No. 12-2693

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-2693

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LONG MECHANICAL, INC.

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") to enforce a Board Order against Long Mechanical, Inc. ("the Company"). The Board's Decision and Order issued on August 9, 2012, and is reported at 358 NLRB No. 98. (D&O 1-7, A. 9-15.)[1] The Board's Order is

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[1]"D&O" references are to the Board's Decision and Order. "A." references are to the Appendix filed by the Company. "GCX" references are to the General Counsel's exhibits introduced at the unfair labor practice hearing, "MDJ" references are to the General Counsel's motion for default judgment, and

a final order with respect to all parties. On December 31, 2012, the Board filed an application for summary enforcement, which was timely because the Act places no time limit on such filings. Thereafter, the Board filed the certified list of the agency record, and on February 21, 2013, the Court issued an order setting the case for full briefing.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. The Court has jurisdiction over the enforcement proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices were committed in Northville, Michigan.

ORAL ARGUMENT STATEMENT

The National Labor Relations Board believes that oral argument is appropriate in this case. While the Board's determination to grant default judgment against the Company involves the application of well-settled principles to largely undisputed facts, oral argument may assist the Court in its consideration of the Company's challenge to the constitutionality of the President's appointment of several members of the Board pursuant to the Recess Appointments Clause.

"GCDJX" references are exhibits attached to that motion. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The constitutional challenge involves a wide range of textual, structural, and historical issues, all of which are addressed in detail in this brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board acted within its discretion in granting the Acting General Counsel's motion for default judgment against the Company.

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

STATEMENT OF THE CASE

This straightforward case involves the Company's failure to establish a material issue of fact for hearing in response to a motion for default judgment, which came on the heels of its earlier failure to comply with the terms of a Board-approved settlement agreement. The Court's review of Board rulings on such motions is very limited. The following subsections summarize the facts and procedural history, and the Board's Conclusions and Order.

I. STATEMENT OF FACTS AND PROCEDURE

Acting on unfair labor practice charges filed by Locals 98 and 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (collectively "the Union"), the Board's Acting General Counsel issued a consolidated amended complaint alleging that the

Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by numerous acts of threatening, coercing, and discharging employees because they supported the Union. (D&O 2-4, A. 10-11; GCX 1(g), A. 63.) On January 19, 2011, during the course of the unfair labor practice hearing, the parties entered into an informal settlement agreement, which the Board's Regional Director approved. (D&O 1, A. 9; GCDJX O, A. 242-47.)

Under the terms of the settlement agreement, the Regional Director agreed to take no further action on the complaint allegations in exchange for the Company's agreement to remedy the alleged unfair labor practices. Thus, among other things, the Company agreed to reinstate certain employees to their former positions and restore their benefits, to place other employees on a preferential recall list and to recall them to their prior or substantially equivalent positions, and to provide payroll and "cost detail" information to the Union. (D&O 1, A. 9; GCDJX O at 1-2, A. 242-43.)

If the Company failed to comply with any of its terms, the agreement provided that the Regional Director "may reissue the complaint." (D&O 1, A. 9; GCDJX O at 1, A. 242.) Further, the agreement provided that if the Regional Director reissued the complaint, "[t]he General Counsel may then file a motion for default judgment with the Board." (D&O 1, A. 9; GCDJX O at 1, A. 242.) The parties agreed that "[o]n receipt of said motion for default judgment, the Board

shall issue an order requiring the [Company] to show cause why said motion . . . should not be granted." (*Id*.) The agreement stated that, "without necessity of trial or any other proceeding," the Board may "find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the [Company], on all issues raised by the pleadings," and may then "issue an order providing a full remedy for the violations found as is customary to remedy such violations." (*Id*.)[2]

By letter of May 19, 2011, the Regional Director advised the Company that it was not in compliance with the terms of the settlement agreement. (D&O 1, A. 9; GCDJX BB, A. 480-81.) Specifically, the Company had failed to restore benefits to all employees, to reinstate or recall employees to their prior positions, and to provide the relevant records. (*Id.*) The Regional Director urged the Company to take immediate action to comply, or risk invoking the agreement's non-compliance provision. (*Id*.) On June 7, the Regional Director again informed the Company that it had not complied, and advised the Company that if it did not do so by June 21, the Acting General Counsel would likely reissue the complaint and file a motion for default judgment. (D&O 1-2, A. 9-10; GCDJX CC, A. 482-

[2] Specifically, the Company agreed to waive: "(a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations." (*Id*.)

83.)

On October 7, after further investigation and correspondence with the Company, the Regional Director reissued the complaint. (D&O 2, A. 10; GCDJX DD, A. 484-91.) On October 10, the Acting General Counsel filed a motion for default judgment with the Board. (D&O 2, A. 10; MDJ, A. 258-493.) The motion, supported by exhibits, specifically alleged that the Company had breached the settlement agreement by failing to reinstate and recall certain employees to their prior positions; by failing to follow the preferential recall list; by belatedly reinstating health insurance benefits for two employees; and by failing to provide complete payroll and cost records. (MDJ at 4-6, ¶¶ 11, 13, 15, 16, 18, 19, A. 261-63.)[3]

On October 28, the Company filed an opposition stating that it "has not, in any way, breached this settlement agreement."[4] (D&O 2, A. 10; Opposition at 2, A. 495.) The Company's opposition did not make any specific arguments, or refer to any documentation, explaining that statement. (*Id*.) On November 23, the Acting General Counsel responded, stating that the Company's general denial

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[3] *See* GCDJX Q pp. 3-5, T, U p.5, V p. 2, W, X, Y, Z and AA (A. 310-12, 373-74, 379, 382, 383, 384-85; 387-441, 442, 466.)

[4] The Company's opposition also discussed a different settlement agreement related to later unfair labor practice charges that the Board found (D&O 2, n.4, A. 10 n.4) to be "completely separate from this case" and "not relevant to this determination." The Company (Br. 7) has not challenged that finding.

failed to raise a genuine issue for hearing. (Response at 1-5, A. 525-29.) On December 2, the Company filed a reply that again failed to specifically address the allegations. (D&O 2, A. 10; Reply at 1-4, A. 530-33.)

