. 1976). Accordingly, the Board did not abuse its discretion by declining to overturn the election based on the closeness of the vote.

II. THE JANUARY 4, 2012 RECESS APPOINTMENTS OF MEMBERS BLOCK, GRIFFIN, AND FLYNN ARE VALID

On January 3, 2012, the first day of the current Session of Congress, the Senate adjourned itself and remained closed for business for nearly three weeks, until January 23. Under the terms of the Senate's own adjournment order, it could not provide advice or consent on Presidential nominations, including the President's pending nominations to the NLRB, at any point during that 20-day period.[7] Messages from the President, including new nominations, were neither laid before the Senate nor considered. The Senate passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in its conduct of business with periodic pro forma sessions, it provided by order that "no business" would be conducted even during those sessions, which were attended by a single Senator and lasted for literally seconds.

At the start of this lengthy period of Senate absence, the membership of the National Labor Relations Board fell below the statutorily mandated quorum, leaving the Board unable to carry out significant portions of its congressionally mandated mission of overseeing implementation of the Nation's labor laws. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the

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[7] The President had nominated Terence Flynn to be a Member of the NLRB in January 2011. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). Sharon Block and Richard Griffin's nominations were submitted in December 2011. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

President exercised his constitutional power to fill vacancies that exist "during the Recess of the Senate," U.S. Const. art. II, § 2, cl. 3, by appointing three members to the NLRB, ensuring that the Board's work could continue without substantial interruption.

These recess appointments were valid because the Senate was plainly in "Recess" at the time under any reasonable understanding of the term. Enterprise's argument to the contrary is rooted in a serious misunderstanding of the meaning and purpose of the Recess Appointments Clause, one that—if adopted by this Court—would substantially alter the longstanding balance of constitutional powers between the President and the Senate.

A. Under the Well-Established Understanding of the Recess Appointments Clause, the Senate was Away on Recess Between January 3 and January 23.

1. The Recess Appointments Clause confers on the President the "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." U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution's careful balancing of governmental powers required of a functioning democracy. The Framers gave the President and the Senate shared roles in the ordinary appointment process, *id.* art. II, § 2, cl. 2, but they also acknowledged the practical reality that the Senate could not (and should not) be "oblig[ated] . . . to be continually in session for the

appointment of officers." *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).[8] The Framers balanced the President's power of appointment, the Senate's advice and consent role, and the infeasibility and undesirability of the Senate remaining perpetually in session, by allowing the President to make appointments, albeit of a limited duration, when the Senate is away on recess, thereby freeing Senators to return home to their constituents and families rather than maintain "continual residence . . . at the seat of government," as might otherwise have been required to ensure appointments could be made.[9] This balance reflected the Framers' understanding that the President alone is "perpetually acting for the public," even in Congress's absence, because the Constitution obligates the President at all times to "take Care that the Laws be faithfully executed."[10]

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[8] 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot's Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators "would settle in the state where they exercised their functions, and would in a little time be rather the representatives of that, than of the state appointing them").

[9] 3 Elliot's Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining that requiring the Senate to "be perpetually in session, in order to provide for the appointment of officers" would "have been at once burthensome to the senate, and expensive to the public").

[10] 4 Elliot's Debates 135-36 (Archibald Maclaine) (explaining that the power "to make temporary appointments . . . can be vested nowhere but in the executive"); U.S. Const. art II, § 3.

The importance of recess appointments to our system of government is demonstrated by the frequency with which they have been employed. Since the founding of the Republic, Presidents have made hundreds of recess appointments in a wide variety of circumstances: during intersession and intrasession recesses of the Senate, during long recesses and comparatively short ones, at the beginning of recesses and in the final days of recesses, and to fill vacancies that arose during the recesses and those that arose before the recesses. Even as Senate recesses have become comparatively short, Presidents have continued to invoke the Recess Appointment Clause with regularity, thus confirming the Clause as a critical part of the allocation of powers under the Constitution.[11]

Consistent with the firm foundation of recess appointments in historical practice, courts regularly interpret the President's recess appointment power broadly. *See, e.g.*, *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (holding that the recess appointment power extends to an intrasession recess of eleven days, to vacancies that arose before the recess, and to Article III appointments); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (holding that the power extends to vacancies that arose before the recess and

[11] *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (quotations and alterations omitted); *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions[.]").

to Article III appointments); *United States v. Allocco*, 305 F.2d 704, 705-706 (2d Cir. 1961) (same).

