Oral Argument Requested

Nos. 13-9547 & 13-9564

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 13-9547 & 13-9564

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-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 PRIOR OR RELATED APPEALS

There are two other cases pending before this Court in which the Court or a party has raised a question as to the validity of the President's recess appointments to the Board: *Teamsters Local Union No. 455 v. NLRB*, Case No. 12-9519 and *NLRB v. Leader Communications, Inc.*, Case No. 13-9558. The Court has abated each of those cases in light of the Supreme Court's consideration of *NLRB v. Noel Canning*, 133 S.Ct. 2861 (2013) (Mem).

GLOSSARY

"the Act"	National Labor Relations Act, 29 U.S.C. § 151 et seq., as amended
"the Board"	National Labor Relations Board
"Br."	Company's opening brief
"D&O"	Decision and Order of the Board in *International Union of Operating Engineers, Local 627*, 359 NLRB No. 91 (2013)
"EEOC"	Equal Employment Opportunity Commission
"GCX"	General Counsel's exhibits
"JX"	Joint Exhibits
"OWL"	Out-of-Work List maintained by the Union
"Tr."	Transcript of the hearing
"the Union"	International Union of Operating Engineers, Local 627

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before this Court on the petition of the International Union of Operating Engineers, Local 627 ("the Union") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the

Board's Decision and Order, issued on April 17, 2013, and reported at 359 NLRB No. 91. (D&O1-14.)[1]

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices were committed in Oklahoma. The Board's Order is final with respect to all parties. The Union's petition for review, filed on April 25, 2013, and the Board's cross-application for enforcement, filed on June 4, 2013, are both timely, as the Act does not impose a time limit for seeking review or enforcement of Board orders.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that the Union violated Section 8(b)(1)(A) of the Act, by arbitrarily and discriminatorily denying Stacy Loerwald's request to examine the Union's exclusive hiring hall out-of-work referral list?

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[1] Record references are to the original record filed with this Court. "D&O" refers to the Board's Decision and Order, contained in Volume III of the record. "Tr." refers to the transcript of the hearing before the administrative law judge, contained in Volume I. "JX" refers to joint exhibits and "GCX" refers to exhibits introduced by the Board's General Counsel, contained in Volume II. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Does substantial evidence support the Board's findings that the Union, by removing Loerwald from the out-of-work referral list and refusing to permit her to re-register for the list, unlawfully discriminated against her and breached its duty of fair representation, in violation of Section 8(b)(1)(A) and (2) of the Act?

3. Does substantial evidence support the Board's finding that the Union breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by arbitrarily and discriminatorily refusing to stamp Loerwald's work search book for the Oklahoma Employment Security Commission?

4. Were the President's recess appointments to the Board valid?

STATEMENT OF THE CASE

Upon unfair-labor-practice charges filed by Stacy Loerwald, the Board's General Counsel issued a complaint alleging that the Union committed numerous violations of Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)). (D&O3.) After conducting a hearing, an administrative law judge issued a decision finding that the Union violated the Act by denying Loerwald's requests to examine the Union's exclusive hiring hall out-of-work referral list ("OWL"), removing her from the OWL, refusing to allow her to re-register on the OWL, and refusing to stamp her Oklahoma Employment Security Commission's work search book. (D&O13.) After the Union filed exceptions to the judge's decision, the

Board issued its decision affirming the judge's rulings, findings, and conclusions, and adopting the judge's recommended Order as modified. (D&O1.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Union Operates an Exclusive Hiring Hall and Maintains an Out-Of-Work Referral List To Track Nonworking Members and Refer Them to Jobs for Which They Qualify

The Union represents approximately 1,200 employee-members, primarily in the construction industry, from district offices in Tulsa, Oklahoma and Oklahoma City, Oklahoma. (D&O3; Tr.24, 202, 247, JX1.) It operates an exclusive hiring hall, which employers who have signed collective-bargaining agreements with the Union must utilize to hire. (D&O3; Tr.15-16.) Likewise, the hiring hall provides the exclusive means by which employees must seek employment with those signatory employers. (D&O3; GCX1(n), ¶ 5(a)(1).)

To operate its hiring hall, the Union maintains the OWL to track which members need work and to determine who should be referred to new jobs. (D&O3; Tr.20-22, 202-03.) Members' OWL registration forms detail their contact information, qualifications, and the date their last job ended. (D&O3; Tr.20-21, 181-82, GCX2, 9.) An employee remains on the OWL until she accepts a job. (D&O3; Tr.189.)

The Union's business agents control and update the OWL. (D&O4; Tr.205.) When a signatory employer contacts a business agent to seek new employees, the employer describes the position and any qualification requirements. (D&O4; Tr.177.) The business agent then reviews the OWL and offers the job to the first qualified member on the list. (D&O4; Tr.178.) If the member accepts the job, the business agent dispatches the employee to the jobsite. (D&O4; Tr.34-35.) Once an employee is physically at the jobsite, the employer has the option to terminate the employee. (D&O4; Tr.35.)