On December 20, the Board issued a notice to show cause why the Acting General Counsel's motion should not be granted. (D&O 2, A. 10; Transfer Order and Notice to Show Cause at 1-2, A. 563-64.) On December 28, the Company filed a short response stating that it incorporated by reference:

> the arguments provided in its October 28, 2011 Statement in Opposition and Brief in support thereof [citation omitted], and its December 2, 2011 Reply to the Acting General Counsel's Response [citation omitted].

(D&O 2, A. 10; Response to Notice to Show Cause at 1-3, A. 565-67.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 9, 2012, the Board (Members Hayes, Griffin, and Block) granted the Acting General Counsel's motion for default judgment, finding (D&O 2, A. 10) that the Company's general denial failed to raise any material issues of fact warranting a hearing. As provided in the settlement agreement, the Board then found (D&O 2, A. 10) that all of the unfair labor practice allegations in the reissued complaint were true.

The Board ordered the Company to cease and desist from the unfair labor practices found. (D&O 4-5, A. 12-13.) Affirmatively, the Board ordered the Company to reinstate and recall employees, make them whole for any loss of

earnings, remove references to the unlawful discharges and layoffs from the employees' personnel files, and post a remedial notice. (D&O 4-6, A. 12-14.) In August 2012, the Company filed a motion for reconsideration, which the Board denied. (Motion For Reconsideration 1- 34, A. 635-68; Order Denying Motion for Reconsideration 1-3, A. 686-88.)

SUMMARY OF ARGUMENT

1. The Board properly exercised its discretion in granting the Acting General Counsel's motion for default judgment and finding the unfair labor practices as alleged. In the face of the Acting General Counsel's specific and amply-supported allegations that the Company breached the settlement agreement, the Company merely made, and then repeated, a blanket denial that it had breached the settlement agreement. Such a response is insufficient to establish a material issue of fact warranting a hearing.

The Company's key challenge to the Board's exercise of discretion is that information contained in the Acting General Counsel's exhibits to the motion for default judgment demonstrated a material issue of fact, and that the Board was obligated to independently recognize the record evidence that supported its general denial. The problem with the Company's argument is that it never referenced nor cited this information in any argument to the Board, prior to doing so for the first time in a motion for reconsideration, a belated argument that was simply too little,

too late. Accordingly, the Court should affirm the Board's exercise of discretion in rendering those rulings and enforce the Board's Order.

2. The Company contends on the basis of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the President's recess appointments to the Board in January 2012 were invalid, and that the Board therefore lacked a quorum when it issued the order in this case. *Noel Canning* is an outlier decision, and conflicts with the decisions of three other courts, two sitting *en banc*. Indeed, the claims approved in *Noel Canning* are wrong as a matter of constitutional text, history, and purpose, and would vitiate nearly two centuries of long-accepted Executive Branch practice.

ARGUMENT

I. THE BOARD ACTED WITHIN ITS DISCRETION IN GRANTING THE ACTING GENERAL COUNSEL'S MOTION FOR DEFAULT JUDGMENT AGAINST THE COMPANY

The Board acted well within its discretion in granting the motion for default judgment. As shown below, the Board reasonably determined that the Company's general denial that it had breached the settlement agreement was insufficient to establish a material issue of fact warranting a hearing, and the Board's consequent adoption of the unfair labor practice allegations was fully consistent with Board law and procedure. The Company's challenge to the Board's ruling, based on its late-raised assertions concerning record materials attached to the Acting General

Counsel's default motion, is without merit. The Company failed to refer to, let alone develop, any argument based on those materials, despite three separate opportunities to do so prior to the Board's ruling. And under settled principles, the Board properly rejected the Company's belated assertions raised for the first time in its motion for reconsideration.

As an initial matter, motions for default judgment are governed by Section 102.24 of the Board's Rules and Regulations (29 C.F.R. § 102.24)—a provision glaringly absent from the Company's brief. That rule provides that after the Board issues a notice to show cause to the opposing party, "[t]he Board in its discretion may deny the motion." 29 C.F.R. § 102.24(b). Unsurprisingly, then, courts review the Board's decision to grant such motions, like most procedural matters, under the "abuse of discretion" standard. *Alois Box Co., Inc. v. NLRB*, 216 F.3d 69, 78 (D.C. Cir. 2000) (after the Board issues a notice to show cause, "whether to grant a hearing lies in the Board's discretion"). This standard is consistent with the Board's generally recognized broad authority to interpret its own rules. *See Father & Sons Lumber & Bldg. Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (the Board may "construe its own rules as it wishes, subject to judicial review only when the [Board]'s construction is so arbitrary as to defeat justice); *see also NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 475-76 (2d Cir. 2009) (the Board is vested with "broad discretion in interpreting and applying its own

rules" and a court will not set aside the Board's construction of its own rules unless "the Board has acted in a fashion so arbitrary as to defeat justice").[5]

The Board acted well within its discretion in determining that the Company's general denial was insufficient to create a genuine issue of fact for hearing. Section 102.24(b) provides the relevant standard after the Board issues a notice to show cause why a motion for default judgment should not be granted. Under Section 102.24(b), "[t]he Board in its discretion may deny the motion [for default judgment] where the motion itself fails to establish the absence of a genuine issue or where the opposing party's pleadings, opposition [to the motion for default judgment] and/or response [to the notice to show cause] indicate on their face that a genuine issue may exist." 29 C.F.R. § 102.24(b).[6] In analyzing the Acting General Counsel's motion and the Company's responses, the Board correctly noted (D&O 2, A. 10) that "[the Company] failed to respond to any of the

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[5] The Company thus incorrectly asserts (Br. vi, 2, 13, 15-16, 18, 25) that the substantial evidence standard should apply. This breach-of-settlement case is not one in which the Board made contested factual or legal findings to adjudicate unfair labor practice allegations. *See U-Bee, Ltd*., 315 NLRB 667, 668 (1994) (summarily finding allegations of complaint to be true after breach of settlement agreement).