2. By the terms of the Clause, the President may appoint officers during a "Recess" of the Senate. Enterprise's challenge to the recess appointments of the Board members rests on a basic misconception of the meaning of "Recess," one that would effectively render the President's recess appointment power a nullity.

The Supreme Court has repeatedly stressed that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (explaining that the Framers "must be understood to have employed words in their natural sense, and to have intended what they have said"). So the meaning of a constitutional term necessarily "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the time of the Founding, like today, the term "recess" was used in common parlance to mean a "[r]emission or suspension of business or procedure," II N. 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). The plain meaning of the term "Recess" as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as those periods the Framers anticipated when Senators would return to their respective States.

The settled understandings of the Executive and the Legislative Branch of the term "Recess" are consistent with the plain meaning of that term. The Executive Branch has long and consistently maintained the view that the Clause is implicated when the Senate is not open to conduct business and thus not providing its advice and consent on Presidential nominations.

For instance, in addressing the question whether the President could make a recess appointment during an intrasession recess, the Attorney General explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is actually present and open for business:

> [T]he essential inquiry, it seems to me, 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?

33 Op. Att'y Gen. 20, 21-22, 25 (1921) (emphasis in original); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

Although the President's interpretation is entitled to deference, s*ee infra* at 25-26, the Legislative Branch has long maintained a similar view of the President's recess appointment power. In a seminal report issued more than a century ago, the Senate Judiciary Committee in 1905 expressed an understanding of the term "Recess" that, like the Executive Branch's understanding, looks to whether the Senate is open for its usual business:

> It was evidently intended by the framers of the Constitution that [the word "recess"] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; 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. . . . Its 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.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). The 1921 Attorney General opinion relied on the Senate's definition, 33 Op. Att'y Gen. at 24, and the Senate's parliamentary precedents continue to cite this report as an authoritative source "on what constitutes a 'Recess of the Senate.'" *See* Floyd M. Riddick & Alan M. Frumin, *Riddick's Senate Procedure: Precedents and Practice*, S. Doc. No. 101-28, at 947 & n.46 (1992) (citing report).

3. The Senate's 20-day break between January 3 and January 23, 2012, fits

squarely within this well-established understanding of the term "Recess." By its own order, the Senate provided that it would not conduct business during this entire period.[12] That order freed virtually all the Senators from any duty of attendance and allowed them to leave the Capitol without concern that the Senate would conduct business in his or her absence. And it precluded any action by the Senate on Presidential nominations for the duration of the 20-day period, including the pending nominations to the NLRB.

That the Senate effectively closed for business throughout this extended period is further underscored by the fact that messages from both the President and the House of Representatives sent to the Senate during this period were not laid

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[12] The relevant text of the Senate order provided as follows:

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

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This order also provided for an earlier period of extended absence punctuated by pro forma sessions for the balance of the First Session of the 112th Congress. *Ibid.* On January 3, 2012, the First Session of the 112th Congress ended and the Second Session began. *See* U.S. Const. amend. XX, § 2. We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of the transition on January 3, 2012, from the First Session to the Second Session, 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

before the Senate or entered into the Congressional Record until the Senate returned from its recess on January 23, 2012. *See* 158 Cong. Rec. S37 (daily ed. Jan. 23, 2012) (message from the President "received during adjournment of the Senate on January 12, 2012"); *id.* at S11 (daily ed. Jan. 20, 2012) (record of *pro forma* session with no mention of receipt of presidential message); *id.* at S9 (daily ed. Jan. 17, 2012) (same); *id.* at S7 (daily ed. Jan. 13, 2012) (same). The Senate's order also made clear that the Senate would not take up consideration of the President's pending nominations until it reconvened on January 23, 2012. *Id.* at S8784.[13]

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[13] The fact that the Senate previously passed legislation by unanimous consent during a session originally intended to be a *pro forma* session, *see* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend temporarily the payroll tax cut), does not alter the character of the January 2012 recess in any respect. As noted, the Senate passed no legislation during the January 2012 recess, and so this Court is not faced with the question of whether the actual passage of legislation could interrupt a recess.