The Union's "Out of Work Procedures" provide the employees' rules for the OWL, including:

> It shall be the responsibility of the applicant to notify the union hall of any change in their address and telephone number . . . . and to remove their name from the list if they are unavailable for work and further to notify all districts in which they are registered when dispatched to work from any district.
> . . .
>
> Failure to maintain a working telephone number where an applicant can be notified of work opportunities will result in the applicant being removed from the list and an applicant must re-register to be placed back on the list.
>
> Applicants who refuse three (3) job referral opportunities for any reason will be placed on the bottom of the list in the district in which the three (3) referrals occur.

(D&O4; GCX9).

The Union's bylaws include additional requirements for the OWL. (D&O4; JTX1.) For instance, the OWL "shall be posted at Local 627's office; and job

referrals shall, in compliance with the law, be made on a non-discriminatory basis." (D&O4; JTX1.) The by-laws do not require that an employee be removed from the list for not maintaining a working phone number. (D&O4; JTX1.)

B. Loerwald Files an EEOC Charge Against the Union, Becomes Frustrated By Several Failed Job Prospects, and Substitutes a Fax Number for Her Phone Number

In early 2011, Loerwald, a member of the Union who utilized the hiring hall, filed a charge against the Union with the Equal Employment Opportunity Commission ("EEOC"). (D&O4-5; Tr.19-20.) In early October 2011, she, along with two other union members, filed a lawsuit alleging that the Union discriminated against them. (D&O5 & n.7; Tr.20, 125.)

Loerwald was laid off from a job in late July 2011. (D&O5; Tr.54.) In September, she spoke with Alan Farris, the Union's business agent for the Oklahoma City District, and Perry Morgan, the Union's business agent for the Tulsa District, about getting a job with union signatory Deep South Rigging. (D&O5; Tr.27-30.) Based on Morgan's representation that she had passed a background check for the job, Loerwald moved near the jobsite. (D&O5; Tr.29-30.) Morgan later told her she did not pass the background check so she did not get the job. (D&O5; Tr.27-30.)

Also during this time, Farris told Loerwald about an oiler position with Northwest Crane and explained that Loerwald was the first oiler on the OWL.

(D&O5; Tr.30-31.) Nevertheless, Loerwald was not selected for the job. (D&O5; Tr.31.) Farris later told her that, at Northwest Crane's request, the Union referred her and four other individuals for jobs but Northwest Crane only selected three of them, not including Loerwald. (D&O5; Tr.32.) Loerwald believed this violated the OWL procedures, which require the Union to send the qualified employee highest on the OWL, and only permit employers to reject an employee once the employee physically reports to work. (D&O5 & n.9; Tr.34-35.) Loerwald learned that at least two of the three individuals who got the job were below her on the OWL and should not have been hired before her. (D&O5; Tr.54-55.)

Frustrated by these experiences, on October 14, Loerwald went to the union hall and instructed Union Secretary Rhea Ellen Bobo to remove her phone number from the OWL. (D&O5; Tr.36, GCX3 p.3.) Loerwald did so in order to force the Union to communicate job offers in writing. (D&O5; Tr.45.) Bobo responded by asking Loerwald "How are they going to contact you for work purposes? Do you got another one?" (D&O5; Tr.44, GCX3, p.3.) Loerwald said that she had a fax number on file. (D&O5; Tr.44, GCX3, p.3.) Bobo did not tell Loerwald that this would take her out of compliance with the OWL procedures. (D&O5; Tr.68, GCX3.)

After talking with Bobo, Loerwald spoke with Farris about the Northwest Crane job. (D&O5; Tr.46-50, GCX3.) During that conversation, he acknowledged

that, although a number of people had refused three jobs or more, he had not yet moved them to the bottom of the OWL, as was required by the OWL procedures and the Union's bylaws. (D&O5; Tr.49, GCX3 p. 30.)

On October 17, Loerwald's attorney, Barrett Bowers, sent a letter to the Union's attorney, James Thomas. (D&O5; GCX5.) Bowers referenced the fact that Loerwald had filed a discrimination suit against the Union and explained that, nevertheless, Loerwald and the Union needed to continue to communicate about future employment opportunities. (D&O5; GCX5.) He informed the Union that Loerwald only wanted the Union to communicate with her when it had a "bona fide job offer," at which time it could reach her through email or a fax number that Bowers provided. (D&O5-6; Tr.56, GCX5.)

C. The Union Refuses Loerwald's Numerous Requests To See the OWL

During visits to the union hall between October 2011 and January 2012, Loerwald repeatedly asked to see the OWL. The Union denied each request. On October 20, she asked Farris if she could see the list. He flipped to the page with Loerwald's name on it, and held it out to her but would not let go of it and prevented Loerwald from examining other pages of the OWL. (D&O6; Tr.56-57, 61-62.)

On November 2, she asked Business Manager Michael Stark if she could see the OWL. (D&O6; Tr.63-65.) Stark told her it was not union policy to show

employee-members the list and that the Union "doesn't stand for" harassment of business agents. (D&O6; Tr.64-65, GCX8, pp. 2-3.) After arguing about whether she was skipped over on the OWL and about the Deep South job, Stark told her that "You're on the [OWL] and that's all I need to tell you. Go talk to your attorney about it." (D&O6; Tr.65, GCX8, pp. 4-8.)