[6] Section 102.24(b) does not require a party to support its opposition or response to a notice to show cause "with affidavits or other documentary evidence," but the Board retains its discretion to deny a hearing where, as here, those pleadings do not establish a genuine issue for hearing "on [their face]." 29 C.F.R. § 102.24(b); *see Alois Box*, 216 F.3d at 78 (respondent's pleadings alone failed to establish that the Board abused its discretion in denying a hearing).

six specific allegations that it had breached the settlement agreement set forth in the Acting General Counsel's motion," and that the Company "has not come forward with anything specifically supporting its general denial that it breached the settlement agreement." (D&O 2, A. 10; Opposition at 2, A. 495.)

Indeed, the Company's reliance (Br. 23-25) on *Vocell Bus Co. Inc*, 357 NLRB No. 148, 2011 WL 6434010 (2011), is curious, as that decision only serves to highlight the deficiencies in the Company's responses. 2011 WL 6434010, at *3. As the Board aptly noted, "unlike here, the respondent in [*Vocell*] did not generally deny that it had breached the settlement agreement, but instead specifically asserted how it complied with the agreement." (Order Denying Motion for Reconsideration at 2 n.2, A. 687 n.2.) To the contrary, despite three separate opportunities to establish a genuine issue regarding its compliance—in its October 28 opposition, in its December 2 reply to the Acting General Counsel's response, and again in its December 28 response to the notice to show cause—the Company merely repeated its blanket assertion that it "has not, in any way, breached this settlement agreement." (A. 495.)

Accordingly, the Board's rejection (D&O 2, A. 10) of the Company's response as insufficient, and its finding that the general denial "fails to raise any material issues of fact warranting a hearing," fits comfortably within the Board's discretion. *See, e.g., Clearwater Sprinkler Sys., Inc*., 340 NLRB 435, 436 (2003)

(general response to notice to show cause, which failed to address the substance of the allegations, was insufficient to survive default judgment); *Circus Circus Hotel & Casino*, 316 NLRB 1235, 1236 n.1 (1995) (general assertions in response to notice to show cause were insufficient to survive summary judgment). The Board's finding that the Company's general denial was insufficient is fully consistent with the Board's disfavored treatment of general denials in other contexts. For example, a general denial is not a sufficient response to a complaint (*see* 29 C.F.R. § 102.20) or a compliance specification (*see* 29 C.F.R. § 102.56(b)), nor is it sufficient to support an exception to a finding by an administrative law judge (*see* 29 C.F.R. §102.46(c)).

Moreover, the Board's consequent granting of default judgment, and its finding of the unfair labor practice allegations to be true, was wholly consistent with the settlement agreement and Board law. As the agreement stated, in the event of non-compliance, after receiving a motion for default judgment and issuing a notice to show cause, the Board "may then, without the necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to [the Company], on all issues raised by the pleadings." *See* GCDJX O at 1, A. 242; *Stagetech Prods., LLC*, 358 NLRB No. 116, 2012 WL 3839414, at *2 (2012) (granting default judgment and deeming allegations of complaint to be true after

employer failed to comply with settlement agreement); *Insulation Maint. & Contracting, LLC*, 357 NLRB No. 50, 2011 WL 3532727, at *2 (2011) (same); *U-Bee, Ltd*., 315 NLRB 667 (1994) (same). Thus, the Board soundly exercised its discretion in granting the Acting General Counsel's motion for default judgment and finding the unfair labor practices true as alleged in the complaint.

The Company's contentions raise no basis to disturb the Board's exercise of discretion. Primarily, the Company attempts to deflect (Br. 11-14, 18-25) its failure to adequately respond to the Board's notice to show cause by asserting that the Board independently should have recognized that information contained in the Acting General Counsel's exhibits provided, it claims, the requisite genuine issue for hearing. In so asserting, the Company brazenly ignores its repeated failures to cite to the information, let alone explain how any of it raised a material issue of fact regarding its compliance with the settlement agreement.[7] As the Board stated, "the [Company] did not rely on [these documents] in its responses to the Board and never referenced or cited them in any manner." (Order Denying Motion for Reconsideration at 2, A 687); *cf*. 29 C.F.R. § 102.48(c) (the Board may limit its

[7] Even if the Company had referenced any information attached to the Acting General Counsel's motion, it would additionally need to argue and demonstrate that the information "address[ed] the substance of" the specific allegation that it breached the settlement agreement. *Clearwater Sprinkler Sys.*, 340 NLRB at 436. Thus, contrary to the Company's suggestion (Br. 18, 21), it was not relieved of its obligation to make an argument about the information merely because it was part of the record.

consideration of a party's exceptions to an administrative law judge's decision to portions of the record specified).

Indeed, "an implicit argument is hardly the same as giving notice so the Board has an opportunity to rule on the argument." *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000). "'[J]udges are not like pigs, hunting for truffles' that might be buried in the record," and neither are Board members. *Emerson v. Novartis Pharmaceuticals Corp.*, 446 F. App'x 733, 737 (6th Cir. 2011) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). Thus, given its failure to articulate any argument based on the information in the Acting General Counsel's exhibits, the Company has not demonstrated that the Board's granting of the motion for default judgment was an abuse of discretion.

Undeterred by its virtual silence on the matter in its opposition, reply, and response to the notice to show cause, the Company asserts (Br. 23) that the Board should have found a material issue of fact because the Company attempted to raise one for the first time in its motion for reconsideration. Under the Board's rules, however, only "extraordinary circumstances" warrant reconsideration. 29 C.F.R. § 102.48(d)(1). As this Court has stated, extraordinary circumstances for these purposes "exist only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." *NLRB v. Allied Prods. Corp.*, 629 F.2d 1167, 1171 (6th Cir.

1980). Here, the Company presented no circumstances whatsoever that would justify its belated reliance on, and citation to, documents that, as the Board found, "are obviously not newly discovered or previously unavailable." (Order Denying Motion for Reconsideration at 2, A. 687.) Accordingly, the Board was well within its discretion in denying the Company's motion for reconsideration. *See NLRB v. St. Mary's Acquisition Co. Inc*., 240 F. App'x 8, 11-12 (6th Cir. 2007) ("[t]he decision to grant or deny a new hearing under [the Board's rules for reconsideration] is within the sound discretion of the Board and will only be disturbed by a reviewing court if the challenging party establishes an abuse of discretion") (internal quotations omitted); *cf. Pointing Plus Inc*., 358 NLRB No. 154, 2012 WL 4471117, at *3 (2012) (the Board will not address a respondent's assertions that it has a meritorious defense unless good cause has been shown for the late response).