Moreover, the mere theoretical possibility that the Senate *could* have passed legislation (though only by unanimous consent) provides no basis for distinguishing the January 2012 recess from any other recess. Concurrent resolutions of adjournment typically allow Congress to reconvene before the end of a recess if the public interest warrants it, and the Senate has previously exercised that authority. *See, e.g.*, 156 Cong. Rec. S6995 (daily ed. Aug. 12, 2010) (recalling the Senate during a recess scheduled by concurrent resolution to pass border security legislation by unanimous consent). That possibility that Congress might reconvene at any time does not alter the fact that the Senate has gone away on recess. Indeed, before the recess appointment at issue in *Evans v. Stephens*, the Senate had adjourned pursuant to a resolution that expressly provided for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that recess appointment. *Evans*, 387 F.3d at 1222.

In short, given the Senate's declared and actual break from business over this continued 20-day period, the President plainly possessed the authority to exercise his recess appointment power.

B. The Senate's Use of Pro Forma Sessions, With No Business To Be Conducted, Did Not Eliminate the President's Recess Appointment Power

1. Enterprise does not claim that the Senate was, in fact, conducting regular business at any point during the January break. Nor does Enterprise suggest that a 20-day break in business is too short to constitute a recess for the President to exercise his recess appointment power. Enterprise instead urges that the Constitution allows the Senate to impede the President's power to make recess appointments by holding intermittent and fleeting *pro forma* sessions where no business is conducted.

The session held on January 6 was typical of these *pro forma* sessions. At three seconds past 11:00 am, a virtually empty Senate Chamber was gaveled into session by Senator Jim Webb of Virginia. The Senate did not say a prayer or recite the Pledge of Allegiance, as typically occurs during regular Senate sessions.[14] Instead, Senator Webb simply asked that a communication be read, prompting an assistant bill clerk to read a two-sentence letter directing Senator Webb to

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[14] *Compare* 58 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) *with* 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); *see also id.* at S8783-84 (daily ed. Dec. 17, 2011) (making clear that "the prayer and pledge" would be required only during the January 23, 2012, session).

"perform the duties of the Chair." So appointed, Senator Webb immediately adjourned the Senate until January 10, 2012. The day's "session" lasted a mere 29 seconds. As far as the video of that session reveals, no other Senator was present. *See* 158 Cong. Rec. S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, http://www.youtube.com/watch?v=teEtsd1wd4c.[15]

Enterprise's reasoning is that such *pro forma* sessions transformed the 20-day period into a series of shorter breaks between short sessions, and that brief interruptions in the Senate's business, such as those occurring over a long weekend between regular working sessions of the Senate, are generally understood to not rise to the level of a "Recess of the Senate." Enterprise's logic fails at the outset, however, because the *pro forma* sessions were nothing like regular working Senate sessions. Instead, they were (as the name implies) mere formalities whose principal function was to allow the Senate to cease business for twenty days.[16]

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[15] *See also* 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (thirty-nine-second pro forma session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (thirty seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

[16] Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, 2012, that three-day break would be sufficient to support the President's recess appointments in the unique circumstances of this case. That three-day period was not an ordinary, long-weekend recess between working sessions of the Senate. Rather, that recess was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity. Under these circumstances, the three-day period between January 3 and January 6 itself qualifies as a "Recess" in the constitutional sense.

The mere fact that the Senate employed *pro forma* sessions, rather than its usual method of adjourning via a concurrent resolution, to facilitate its January break, does not alter the central fact that the Senate broke from business for a continuous 20-day period. In general, when the Senate wants to take a break from regular business over an extended period of time—that is, to be away on a recess—it follows a process in which the two Houses of Congress pass a concurrent resolution of adjournment, which authorizes the Houses to cease business over that period of time.[17] Since 2007, however, the Senate has used *pro forma* sessions to allow for recesses from business during times when it would historically have obtained a concurrent adjournment resolution, like over the winter and summer holidays.[18]

Regardless of the reasons for this procedural innovation, the change does not alter the Recess Appointments Clause analysis. The orders providing for *pro*

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[17] Congress regards this process as satisfying the Adjournment Clause, which provides that "neither House, during the Session of Congress, shall, without consent of the other, adjourn for more than three days." U.S. Const, art. I, § 3; *see* John Sullivan, Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011).