Business Agent Farris refused Loerwald's subsequent requests to see the OWL on November 23 and 30, December 5 and 14, and January 17. (D&O6-7; Tr.78-88, 101-02, 105-06, GCX15, 16, 17, 18.) On January 4, 2012, Bobo provided her with a copy of the OWL, but almost all of the information on the list, including the names of other members, was redacted. (D&O7; Tr.90-94, GCX19.)

D. The Union Notifies Loerwald That It Removed Her From the OWL and She Responds By Providing Her Attorney's Phone Number and Eventually Her Own Phone Number

On November 7, Bowers received two letters from Thomas stating that Loerwald had been removed from the OWL. (D&O6; Tr.66, GCX9, 10.) In the first letter, Thomas stated that Loerwald was in violation of the Union's OWL procedures and that Loerwald was harassing the Union's business agents in an attempt to gain evidence for her discrimination lawsuit. (D&O6; GCX10.) He also alleged that she demanded that union agents perform "special tasks" for her, including allowing her to inspect the OWL. (D&O6; GCX10.) In the second letter, Thomas stated Loerwald was removed pursuant to unspecified provisions in

the OWL procedures and provided a copy of the procedures to Bowers. (D&O6; GCX9.) The Union had never previously given Loerwald a copy of those procedures. (D&O10; Tr.67.)

The following day, Bowers responded by stating that Loerwald was in compliance with the OWL procedures and that the Union could contact her through his phone number, and asked that the Union place her back on the OWL. (D&O6; GCX11.) He also asserted that the Union was violating the OWL procedures because the business agents refused to allow Loerwald access to the list. (D&O6; GCX11.)

In a letter dated November 18, Bowers provided Thomas with Loerwald's phone number and, once again, asked that she be reinstated to her original position on the OWL. (D&O6; GCX14.) The Union refused to do so and it never restored her to the OWL. (D&O6; Tr.78.)

E. The Union Refuses To Stamp Loerwald's Oklahoma Employment Security Commission's Work Search Book

During this time period, Loerwald received unemployment insurance benefits from the state of Oklahoma. To remain eligible for benefits, Loerwald was required to contact the hiring hall each week and to get the Union to stamp her work search book to verify that she had "checked in." (D&O4; Tr.78–79, GCX23.) Bobo stamped Loerwald's book when Loerwald visited the union hall in November and December. (D&O6-7; Tr.78-79, 87-89.) When Loerwald checked

in on January 10, 2012, however, Bobo refused, explaining that Stark had instructed her not to stamp the book because Loerwald was not registered on the OWL. (D&O7; Tr.100-01, GCX21.) Bobo again refused to stamp Loerwald's book on January 17. (D&O7; Tr.101-03; GCX22.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce, Members Griffin and Block) found, in agreement with the administrative law judge, that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by arbitrarily and discriminatorily denying Loerwald's request to examine the exclusive hiring hall OWL. (D&O1, 13.) The Board also agreed that the Union violated Section 8(b)(1)(A) and (2) of the Act by arbitrarily and discriminatorily removing Loerwald from the OWL, and refusing to permit her to re-register for the OWL, and caused employers to discriminate against her in violation of Section 8(a)(3) of the Act. (D&O1, 13.) Finally, the Board found that the Union violated Section 8(b)(1)(A) of the Act by arbitrarily and discriminatorily refusing to stamp Loerwald's work search book. (D&O1, 13.)

The Board's Order requires the Union to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (D&O1.) Affirmatively, the Board's Order requires the

Union to: (a) grant Loerwald's requests to examine the OWL, including previous versions if they are retrievable; (b) restore her to the OWL in her rightful order of priority; (c) make her whole for any loss of earnings and other benefits she suffered; (d) compensate her for any adverse income tax consequences of receiving any backpay in a lump sum; (e) remove from its files any reference to her removal from the OWL; (f) preserve and provide the Regional Director records necessary to analyze the amount of backpay due under the terms of the Order; and (g) post a remedial notice at its office and hiring halls in Oklahoma City and Tulsa and to distribute it electronically if it customarily communicates with members by such means. (D&O1-2.)

STANDARD OF REVIEW

This Court has stated that it "will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole." *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) (internal citation omitted). "Substantial evidence" consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). In determining whether substantial evidence exists, a court may not displace the Board's choice between fairly conflicting views of the evidence,

even if "an appellate panel may have decided the matter differently." *Interstate Builders*, 351 F.3d at 1028 (internal citation omitted).

SUMMARY OF ARGUMENT

When a union runs an exclusive hiring hall, it exercises a great deal of authority over its members, who are obligated to seek employment with participating employers through the hiring hall. In wielding this authority, a union owes a duty to fairly represent its members and to avoid engaging in discriminatory or arbitrary conduct. The failure to do so violates Section 8(b)(1)(A) and (2) of the Act.

Substantial evidence supports the Board's findings that the Union violated its duty to fairly represent its members by denying Loerwald her well-established right to review the OWL so that she could determine whether the Union was properly referring her to jobs. The Union argues that she had no right to the OWL because she had been removed from the OWL, but several of her requests came before the Union removed her and, more importantly, the Union's decision to remove her from the OWL was itself unlawful.