Finally, it is highly questionable whether the Company has even sufficiently preserved its claim before this Court by raising it for the first time in its motion for reconsideration. *See Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[b]y the time [the petitioner] objected to the [issue] in a motion for reconsideration, it was too late [to preserve the argument for review in court]."). Indeed, under Section 10(e) of the Act, no objection that has not been urged before the Board shall be considered by a court of appeals "unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Moreover, an objection is not properly urged unless made at the appropriate time under an agency's practice. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[S]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). Moreover, the Company's novel and unsupported interpretation (Br. 22-24) of the language of Section 10(e), suggesting that a party may preserve an argument for court review merely by raising it before the Region, is contrary to the well-established principles discussed above. Thus, the Company's failure to assert that information in the Acting General Counsel's exhibits could establish a genuine issue for hearing until its motion for reconsideration is arguably too late to preserve it for court review. In any event, the above discussion amply demonstrates that even if the Company had properly preserved the issue, it nonetheless failed to show that Board abused its discretion in rejecting its belated claim under the circumstances of this case.

II. THE COMPANY'S RECESS APPOINTMENT CHALLENGES LACK MERIT

From January 3 until January 23, 2012, a period of nearly three weeks, the Senate was in recess. At the start of this period, Board member Craig Becker's term ended, and the Board's membership fell below the statutorily mandated

quorum of three members. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, on January 4, 2012, the President invoked his constitutional authority under the Recess Appointments Clause to appoint three new members, bringing the Board to full membership.

The Company does not dispute that the Senate was in a twenty-day recess at the time these appointments were made.[8] It nonetheless contends that the appointments were unconstitutional, and it relies on the D.C. Circuit's recent decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). (Br. 55-56). That decision held the appointments unconstitutional on two alternative theories: (1) they were made during an *intra*session recess, and were thus outside the scope of the Recess Appointments Clause, and (2) they improperly filled vacancies that

[8] Parties in other cases have argued that the Senate's scheduling of *pro forma* sessions—during which the Senate agreed by binding unanimous consent that no business would be conducted —transformed the 20-day recess into a series of shorter breaks. *See, e.g.*, Br. for Resp't, *Huntington Ingalls Inc. v. NLRB*, No. 12-2000 (4th Cir. filed Oct. 10, 2012). But Long has not raised that argument here, and so it is waived. *Kuhn v. Washtenaw Cty.*, 709 F.3d 612 (6th Cir. 2013); *see also Freytag v. CIR*, 501 U.S. 868, 878-79 (1991) (holding that appointments challenges are "nonjurisdictional" objections).

In any event, such an argument would be meritless even if it were timely raised. Among other things, the Senate itself referred to its break as "the Senate's recess," notwithstanding the scheduled *pro forma* sessions. See 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (authorizing committees to report on January 13 "notwithstanding the Senate's recess").

first arose before the recess in question.[9] This Court should reject the Company's challenges based on *Noel Canning*, and should instead follow the decisions of the three other appellate courts to consider these issues.

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

In common parlance, when the Senate uses a specific type of adjournment known as an adjournment *sine die* (*i.e.*, without specifying a day for its return), that adjournment terminates a legislative session under long-accepted parliamentary practice, and the ensuing recess until the next session begins is an *inter*session recess. *See* Robert, *Pocket Manual of Rules of Order for Deliberative Assemblies* § 42, at 109-110, § 63, at 169-170 (1885); *Noel Canning*, 705 F.3d at 22. When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session because the session continues when the legislature reconvenes on the particular day, and the resulting recess between the adjournment and the reconvening is commonly referred to as an *intra*session recess. The Company contends the President is powerless to make recess appointments during intrasession recesses. Although this argument was recently accepted in *Noel Canning*, it was squarely rejected by the *en banc* Eleventh Circuit

[9] On April 25, 2013, the Board petitioned the Supreme Court for a writ of *certiorari* in *Noel Canning*.

in *Evans v. Stephens*, 387 F.3d 1220 (2004) (en banc), *cert. denied*, 544 U.S. 942 (2005), and should be rejected by this Court as well.

The Company's position flies in the face of constitutional text, purpose, and history. Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. *See* Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, at 22-28 (2013). These intrasession recess appointments include three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See* Hogue, *Intrasession Recess Appointments*¸ *supra*, at 5-31. The practice has continued regularly since an opinion by Attorney General Daugherty, relying on the Senate's own interpretation of the Recess Appointments Clause, confirmed nearly a century ago that such appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); S. Rep. No. 58-4389 (1905). The Legislative Branch itself has acquiesced in the President's power to make such appointments.[10] Under the Company's

[10] *See, e.g.*, 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the "accepted view" of the Recess Appointments Clause, and interpreting the Pay Act in a consistent manner so as to allow payment to intrasession recess appointees); 41

view, however, every one of these appointments was unconstitutional. This Court should reject that contention. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions").

1. The Company's position founders at the outset on the text of the Recess Appointments Clause, which provides that the President may fill vacancies during "the Recess of the Senate." That text "does not differentiate expressly between inter- and intrasession recesses." *Evans*, 387 F.3d at 1224. The plain meaning of the term "recess," both at the Framing and today, means a "period of cessation from usual work." 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing sources from the 17th and 18th centuries); *see also* II Webster, *An American Dictionary of the English Language* 51 (1828) (defining "recess" as a "[r]emission or suspension of business or procedure"); 2 Johnson, *Dictionary of the English Language* 1650 (1755) (same); *Evans*, 387 F.3d at 1224-25. That definition does not differentiate between recesses that are between sessions of the Senate and those that are within sessions. Consistent with that understanding, the Senate *itself* described the relevant period here as part of its "recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

Op. Att'y Gen. 463, 466-69 (1960) (reasoning that the Pay Act constitutes congressional acquiescence under circumstances in which it permits payment).