[18] The Senate had previously, on isolated occasions, used *pro forma* sessions over short spans of time in which they were unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate's *regular* use of pro forma sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued apace since. *See* 148 Cong. Rec. 21,138 (Oct. 17, 2002); *see generally Congressional Directory, Sessions of Congress, 1st to 112th Congresses, 1789-2011* at 536–38.

forma sessions are functionally indistinguishable from concurrent adjournment resolutions: both allow the Senate to cease doing business for an extended and continuous period, and thus release Senators from a duty of attendance and enable their return to their respective States. The only difference is that one Senator remains in the Capitol to gavel in and gavel out the pro forma sessions, at which no other Senator need attend and "no business [is] conducted." That difference does not affect whether the Senate is away on "Recess" as the term has long been understood: the "essential inquiry [remains] 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?" 33 Op. Att'y Gen. at 21-22, 25 (emphasis in original); *accord* S. Rep. No. 58-4389, at 2.

There is no question that under this well-established standard the Senate was away on recess notwithstanding the periodic *pro forma* sessions. The pro forma sessions were in fact part and parcel of the Senate's 20-day recess—its ongoing "suspension" of the Senate's usual "business or procedure"—not an interruption of that recess. To conclude otherwise would "give the word 'recess' a technical and not a practical construction," would "disregard substance for form," 33 Op. Att'y Gen. at 22, and would likewise be contrary to the Supreme Court's admonition to exclude "secret or technical meanings that would not have been known to ordinary

citizens in the founding generation" when interpreting constitutional terms. *Heller*, 554 U.S. at 577.

2. Enterprise asserts that the "Senate's own definition of its actions" precludes the President's exercise of his recess appointment powers, *see* Appellants Br. 42, but it does not point to any Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no rule or resolution at the time expressing the view of the Senate.[19] The only formal statement from the Senate is its order that there would be "no business conducted" during its pro forma sessions, and Enterprise makes no attempt to address that order.

In any event, Enterprise's position that the holding of *pro forma* sessions where no business is conducted somehow means that a twenty day break is not a recess would severely disrupt the long-standing constitutional balance of powers between the Senate and the President. The Supreme Court has repeatedly condemned congressional action that "disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its

[19] The Employer cites individual Senators' *post hoc* opinions that the *pro forma* sessions precluded recess appointments, but such individual views are not tantamount to a Senate determination on that score. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those "authorized to represent their respective Houses of Congress"); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate's interest in litigation as amicus curiae only upon a resolution adopted by the Senate).

constitutionally assigned functions." *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Allowing the Senate to effectively eliminate the President's recess appointment power would do just that.

The Constitution has long been understood to require the Senate to make a choice between two mutually exclusive options. Either the Senate can remain "continually in session for the appointment of officers," Federalist No. 67, and serve its function of advice and consent, or it could "suspen[d] . . . business" and allow its members to return to their States, II Webster, *supra* at 51, whereupon the President could exercise his authority to make temporary appointments to vacant positions. For decades, the Senate's desire to suspend business rather than remain continually in session has formed the backdrop to repeated negotiations between the Senate and the President over the President's exercise of his recess appointment power while the Senate is away.[20] For example, in 2004, the Senate and President reached an inter-branch compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agreement not to invoke his constitutional power to make recess appointments

[20] *See generally* Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 253-55 (2008) (describing various political confrontations over recess appointments in the 1980s, 1990s, and 2000s, which ultimately culminated in negotiated agreements between the Senate and the President regarding the President's use of the recess appointment power).

while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004. These political accommodations allowed both branches to vindicate their respective institutional prerogatives with respect to appointments of Federal officers: they gave the President the assurance that the Senate would act on his nominees, while freeing the Senators to cease business and return to their respective States without losing the opportunity to give "advice and consent" on Presidential nominees.

Under Enterprise's view, however, the Senate would have had little, if any, incentive to compromise with the President in this fashion, because according to Enterprise, the Senate always possessed the unilateral authority to divest the President of his recess appointment power through the simple expedient of holding intermittent and fleeting *pro forma* sessions over any period of time without conducting any business. Indeed, under Enterprise's logic, early Presidents would have been precluded from making recess appointments during the Senators' months-long absences from Washington (necessitated, of course, by the means and practicalities of long-distance travel in that era) if only the Senate had asked one of its Members to remain in Washington to gavel in an empty chamber every few days.