Substantial evidence also supports the Board's findings that the Union violated the Act by removing Loerwald from the OWL and refusing to allow her to re-register. Utilizing the Board's *Wright Line* framework, the Board reasonably determined that the Union was unlawfully motivated by Loerwald's discrimination

cases against it. The Board also found that the Union's treatment of Loerwald was arbitrary and thus in violation of its duty of fair representation. In reaching both of these findings, the Board rejected the Union's argument that Loerwald had effectively removed herself from the OWL by not providing a working phone number in violation of the OWL procedures. The Board found that the Union had never notified Loerwald of the OWL procedures and that, in any event, she substantially complied with those procedures by providing the Union with her attorney's phone number.

Substantial also supports the Board's finding that the Union violated the Act by refusing to stamp Loerwald's unemployment book and thereby certify that she was registered with the hiring hall. Because the Union's decision to remove Loerwald from the OWL was unlawful, its refusal to stamp her book was a continuation of the Union's breach of its duty of fair representation. The Union's failure to challenge this finding in its brief waives any defense and warrants summary enforcement of that portion of the Board's Order.

Finally, the Union fleetingly invokes a recent D.C. Circuit case to contend that the President's recess appointments to the Board were invalid. But that understanding of the Recess Appointments Clause is wrong as a matter of text, history, and purpose. Indeed, the settled understanding of the political branches, for nearly a century, is in direct contravention to the Union's arguments.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION REPEATEDLY VIOLATED THE ACT BY REFUSING LOERWALD'S REQUESTS TO SEE THE OUT-OF-WORK LIST

A. A Union's Duty of Fair Representation in Operating a Hiring Hall

Section 8(b)(1)(A) of the Act (29 U.S.C. §158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 of the Act." Section 7 (29 U.S.C. § 157) grants employees the right "to form, join, or assist labor organizations, . . . and also . . . to refrain from any or all such activities . . . ."

In addition to these explicit statutory protections, the Board, with court approval, has found that a union owes a duty of fair representation to the employees it represents. *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 73 (1989); *Miranda Fuel Co., Inc.*, 140 NLRB 181, 184-85 (1962). This reflects the principle that a union's status as the exclusive representative "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A union breaches this duty "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith."

Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998). And although this duty is judicially created, the Supreme Court has held that such conduct may also restrain employees in the exercise of their Section 7 rights and therefore violate Section 8(b)(1)(A) of the Act. *See Breininger*, 493 U.S. at 73-74; *accord Teamsters Local Union No. 435 v. NLRB*, 92 F.3d 1063, 1068-69 (10th Cir. 1996). The protections of Section 8(b)(1)(A), and the union's duty of fair representation, apply to "exclusive hiring hall arrangements, under which workers can obtain jobs only through union referrals." *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *accord Breininger*, 493 U.S. at 87-88 & n.11.

It is well established that a union's duty of fair representation encompasses the obligation to provide members access to its job referral lists so that they can determine whether their rights are being protected. *See NLRB v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987); *NLRB v. Local 139, Int'l Union of Operating Eng'rs*, 796 F.2d 985, 993 (7th Cir. 1986); *Teamsters Local Union No. 519*, 276 NLRB 898, 901-02 (1985). By refusing to provide such information, a union breaches its duty and violates Section 8(b)(1)(A) of the Act. *See, e.g.*, *Plumbers Local 32*, 346 NLRB 1095, 1096 (2006). In some cases, the Board has imposed a heightened standard, requiring the union to permit a member access to its referral records upon a "reasonable belief" that the union treated the member unfairly. *Boilermakers Local 197*, 318 NLRB 205 (1995).

B. The Union Unlawfully Refused Access to the OWL

Substantial evidence supported the Board's finding (D&O7-9) that, even applying the heightened standard, Loerwald reasonably believed that the Union was treating her unfairly with respect to its operation of the OWL, thus the Union violated the Act by repeatedly denying her requests to review the OWL. First, Loerwald reasonably believed that the Union was not properly administering the OWL. Despite being told that she was the first qualified oiler on the OWL, she was not properly referred to the Northwest Crane job. She also learned that Business Agent Morgan was not following the requirement that, if a member refused a job on three occasions, he was to be moved to the bottom of the OWL. Moreover, the Union's repeated refusal to allow her to examine the OWL reasonably caused her to believe it was not being properly administered.

Despite Loerwald's legitimate concerns over the Union's administration of the OWL and its consequences for her job prospects, the Union unlawfully refused Loerwald's requests to review the OWL on eight separate occasions between October 20, 2011 and January 17, 2012. (D&O7-8.) On the few occasions it did not outright refuse, it concealed the relevant information. For example, on October 20, Business Agent Farris let her see the page on which her name appeared, but did not allow her to review the entire list. And on January 4, Union Secretary Bobo let

her see a copy of the list, but almost all of the information, including member names, was redacted, rendering it essentially useless.