Furthermore, in the Framing Era the term "the Recess of the Senate" would have naturally been understood in the legislative context to encompass both intrasession and intersession recesses. The British Parliament, whose practices formed the basis for American legislative practice, used the term "recess" to encompass both kinds of breaks. *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (2d ed. 1812) (describing a "recess by adjournment" as one occurring during an ongoing session); 33 H.L. Jour. 464 (Nov. 26, 1772) (King's reference to a "Recess from Business" that was inter-session). Indeed, the Oxford English Dictionary, in defining the word "recess," provides a usage example from Parliament in 1621 that refers to an *intra*session recess. *See* 13 Oxford English Dictionary, *supra* at 322-23 (quoting reference to House of Commons request about an impending "Recess of this Parliament" that was intra-session (citing 3 H.L. Jour. 61)); 3 H.L. Jour. 74 (adjourning until April 17).

Founding-era legislative practice in the United States conformed to the Parliamentary understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States "in *the recess* of Congress." Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1 (emphasis added). The only time Congress did so was for a

scheduled *intra*session recess.[11] And when the Constitutional Convention of 1787 adjourned on July 26 to August 6, some delegates, including the President of the Convention, referred to that intra-session period as "the recess."[12]

State legislatures employed the same usage. The Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes "in the recess" of the legislature. *See* Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during intersession legislative recesses.[13] And in

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[11] Annual sessions of the Continental Congress began on the first Monday of November, *see* Articles of Confederation of 1781, art. V, but the relevant recess occurred when Congress scheduled its adjournment to end earlier, on October 30, 1784. *See* 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 *id*. at 555-56..

[12] *See, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York "during the recess" due to a broken carriage), *reprinted in* 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76; 3 Farrand, *supra*, at 191 (1787 speech by Luther Martin, discussing matters that occurred "during the recess" of the Convention); *see also* 2 Farrand, *supra*, at 128.

[13] *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (recessing from April 16, 1781 to June 13, 1781). Neither recess was preceded by a *sine die* adjournment or its equivalent. In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, § 9; Vt. Const. of 1777, ch. II, sec. VII.

1775, the New York legislature appointed a "Committee of Safety" to act "during the recess" of the legislature; the referenced recess was a 14-day intrasession one.[14]

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause. The Clause allowed state governors to "make Temporary Appointments" of Senators "if Vacancies happen . . . during *the Recess* of the Legislature of any State." Art. I, § 3, cl. 2 (emphasis added). Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted the commission without objection.[15] The absence of objection is telling, for the Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See generally* Butler & Wolf, United States Senate Election, Expulsion and Censure Cases: 1793-1990 (1995).

Furthermore, construing the Recess Appointments Clause to encompass intrasession recesses accords with the common functional definition of "the Recess of the Senate" that both the Executive Branch and the Senate have long employed. *Compare* 33 Op. Att'y Gen. at 21-22, 25 (1921 opinion noting that the "essential

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[14] 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

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

inquiry" looks to whether "the members of the Senate owe no duty of attendance"; whether the Senate's "chamber [is] empty"; and whether the Senate is "absent so that it can not receive communications from the President or participate as a body in making appointments"), *with* S. Rep. No. 58-4389, at 2 (1905) (Senate Judiciary Committee report looking to similar factors).[16] And since 1921, executive and legislative officers have repeatedly affirmed the understanding that intra-session recess appointments are valid. See, *e.g.*, 41 Op. Att'y Gen. 463, 466-469 (1960); 20 Op. Off. Legal Counsel 124, 161 (1996); 13 Op. Off. Legal Counsel 271, 272-273 (1989); 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 28 Comp. Gen. 30, 34-37 (1948).

This interpretation best serves the purpose of the Recess Appointments Clause. When the Senate is in session, the power to fill vacant offices is shared by the President and the Senate. The Recess Appointments Clause was meant to ensure that vacant offices may be filled, albeit temporarily, when the Senate is unavailable to offer its advice and consent on nominations, while also freeing the Senate from having "to be continually in session for the appointment of officers."

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[16] The Senate's modern parliamentary precedents continue to cite the 1905 report as an authoritative source "on what constitutes a 'Recess of the Senate.'" *See* Riddick & Frumin, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. No. 101-28, at 947 & n.46 (1992).

The Federalist No. 67, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).[17] The Clause also enables the President to meet his continuous constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, since the President cannot exercise that authority "alone and unaided," but requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926); *see* 4 ELLIOT'S DEBATES 135 (Archibald Maclaine's explanation that the power "to make temporary appointments * * * can be vested nowhere but in the executive, because he is perpetually acting for the public"). The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the President's need to fill vacancies in aid of his constitutional responsibilities is just as great. Intrasession recesses often last longer than intersession ones. *See Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken "zero-day intersession recesses" as well as "intrasession recesses lasting months"). And in modern Senate practice, intrasession recesses account for more of the Senate's absences than intersession recesses. *See* Congressional Directory, 112th Congress 530-37 (2011) ("Congressional Directory").

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[17] *See also* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (ELLIOT'S DEBATES) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

The Company's position, by contrast, would apparently empower the Senate unilaterally to eliminate the President's recess appointment authority even when the Senate is unavailable to advise and consent, simply by recasting an adjournment *sine die* as an equally long adjournment to a date certain. For example, the 82nd Congress's second session ended on July 7, 1952, when Congress adjourned *sine die*, and the President was able to make appointments from then until January 3, 1953 when the next session of Congress began pursuant to the 20th Amendment. Congressional Directory, *supra*, at 529. If the Senate had instead adjourned from July 7 to a date immediately before the next congressional session (say, January 2), the break would have been equally long, but it would have constituted an intrasession recess, during which the President would have been powerless to make recess appointments under the Company's theory. The Framers could hardly have intended such a result. Rather, the Framers must have intended the Senate's practical unavailability to control in that hypothetical setting, despite the Senate's efforts to elevate form over substance in the manner of adjourning and reconvening.