History provides no support for Enterprise's position. To the contrary, the fact that the Senate had never assumed, before 2007, that it had the power to

simultaneously be in session for Recess Appointment Clause purposes and officially away for all actual purposes of conducting business "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 908 (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).[21]

The separation-of-powers concerns raised by Enterprise's position are well illustrated by the facts of this case. If, as Enterprise urges, the Senate could prevent the President from filling vacancies on the NLRB while simultaneously being absent to act on nominees, the NLRB would have been unable to carry out significant portions of its mission during the entire period of the Senate's absence. Such a result would undermine the Constitution's careful balance of powers, which ensures that all Branches can carry out their constitutional duties, including the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

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[21] Controversies over the President's exercise of his recess appointment power are not solely of recent vintage. For instance, in 1813, Senator Christopher Gore of Massachusetts introduced a motion in the Senate to censure President James Madison on the ground that Madison had made unconstitutional recess appointments of officials negotiating a peace treaty with Great Britain. *See generally* 20 Op. Off. Legal Counsel 284, 289 (1996); 26 Annals of Cong. 651. *But see*, *infra*, note 25.

In contrast, giving effect to the President's recess appointments here, notwithstanding the Senate's *pro forma* sessions, would leave the established balance of constitutional powers unaltered. The President's recess appointments are only temporary under the plain text of the Clause, which specifies that commissions granted by the President under the Clause "shall expire at the End of [the Senate's] next Session." U.S. Const. art. II, § 2, cl. 3. The Senate retains the authority to vote up or down the NLRB nominations, which remain pending before it.[22] More broadly, the Senate would still have the choice the Framers envisioned between remaining continuously in session to conduct business, including to act on nominees, thereby removing the constitutional predicate for the President's recess appointment power, or leaving the Capitol to return home, with the knowledge that the President may make temporary appointments in their absence. This Court should therefore decline Enterprise's suggestion to free the Senate from that long-established trade-off. Adopting Enterprise's view here would effectively eliminate the President's recess appointment power by allowing the Senate to be away conducting "no business" for an extended period and yet be deemed not in recess.

[22] A Senate vote rejecting the current nominees would not shorten the duration of their recess appointments, although Congress has passed legislation to limit the pay of recess appointees whose nominations to full terms are rejected in a full Senate vote. Pub. L. No. 110-161, § 709 (2007); *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 275 n.4 (1989).

Indeed, in the few months since the recess appointments at issue here, the Senate and the President have resumed the traditional means of using the political process to reach inter-branch accommodation with respect to Presidential appointments. In April 2012, the President and the Senate reached a compromise in which the Senate agreed "to approve a slate of nominees" while the President "promis[ed] not to use his recess powers." Stephen Dinan, The Washington Times, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of bargain that was struck before the Senate's more recent use of *pro forma* sessions to allow the cessation of business over extended periods of time, and reflects the balance of powers that has long characterized interbranch relations. There is no sound reason for this Court to upset that balance.

3. Enterprise raises two additional points, neither of which have merit. First, Enterprise's reliance on the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, misapprehends the relevance of that provision to the issue presented here. That Clause provides the Senate with the authority to "determine the Rules of its Proceedings," *ibid*., that is, to establish rules governing the Senate's internal processes. *See INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (explaining that the Clause provides each House with "the power to act alone in determining specified internal matters," and "only empowers Congress to bind itself."). But as noted above, Enterprise does not and cannot point to any Senate Rule purporting to

define the *pro forma* sessions as interrupting the Senate's recess. And Enterprise's argument ignores the plain language of the only pertinent statement of the Senate as a body: its official announcement that there would be "no business conducted" during its 20-day January break.

And even if Enterprise could point to such a Rule defining the effect of *pro forma* sessions, it would have to be carefully examined in light of the grave separation-of-powers concerns addressed above.[23] Because Article II gives the President the power to make appointments whenever the Senate is away on recess, the President's own determination that the Senate is in "Recess" is owed a measure of deference in its own right.[24]

Indeed, the Legislative Branch has long acknowledged the President's role in this regard. For example, in 1980, the Comptroller General—an officer of the Legislative Branch—affirmed the President's authority to make recess appointments to a newly created federal agency during an intrasession recess, relying on the Attorney General's opinion that "the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and

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[23] *See United States v. Ballin*, 144 U.S. 1, 5 (1892) (Congress "may not by its rules ignore constitutional restraints or violate fundamental rights"); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.").