In its brief, the Union does not deny that it refused Loerwald's requests, or offer any justification for why it did so. Instead, it weakly claims (Br. 14) that Business Manager Stark cannot be blamed for not showing her the OWL, because the business agents have the list. But when Loerwald asked Stark if she could see the list on November 2, he did not refer her to the business agents. Instead, he told Loerwald that it was not the Union's policy to show members the OWL every day and that the Union "doesn't stand for" harassment of the business agents. (D&O6; GCX8 pp. 2-3.) Then, after they argued about whether she was skipped on the list, and about what Morgan had told her about the Deep South job, he told her in no uncertain terms that "You're on the out-of-work list, and that's all I need to tell you. Go talk to your attorney about it." (D&O8; GCX8, p.7.) More importantly, Loerwald directed all of her other requests to Business Agent Farris, who denied each of those requests.

The Union also attempts to excuse its refusals by arguing (Br. 14) that, once Loerwald was off the OWL, she no longer had any reason to review the OWL. But Loerwald maintained that she was improperly removed from the OWL, thus, as found by the Board (D&O8), her request was "reasonably directed towards ascertaining whether" the Union was treating her fairly. *See Carpenters Local*

608, 811 F.2d at 152. Furthermore, Loerwald first asked to see the OWL on October 20, then again on November 2, before she was removed from the OWL on November 7. Finally, as will be discussed below, the Union acted unlawfully by removing her from the OWL in the first place, and thus cannot use her removal to justify its unlawful refusal to allow review of the OWL.

In short, the Union provides no legitimate argument justifying its refusal to provide Loerwald access to the OWL. Substantial evidence thus supports the Board's findings that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE UNION VIOLATED THE ACT BY REMOVING LOERWALD FROM THE OWL AND REFUSING TO ALLOW HER TO RE-REGISTER

The Board found (D&O9-13) that the Union violated Section 8(b)(1)(A) and (2) by removing Loerwald from the OWL and refusing to allow her to re-register. In reaching this determination, the Board found that the Union was unlawfully motivated and that it violated its duty of fair representation. Substantial evidence supports both of these findings.

A. The Union's Decisions To Remove Loerwald From the OWL and Refuse To Allow Her To Re-Register Were Unlawfully Motivated

1. A union violates the Act when it retaliates against a member for engaging in protected activity

As discussed above (p. 15), Section 8(b)(1)(A) of the Act (29 U.S.C. §158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 of the Act." Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of" Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)).[2] A union violates both of these sections when it takes an adverse action against an individual in retaliation for protected activity.

In applying these provisions, an inquiry into the union's motive is essential. *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961). To analyze motive, the Board applies the burden-shifting framework set out in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d. 889 (1st

[2] Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) provides, in relevant part, "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to discourage or encourage membership in any labor organization . . . ." As the Board explained (D&O9), Section 8(b)(2) does not require an overt demand by a union to discriminate. Rather, a union may discriminatorily refuse to refer an employee to work by simply failing to do so, without making any demand of the employer. *See Local 675, IBEW*, 223 NLRB 1499 (1976), *enforced mem.*, 556 F.2d 574 (4th Cir. 1977); *accord NLRB v. Local 46, Metallic Lathers Union*, 149 F.3d 93, 99 n.3 (2d Cir. 1998).

Cir. 1981). *See also NLRB v. Transp. Mgt. Corp.*, 462 U.S. 393, 398 (1983) (approving *Wright Line* framework). Although *Wright Line* typically applies to cases brought against employers, it is equally applicable to cases where a union's motivation is at issue. *See, e.g.*, *NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 786 (7th Cir. 2013); *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004).

Under *Wright Line*, the General Counsel must establish that an employee engaged in protected activity, that the Union had knowledge of that activity, and that the protected conduct was a substantial or motivating factor in the adverse action taken by the respondent. *MJ Metal Prods, Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001). If the General Counsel satisfies that burden, the Board will find a violation of the Act unless the respondent shows, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected union activity. *Id*.

The Board may infer unlawful motive from circumstantial evidence, such as the timing of the adverse action relative to the protected activity, the commission of other unfair labor practices, and the inability of the proffered justification to withstand scrutiny. *See NLRB v. Link Belt Co.*, 311 U.S. 584, 602 (1941); *MJ Metal Prods, Inc.*, 267 F.3d at 1065. The Board's motive findings must be upheld so long as they are supported by substantial evidence, no matter that the reviewing

court could justifiably make different findings were it to consider the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996).

2. The Union discriminated against Loerwald

Applying the *Wright Line* framework here, the Board found (D&O1 n.2, 9-11) that Loerwald engaged in protected activity, that the Union had knowledge of that activity, and that the Union's hostility towards this activity was a motivating factor in its decision to remove Loerwald from the OWL and to refuse to allow her to re-register. Further, the Board found (D&O11-12) that the Union failed to show that it would have taken these actions absent her protected activity.

In its brief, the Union does not contest the Board's findings that it knew that Loerwald engaged in protected activity. First, Loerwald, along with two other members, filed an EEOC charge, and later a discrimination lawsuit, against the Union. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978) ("the 'mutual aid or protection' clause [of Section 7] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums") (internal citations omitted)). Loerwald also engaged in protected activity by expressing her belief that the Union was not

properly running the hiring hall or administering the OWL. The Board found (D&O10) that the Union certainly had knowledge of these actions.