Finally, the longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further supports the government's interpretation. The Supreme Court has stressed that "[t]raditional ways of conducting government give meaning to the Constitution," *Mistretta v. United*

States, 488 U.S. 361, 401 (1989) (internal quotation marks and ellipses omitted), and that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions," *The Pocket Veto Case*, 279 U.S. at 689. Instead of giving "great weight" to this vast and settled body of practice, the *Noel Canning* court looked to the fact that no intrasession recess appointment had been documented before 1867. 705 F.3d at 501-03. But until the Civil War, there were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See* Congressional Directory, *supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th Century. *See id.* at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of intrasession recesses beyond three days.[18] In any event, the Supreme Court has indicated "that a practice of at least *twenty* years duration on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 690 (emphasis added and internal

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

quotations marks and citation omitted). The practice of intrasession recess appointments stretches back at least *ninety* years, and is likewise entitled to "great regard."

2. The court in *Noel Canning* failed to take proper account of any of the above points, and instead employed its own flawed textual and historical analysis. In examining the Clause's text, *Noel Canning* reasoned that the Clause's reference to "*the* Recess of the Senate" confines the Clause to intersession recesses because it "suggests specificity." 705 F.3d at 500 (emphasis added). But as the *en banc* Eleventh Circuit explained, the word "the" can also refer generically to a *class* of things, *e.g.*, "The pen is mightier than the sword," rather than a specific thing, *e.g.*, "The pen is on the table." *See Evans*, 387 F.3d at 1224-25 (citing dictionary usages). In context and in light of the historical usages described above, it is obvious that the Framers used the word "the" in its former sense, as referring to *all* periods during which the Senate is unavailable to conduct business, rather than a *specific* one.[19]

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[19] Indeed, it is apparent that even the *Noel Canning* court could not have meant to use the definition of "the" on which it purported to rely. *See Noel Canning*, 705 F.3d at 500 ("'the' [is] an 'article noting a *particular* thing'" (quoting Johnson, *supra*, at 2041)). *Noel Canning* did not read "the Recess of the Senate" as referring to a particular recess in the same way that "the pen on the table" refers to a particular pen. Instead, it read "the Recess" as referring generically to the *class* of all intersession recesses. Once that Rubicon is crossed, "the" provides no textual basis for drawing a constitutional line between a restrictive class of recesses

Contrary to *Noel Canning*'s suggestion, 705 F.3d at 505, this usage is not solely a modern one. The Constitution itself elsewhere uses "the" to refer to a class of things. For example, the Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days "during *the Session* of Congress." Art. I, § 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to "the Session" cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* pp. 21-23.

The fact that the Clause refers to "the Recess" rather than "the Recesses," *Noel Canning*, 705 F.3d at 499-500, 503, is equally inapposite. The Constitution repeatedly uses a singular noun, in conjunction with the article "the" to refer to any instance in a class of repeating occurrences—as demonstrated by the references to "the Absence" and "the Session" in the provisions quoted in the preceding paragraph. Moreover, the Senate is constitutionally required to have at least two enumerated sessions per Congress, *see* Amend. XX, and in the 18th and 19th

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limited to intersession ones, and a broader class that includes intrasession ones as well.

Centuries, the Senate regularly had three or four enumerated sessions. *See generally* Congressional Directory, *supra*, at 522-26. Thus, the Senate regularly had at least two intersession "Recesses" per Congress. Thus, with respect to the Recess Appointments Clause, there is no correlation between the reference to "the Recess" and the multiple inter-session recesses that have occurred within every Congress.

Noel Canning also claimed that the structure of the Clause supported its conclusion that the Constitution treats a "recess" and a "session" as mutually exclusive, so that the Senate cannot have a recess during a session. *See* 705 F.3d at 500-01. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that the term of a recess appointee expires at the end of the Senate's "next" session, and viewed this provision as conclusive evidence that the Framers anticipated that the recess appointment power could be invoked only between enumerated congressional sessions. *Ibid.* (citing Federalist No. 67). But the Framers' provision of a specified termination point for the terms of recess appointees says nothing about whether a recess can occur within an enumerated session. As shown above, intrasession recesses were a recognized legislative practice at the time of the Framing. If the Framers meant to exclude them from the reach of the Recess Appointments Clause, they would hardly have expressed that intent in such an oblique manner, through the provision setting the termination date

for the appointments. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

And there are practical reasons why the Framers would have decided that the terms of all recess appointees—including intrasession appointees—would last until the end of the next session. For instance, because some intrasession recesses have extended almost to the end of the enumerated session (*see, e.g.*, Congressional Directory, *supra*, at 528, 533, 536), an intra-session recess appointment may occur near the close of a session. In such a situation, the Senate may not have an opportunity before the end of its current session to consider a permanent nominee for the position. Thus, having the end of the *next* session mark the end of each recess appointment ensures that the Senate will have a full opportunity to consider a permanent nominee before the office becomes vacant again.

Moreover, the fact that intrasession recess appointments may last a significant period of time does not distinguish them from intersession recess appointments. Under the original schedule for legislative sessions prior to the Twentieth Amendment, *inter*session recess appointments could last for an extended period. For example, on April 18, 1887, President Grover Cleveland

recess appointed William Allen to serve as United States district judge.[20] Had he not been confirmed by the Senate, Allen's temporary commission would have lasted until October 20, 1888, at the end of the Senate's next session—a span of 552 days. *See* Congressional Directory, *supra*, at 526. And that temporary commission would have continued even longer had the Senate's session run until the start of the next session in December 1888. *Ibid.*

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

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

its Return, in which Case it shall not be a Law") *with* Art. II, § 2, cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate").[21] This usage was commonplace in the Framing Era. When the Continental Congress convened a committee "during the recess," it did so under an intrasession "adjournment." 27 J. Continental Cong. 1774-1789, at 555-56. And Thomas Jefferson described intrasession breaks of the British Parliament as "recess by adjournment." Jefferson, *supra*, § LI. To the extent that "adjournment" was used at the time to refer to breaks in legislative business, rather than to the act of adjourning, it was used interchangeably with "recess," not in any broader sense. For instance, George Washington used the terms "recess" and "adjournment" in the same paragraph to refer to the same 10-day break in the Constitutional Convention. Letter from Washington, *supra* (expressing regret that he had been unable to come to New York "during the adjournment" because a broken carriage had impaired his travel "during the recess").