[24] *See Allocco*, 305 F.2d at 713 (before making a recess appointment, "the President must in the first instance decide whether he acts in accordance with his constitutional powers").

genuine recess which makes it impossible for him to receive the advice and consent of the Senate." *See* John D. Dingell, House of Representatives, B-201035, 1980 WL 14539, at 5 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att'y Gen. 20 (1921)).[25] Courts as well have accorded the President's determinations in this context with a presumption of constitutionality, and have consistently looked to Executive Branch practice and interpretation in addressing the validity of recess appointments.[26]

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[25] Similar views were expressed during the Senate debates over President Madison's use of the recess appointment power to appoint members of the delegation negotiating a peace treaty with Great Britain. *See supra* note 21. Senator William Wyatt Bibb and Senator Outerbridge Horsey were the chief opposition to Senator Gore's motion to censure the President. Although the Senators were from opposing political parties, they agreed that the President was owed deference in his exercise of the recess appointment power. *See* 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (observing that the Recess Appointment Clause "delegates to the President *exclusively* the power to fill up *all* vacancies which happen during the recess of the Senate" and that "it will not be denied that where a discretionary power is granted to do a particular act, in the happening of certain events, that the party to whom the power is delegated is necessarily constituted the judge whether the events have happened, and whether it is proper to exercise the authority with which he is clothed"); 26 Annals of Cong. 707-08 (April 1, 1814) (Sen. Horsey) ("Thus, sir, it appears to me, so far as respects the exercise of the qualified power of appointment, lodged by the Constitution with the Executive, that the Senate have no right to meddle with it."). It was Senators Bibb and Horsey's view that prevailed. *See* Irving Brant, JAMES MADISON: COMMANDER IN CHIEF 1812-1836, at 242-43 (1961) (explaining that Senator Gore's effort to censure the President "collapsed when [Horsey] cited seventeen diplomatic offices created and filled by former Executives while the Senate was in recess").

[26] *See, e.g.*, *Evans*, 387 F.3d at 1222 (en banc) (noting that "when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional" and

Second, Enterprise cites the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4, which is similarly irrelevant. That clause provides that "neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days." *Ibid.* Enterprise's claim, although vague, appears to be that because the House did not expressly consent to the Senate's adjournment for more than three days during the January break, there could not have been a "Recess of the Senate" within the meaning of the Recess Appointments Clause. Appellant Br. 42. Assuming that to be Enterprise's claim, it is flawed at several levels.

As an initial matter, this Court is not presented with the question whether the Senate, in fact, complied with the Adjournment Clause and so need not decide that issue. In any event, Enterprise provides no basis in the text or structure of the Constitution for equating Article I's Adjournment Clause with Article II's Recess Appointments Clause. Nor does Enterprise cite evidence that the Framers viewed the two Clauses as covering the same ground. As with any other constitutional provision, the requirements of each Clause must be interpreted based on each one's separate and individual text, history, and purpose.

The Adjournment Clause relates primarily, if not exclusively, to the internal operations and obligations of the Legislative Branch. In that setting, the view of

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upholding the President's determination that an intrasession recess is a "Recess" within the meaning of the Clause).

the Senate and the House as to whether *pro forma* sessions satisfy the requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violations of that Clause.[27] In contrast, as explained, the Recess Appointments Clause defines the scope of an exclusively Presidential power, and the definition of that term has ramifications that extend far beyond the Legislative Branch. As discussed above, examination of the text, purpose, and established historical understandings of the Recess Appointments Clause compel the conclusion that the *pro forma* sessions in this case did not vitiate the President's recess appointment power, whatever the effect those sessions may or may not have had with respect to other provisions of the Constitution.

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[27] 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, Adjournment at 15 (noting that "in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it"). If this Court were forced to confront whether the Senate's *pro forma* sessions satisfied the Adjournment Clause—which, as explained, it is not—there are grounds for concluding that the sessions did not. The central purpose of the Adjournment Clause is to ensure the Houses' simultaneous presence in the Capitol to do business. *See, e.g.*, Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) ("It was necessary therefore to keep [each house of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will."). The Senate's use of *pro forma* sessions, at which no business is conducted, to allow virtually all of its Members to be away from the Capitol for an extended period of time, is in considerable tension with that purpose.

CONCLUSION

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

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AUGUST 2012

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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(s) Linda Dreeben

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)
	)
Petitioner	)
	)
v.	) No. 12-1514
	)
ENTERPRISE LEASING COMPANY-	)
SOUTHEAST, LLC	)
	) Board Case No.
	) 11-CA-73779
Respondent	)

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