The Board's finding (D&O10) that Loerwald's protected activity was a motivating factor in the Union's decision to remove her from the OWL, and to refuse to allow her to re-register, is also well supported. Business Manager Stark and Business Agent Farris held "significant animus" (D&O10) against Loerwald based on her protected activity. It manifested this animus in the November 7 OWL-removal letter to Loerwald's attorney (GCX10), in which the Union's attorney asserted that Loerwald engaged in "harassing" conduct in connection with her EEOC complaint.

Additional factors further support the Board's motive findings. As the Board explained (D&O10), the timing was "highly suspect" because although Loerwald had asked to have her phone number from the OWL in mid-October, the Union only removed her from the OWL on November 7, "on the heels of" her complaints about the hiring hall to Stark and Farris in late October and early November. This led the Board to find (D&O10) that the removal of her name from the OWL was "directly tied to the business agents' complaints that she was 'harassing' them to see the OWL," which was protected activity, in a "futile effort" to support her discrimination suit, which was also protected activity. There was no

doubt, the Board found, that the Union held "significant animus" against her for engaging in this protected conduct.

Moreover, though the Union claimed it removed Loerwald for failing to provide her phone number, it never notified her of that requirement, though it was required to do so. *See NLRB v. Int'l Bhd. of Elec. Workers, Local 11*, 772 F.2d 571, 574, 576 (9th Cir. 1985) (holding failure to give notice of hiring hall procedures to employment applicants constituted violation of §§ 8(b)(1)(A) and (b)(2)); *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (holding duty of fair representation requires the union to inform workers of hiring hall rules). Indeed, the Board (D&O10) credited Loerwald's testimony that she was unaware of the OWL procedures until the Union sent her attorney a copy with the November 7 OWL-removal letter. The Union has not challenged this credibility determination in its brief and has thus waived any such argument. *See United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005) ("issues not raised in the opening brief are deemed abandoned or waived").

The Union's unlawful motive was further revealed by its refusal to return Loerwald's name to the OWL after her attorney informed the Union that it could communicate with Loerwald through his phone number, and after he provided her direct phone number on November 18, thus curing any deficiencies with the asserted policy that required a working phone number. (D&O4; GCX9, 11, 14).

Nothing in the OWL procedures required Loerwald to provide her own working phone number, and indeed it was common practice for the Union to leave messages at nonmember phone numbers and to email members. (D&O10 & n.22.)

Finally, evidence of the Union's disparate treatment of Loerwald supported the Board's motive determination. Although the Union had noted on the OWL that member Justin Weant should have been removed for failing to maintain a working phone number, it failed to do so between October 2011 and March 2012, and Farris tried to reach Weant in order to update his records. (D&O10; Tr.257-259.) Though the Union could not offer him jobs while it lacked contact information, it allowed him to remain on the list as it took proactive measures to update his records. Leaving him on the OWL for approximately 5 months without a working phone number does not amount to a "negligent mistake" as the Union suggests (Br. 12-13), and stands in stark contrast to its removal of Loerwald from the OWL as soon as the Union's attorney decided to look into the OWL rules and deemed her out of compliance which, as discussed above, occurred "on the heels of" her complaints about the hiring hall. (D&O10-11 & n.24.) Likewise, the Union's generous treatment of Weant around the same time undercuts the Union's argument (Br. 13-14) that it removed Loerwald from the OWL in a newfound attempt to follow the OWL procedures "generally and across the board . . . ." The timing of the Union's actions, as well as the evidence of disparate treatment and of

the Union's animus against Loerwald's protected activity provides substantial evidence supporting the Board's finding (D&O11) that the Union was unlawfully motivated when it removed her from the OWL and refused to allow her to re-register.

The burden then shifted to the Union to establish that it would have taken these same actions even absent Loerwald's protected activity. The Union attempted to meet this burden by arguing that Loerwald did not provide the Union with a proper telephone number, and thus ran afoul of the OWL procedures, and further that she never asked to re-register. The Board (D&O11-12) reasonably rejected these arguments.

The Union argued that Loerwald ran afoul of the OWL procedures because she provided her attorney's phone number rather than her own. But those procedures (GCX9) state that a member will be removed from the OWL for "[f]ailure to maintain a working telephone number where an applicant can be notified of work opportunities . . . ." There was no requirement that members provide a personal phone number, and it was the Union's practice to allow individuals to remain on the OWL who had provided phone numbers of relatives and neighbors. The Board thus rejected the Union's argument and found (D&O11) that Loerwald complied with the OWL procedures.