In any event, the government's position is consistent with the possibility that "recess" may be narrower than "adjournment," and with the conclusion that the Recess Appointments Clause does not necessarily apply to every period following

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[21] That understanding is reinforced by the fact that, at the time of the Framing, the word "recess" was generally not used as a verb, as that function was instead performed by the word "adjourn." *See* Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, *at* http://lawnlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1/.

an adjournment. The Adjournment Clause makes clear that the action of taking even an extremely short break counts as an "adjournment," *see* Art. I, § 5, cl. 4 (recognizing that breaks of less than three days are still "adjourn[ments]"), but the Executive has long understood that such short breaks that are not of sufficient duration to genuinely render the Senate unavailable to provide advice and consent do not trigger the President's authority under the Recess Appointments Clause. 33 Op. Att'y Gen. at 22. Here it is undisputed that the recess was of sufficient duration to trigger the President's recess appointment power.

Noel Canning also made little effort to review the usage of "the recess" during the period of the Framing, and the few historical materials that it did cite do not support its conclusions. The court of appeals cited a recess-appointment provision of the Revolutionary-era North Carolina constitution (N.C. Const. of 1776, Art. XX) and a later state-court decision, *Beard* v. *Cameron*, 7 N.C. (3 Mur.) 181 (1819), that supposedly "implie[d] that the provision was seen as differentiating between" the legislature's session and its recess. 705 F.3d at 501 .But the language of the North Carolina provision differs significantly from the Recess Appointments Clause. Moreover, *Beard* was decided on unrelated procedural grounds, the language on which *Noel Canning* relied came from a single judge's summary of the defendant's argument, and the relevant recess discussed there was not an intrasession one. *See* 7 N.C. 181. *Beard* is no answer

to the weight of historical evidence showing that the Framers would have naturally understood "the Recess of the Senate" to encompass inter- and intrasession recesses, and the "great regard" owed to Presidential practice, acquiesced in by the Senate, spanning at least ninety years. *See The Pocket Veto Case*, 279 U.S. at 690.

Finally, there is no basis for *Noel Canning*'s speculation that Presidents would use intrasession recess appointments to evade the Senate's advice-and-consent role. *See* 705 F.3d at 503. Despite the long-held understanding that Presidents may make intrasession recess appointments, Presidents routinely seek Senate confirmation, and they have a strong incentive to do so, because recess appointments are only temporary.

B. The President May Fill All Vacancies During a Recess, Not Just Those Vacancies that Arise During the Same Recess

The Company also takes the view that the President lacked the authority to make the January 2012 recess appointments because they did not arise during a recess. The theory that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeals, two of them sitting *en banc*. *See Evans*, 387 F.3d at 1226-27 (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). *Noel Canning*'s contrary conclusion is erroneous and should not be adopted by this Court.

1. The Recess Appointments Clause states that "[t]he President shall have Power to fill up all Vacancies *that may happen* during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist during a recess, including those that arose beforehand. He pointed out that "happen" is an ambiguous term, which could be read to mean "happen to occur," but "may mean, also . . . 'happen to exist.'" 1 Op. Att'y Gen. 631, 632 (1823). He explained that the "exist" interpretation rather than the "occur" interpretation is more consonant with the Clause's purpose of "keep[ing] these offices filled," *id.*, and the President's duty to take care of public business. Accordingly, "all vacancies which . . . *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled." *Id.* at 633 (emphasis added). Subsequent Attorneys General (and Assistant Attorneys General) have repeatedly endorsed Wirt's conclusion. See, *e.g.*, 41 Op. Att'y Gen. at 468; 13 Op. Off. Legal Counsel at 272; see also *Allocco*, 305 F.2d at 713 (listing opinions).

Attorney General Wirt's interpretation fits the durational nature of vacancies. Although the event that *causes* a vacancy, such as a death or resignation, may "happen" at a single moment, the resulting vacancy itself continues to "happen" until the vacancy is filled. *Accord* Johnson, *supra*, at 2122

(defining "vacancy" in 1755 as the "[s]tate of a post or employment when it is unsupplied"); *see* 12 Op. Att'y Gen. 32, 34-35 (1866).[22] That durational usage accords with common parlance. For example, it would be conventional to say that World War II "happened" during the 1940s, even though the war began on September 1, 1939. And the durational sense of "happen" is all the more appropriate when asking if one durational event (a vacancy) happens in relation to another (a recess). Thus, although some eighteenth century dictionaries defined "happen" with a variant of "come to pass," *Noel Canning*, 705 F.3d at 507, as applied to a durational event like a vacancy, that definition is consistent with Attorney General Wirt's interpretation.

For nearly two centuries, the Executive Branch has followed the opinion provided by Attorney General Wirt to President Monroe, himself one of the Founding Fathers, and Congress has repeatedly acquiesced. *See Allocco*, 305 F.2d at 713-14. As noted above, such a longstanding and uncontroverted interpretation is entitled to "great weight" in "determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 688-90.

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

This interpretation is also consistent with Executive Branch practice reaching back to the first Administration. President Washington made at least two recess appointments that would have run afoul of the rule proposed by the Company and adopted in *Noel Canning*. In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by a statute enacted in April 1792.[23] Under *Noel Canning*'s interpretation, the vacancy did not "happen" during the recess because it arose when the statute was first passed, and was then filled up during a later recess after at least one intervening session. And in October 1796, Washington recess-appointed William Clarke to be the United States Attorney for Kentucky, even though the position had gone unfilled for nearly four years.[24] President Washington's immediate successor, John Adams, expressed the same understanding as the government does

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[23] 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 1 Stat. 246. Scot's appointment was occasioned by Joseph Wright's death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in that office, and even if he had been, it would have also been during the same recess in which Scot was appointed (in which case Wright's commission would have run afoul of *Noel Canning*). *See* 17 Am. J. Numismatics 12 (Jul. 1883); Fabian, JOSEPH WRIGHT: AMERICAN ARTIST, 1756-1793, at 61 (1985).