The Union's arguments in its brief are no more persuasive. Though it asserts (Br. 11) that Loerwald attempted to "unilaterally implement an in-writing only policy," and that the judge "ruled that all correspondence about the OWL should have been through the lawyers," neither is true. Bowers, Loerwald's attorney, told Thomas, the Union's attorney, that the Union should contact Loerwald through his phone number. (GCX11.) And the judge never made the "extraordinary conclusion that all contact must be through the lawyers." (Br. 11.) She simply found (D&O11) that Loerwald's decision to use Bowers's phone number was not inconsistent with the OWL procedures or the Union's practice of contacting members through the number of third parties. Moreover, the Union chose to convey important information to Loerwald through Bowers. Thomas informed Bowers that the Union had removed Loerwald from the OWL and provided him with a copy of the OWL procedures. (GCX9, 10.) Likewise, during Loerwald's January 4 visit to the union hall, Farris stated that he would contact her through her attorney about a possible job. (D&O11; GCX19, p. 4.) It is thus ironic that the Union now cavalierly dismisses these communications between counsel, arguing (Br. 12) that Loerwald's "only feeble attempt to [re-register for the OWL] was apparently a letter in mid-November between counsel that did not come to the attention of the Union." The Board thus reasonably found (D&O11) that the Union's argument was pretextual.

Likewise, the Board rejected (D&O11) the Union's contention that, as a result of its efforts to more strictly comply with the OWL procedures than it had in the past, it would no longer afford Loerwald special treatment. There was no evidence that Loerwald had ever received special treatment. Moreover, the Union never provided Loerwald with the OWL procedures until it sent a copy to Bowers on November 7. (GCX9.) In any event, as discussed above, the Board found that Loerwald complied with the OWL procedures by providing a working phone number on November 8.

With respect to the Union's refusal to permit Loerwald to re-register, the Union made the perplexing argument that she never asked to re-register and was therefore properly left off of the OWL. In letters dated November 8 and 18, Bowers demanded that the Union restore her name to the OWL. (GCX10, 11.) While the Union argues (Br. 12) that Bowers' November 18 letter to Thomas, in which he provided Loerwald's phone number, "did not come to the attention of the Union," there is no record support for this assertion. Moreover, this argument is specious where Thomas never denied receiving this letter and agency principles establish that a client/principal is deemed to know what its attorney/agent does. (GCX5, 9-14.) *See Grason Elec. Co.*, 296 NLRB 872, 885 & n.32 (1989) ("It is a well-established principle of agency law that attributes to a client the knowledge obtained by the client's attorney.") (citing *Link v. Wabash R.R. Co.*, 370 U.S.

626, 634 (1962)), *rev'd on other grounds*, 951 F.2d 1100 (9th Cir. 1991); *see also O.K. Mach. & Tool Corp.*, 279 NLRB 474, 478 (1986). And Loerwald made her desire to be returned to the OWL "abundantly clear" during her numerous visits to the union hall, leading the Board to find that the Union's argument was "highly disingenuous." (D&O11.)

In its brief, the Union also quibbles with the judge's recitation of the facts but it fails to establish that any of the Board's findings were not supported by substantial evidence. The Union suggests (Br. 7) that "[t]he ALJ seems to blame the Union that Loerwald did not get" the Deep South Rigging job, and that the judge found that the Union told her she had passed the background check. In fact, the judge merely recounted that, "according to Loerwald," Business Agent Perry Morgan told her she had passed, and noted that the Union disputed this assertion but stated that it was unnecessary to resolve this dispute. (D&O5 & n.8.) Likewise, the judge recited Loerwald's testimony about not getting the Northwest Crane job, but did not, as the Union suggests (Br. 9), rely on this matter as evidence of discrimination by the Union. Instead, these failed job prospects simply provided the backdrop against which Loerwald attempted to force the Union to convey job information in writing by fax or email, rather than by phone.

Finally, despite never giving Loerwald the OWL rules, the Union insists (Br. 14) that Loerwald knew that removing her phone number would lead to her

removal from the OWL. It argues (Br. 10) that, when she did so, the Union pointed out that there would be no way to contact her. In fact, Union Secretary Bobo simply asked how the Union would contact her, and Loerwald responded that she had provided a fax number. (D&O5; GCX3, p. 3.) This did not, as the Union suggests (Br. 10), serve to put Loerwald on notice that she was out of compliance with the OWL procedures. And while the Union insists (Br. 10) that it "uniformly" told others that they needed to have a phone number, as discussed above, the Union routinely allowed employees to provide the numbers of third parties and communicated with members by email. Accordingly, because Loerwald asked the Union, through counsel, to convey job offers through her fax number, attorney's number, or her email address, the Union cannot reasonably claim that she knew she would be removed from the OWL.

B. The Union Violated Its Duty of Fair Representation

As discussed above (pp. 15-16), a union breaches its duty of fair representation, in violation of 8(b)(1)(A) and (2) of the Act, when its conduct toward a member of the bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *accord Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67, 77 (1991) (holding that standard announced in *Vaca* applies to all union conduct including its operation of an exclusive hiring hall). "No specific intent to discriminate on the basis of union membership or activity is

required; a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent." *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988). A union breaches this duty by arbitrarily refusing to permit individuals to register for its hiring hall and by failing to inform workers of relevant rules. *Id*. (internal citations omitted).

In its brief, the Union offers no specific challenge to the Board's findings (D&O12-13) that the Union violated its duty of fair representation. As discussed above (p. 25), it has thus waived any such argument. Accordingly, provided that the Court agrees that the Union unlawfully removed Loerwald from the OWL, the Board is entitled to summary enforcement of that portion of the Board's Order finding that the Union violated its duty of fair representation.