[24] Dep't of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979).

today,[25] and President James Madison made at least one appointment that is not in accord with *Noel Canning*'s view.[26] And President Abraham Lincoln rejected *Noel Canning*'s approach as well when he recess-appointed David Davis to the Supreme Court of the United States on October 17, 1862, to a seat that had been vacated on April 30, 1861.[27] *See* 10 Op. Att'y Gen. 356 (1862) (Attorney General advising President Lincoln that he could make this appointment because the question had been "settled in favor of the power, as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate"). The Executive's long-held interpretation is entitled to "great weight" in "determining the true construction of a

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[25] *See* Letter from John Adams to James McHenry (April 16, 1799), *reprinted in* 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES ("ADAMS WORKS") 632-33; Letter from James McHenry to Alexander Hamilton (April 26, 1799), *reprinted in* 23 THE PAPERS OF ALEXANDER HAMILTON 69-71 (H.C. Syrett ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, at 647-48.

[26] Hartnett, *supra*, at 400-401. There is also some evidence to support appointments by President Jefferson that would be inconsistent with *Noel Canning*'s interpretation. *Id*. at 391-400.

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

constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 688-690.

The government's long-settled interpretation is also more consistent with the purpose of the Recess Appointments Clause. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, the slow speed of long-distance communication in the 18th Century meant that the President might not even have *learned* of such a vacancy until after the Senate's recess had begun. *See* 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant for months during a recess merely because news of the death during the session had not reached the Nation's capital until after the Senate was already in recess. The Company's position, by contrast, would make the President's ability to fill offices turn on the fortuity of when the previous holder left office. But "[i]f the [P]resident needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it must be filled now." Herz, *Abandoning Recess Appointments?*, 26 Cardozo L. Rev. 443, 445-46 (2005).

2. The Company's position also creates serious textual difficulties. If, as the Company urges, the phrase "during the Recess of the Senate" were read to modify the term "happen," and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and would be unavailable to limit the *time* when the President may exercise his "Power to fill up" those vacancies through granting commissions. As a result, the Company's reading would mean that the President would retain his power to fill the vacancy that arose during the recess *even after the Senate returns from a recess*, an interpretation that cannot possibly be correct. *See* 12 Op. Att'y Gen. at 38-39 (criticizing the "happen to arise" interpretation for this reason). The government's interpretation does not suffer from this defect. It allows for "during the Recess of the Senate" to delimit the President's "Power to fill up" all "Vacancies."

Noel Canning contended that the government's interpretation renders the words "that may happen" superfluous. *See* 705 F.3d at 507. But in the Framing era, the words "that may happen" could be appended to the word "vacancies" without signifying an apparent additional meaning. *See, e.g.*, George Washington, General Order to the Continental Army, Jan. 1, 1776 ("The General will, upon any Vacancies that may happen, receive recommendations, and give them proper consideration[.]"). In any event, the government's reading does not necessarily render any words superfluous. Without the phrase "that may happen," the Clause

could be read to enable the President to fill up known future vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing "that may happen" as the Executive has long read it confines the President to filling up vacancies in existence at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed the "happen to arise" interpretation. *See* 705 F.3d at 508-09. Randolph's opinion has been thoroughly repudiated by a long line of subsequent Attorney General opinions dating back to 1823, *see Allocco*, 305 F.2d at 713, and it is not clear that any President ever found the advice wholly persuasive. As noted above, even George Washington, to whom Randolph gave his advice, departed from it on more than one occasion. At most, Randolph's opinion shows an early "difference of opinion," Letter from John Adams to John McHenry (May 16, 1799), *reprinted in* 8 Adams Works, *supra*, at 647, regarding an ambiguous constitutional provision. Any such early differences were resolved by Attorney General Wirt's 1823 opinion, which has been adhered to consistently for nearly two hundred years.

Noel Canning also dismissed Congress's longstanding acquiescence in the Executive Branch's interpretation as a departure from a position supposedly expressed in an 1863 statute. *See* 705 F.3d at 509. But far from rejecting the

Executive's interpretation, the 1863 statute acknowledged it. *See* 16 Op. Att'y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1940, 54 Stat. 751.

Finally, *Noel Canning* attempted to minimize the damaging consequences of its decision by suggesting that Congress could more broadly provide for "acting" officials. *See* 705 F.3d at 511. The very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some positions (*e.g.*, Article III judgeships) cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions for an extended period of time, such as Cabinet level positions or positions on boards designed to be politically balanced.[28]

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[28] Even if the Recess Appointments Clause were confined to vacancies that arise during a recess, this Court would nevertheless be required to uphold the Board's order, because under the facts found by *Noel Canning* the appointments of the two recess appointees on the panel that issued the challenged order—Sharon Block and Richard Griffin—met that purported requirement. The third panel member was Senate-confirmed.

Block's seat was previously held by Craig Becker. *Noel Canning* understood Becker's recess appointment to have terminated pursuant to the Recess

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Appointments Clause "at the end" of the Senate's session—at noon on January 3, 2012. *See* 705 F.3d at 512. Having made that finding, *Noel Canning* nevertheless erroneously stated that the vacancy did not arise during the recess after January 3. *Id*. at 513. That view cannot be squared with the Recess Appointments Clause's provision regarding the termination date of appointments. If Becker occupied the position until the end of the Senate's session, the vacancy Block filled could not have arisen in that same session. By definition, the vacancy must have arisen *after* the earlier recess appointment ended at the end of the session—*i.e.*, during the recess. The appointment of Block on January 4 was thus made during that same period in which the vacancy she filled had arisen.

Griffin's seat, meanwhile, had become vacant on August 27, 2011, during an intrasession recess. *See id.* at 512. Even under the "arise" interpretation, the Recess Appointments Clause plainly provides that so long as a vacancy arose "during the Recess of the Senate," the President possesses the power to fill it. Although *Noel Canning* concluded that the President's recess appointment power is limited to the *same* recess in which the vacancy arose, *id.* at 514, nothing in the Clause's text imposes such a limitation.

CONCLUSION

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

Respectfully submitted,

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May 2013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 12-2693
	*	
v.	*	
	*	Board Case No.
LONG MECHANICAL, INC.	*	7-CA-52917
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,222 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 6th day of May, 2013

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CERTIFICATE OF SERVICE

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this 6th day of May, 2013