In any event, the Board explained (D&O12 & n.27) that the same facts that support the conclusion that the Union acted with discriminatory intent support the conclusion that the Union acted arbitrarily in derogation of its duty of fair representation. While it permitted others to provide phone numbers of third parties, it removed Loerwald from the list despite the fact that she provided her attorney's phone number. And it permitted at least one member—Justin Weant—to remain on the list for months during this same time period despite the fact that he had no phone number on file. By contrast, just weeks after she removed her

personal number from the OWL, and "on the heels of" her complaints about the hiring hall, the Union adopted the position that she was out of compliance with the OWL rules and immediately removed her from the OWL. The Board's finding that the Union breached its duty of fair representation in its treatment of Loerwald is thus reasonable and supported by substantial evidence.

III. THE UNION VIOLATED THE ACT BY REFUSING TO STAMP LOERWALD'S UNEMPLOYMENT BOOK

Beginning in January 2012, the Union refused to stamp Loerwald's unemployment work search book, which she had to maintain to remain eligible for unemployment benefits. The Union stated that it could not stamp the book because Loerwald was not registered on the OWL. Because it was unlawful for the Union to remove her from the OWL and prevent her from re-registering, the Board reasonably concluded (D&O13) that the Union's refusal to stamp the book was a continuation of the Union's breach of its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. The Union failed to challenge this finding in its opening brief. Accordingly, as discussed above (p. 25), it has waived any such challenge. Thus, again, provided that the Court agrees that the Union violated the Act by removing Loerwald from the OWL, the Board is entitled to summary enforcement of that portion of the Board's Order finding that the Union also violated the Act by refusing to stamp her unemployment book.

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

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

The Union urges that two of these Board members were appointed in violation of the Recess Appointments Clause, Art. II, § 2, cl. 3. It apparently bases this contention on two grounds: that the President may not make recess appointments during *intra*-session recesses, and that the President may not fill vacancies that first arose before the recess in question. (Br. 5-6 (invoking *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (June 24, 2013)). The Union's assertion is meritless, and rests on grounds rejected by multiple courts of appeal. *See Evans v. Stephens*, 387 F.3d 1220, 1224-27 (11th

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

Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962).[4]

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

A legislative body like the Senate characteristically begins a recess, whether long or short, in one of two ways. By adjourning *sine die* (*i.e.*, without specifying a day of return), it ends its current session, and the ensuing recess, which lasts until the beginning of the next session, is commonly known as an *inter*-session one. By adjourning, instead, to a specified time or date, the body typically resumes pending business when it reconvenes, and the intervening recess is commonly known as an *intra*-session one.[5]

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

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[4] After *Noel Canning*, divided panels in two other circuits held that the President cannot make recess appointments during intra-session recesses. *See NLRB v. Enterprise Leasing Co.*, 722 F.3d 609 (4th Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013), *petition for reh'g pending (*filed July 1, 2013; stayed July 15, 2013).

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

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

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

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

The Third Circuit suggested that other, less-apposite definitions of "recess" "contain some connotation of permanence or, at least, longevity." *New Vista*, 719 F.3d at 221-22. But any such connotation does not apply to Senate recesses. The Senate has had many inter-session recesses that were zero, one, or two days long, including a substantial number in the 18th and 19th centuries. *See* S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-535 (2011) (*Congressional*

Directory), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.[6] Intra-session recesses are often much longer, and since 1867 have frequently been several weeks or even months long. *Id*. at 525-38.

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

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

[6] Parliament's inter-session recesses were "sometimes only for a day or two." 1 Blackstone, *Commentaries on the Laws of England* 180 (1765).

ed., 1928); 27 *id.* at 555-56.[7] Similarly, the Constitutional Convention of 1787 adjourned intra-session from July 26 to August 6, and delegates referred to that break as "the recess."[8]

Founding era state legislative practice was similar. For example, legislatures in New York, New Jersey, Massachusetts, and New Hampshire used "the recess" in the 1770s and 1780s to refer to breaks prompted by adjournments to a date certain.[9] Revolutionary-era constitutions in Pennsylvania and Vermont authorized the Executive to issue embargoes "in the recess" of the legislature; those powers were exercised during intra-session breaks. *See New Vista*, 719 F.3d at 225.

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

[8] 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1966) (*Farrand*) (letter from Washington to John Jay); 3 *Farrand* 191 (speech of Luther Martin); 2 *Farrand* 128 (July 26 adjournment), 649 ("Adjournment sine die" in September).

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

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

c. *Noel Canning* also noted that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." 705 F.3d at 500. As an historical matter, however, "adjournment" typically referred to the *act* of adjourning, while "recess" referred to the resulting *period* of cessation from work—a distinction reflected in the Constitution itself.[10] When the Continental Congress convened a committee "during the recess" in 1784, it did so following an intra-session "adjournment." 27 *J. Continental Cong. 1774-1789*, at 555-56 (Gaillard Hunt ed., 1928).

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

Even if the Constitution were thought to use "adjournment," like "recess," to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive's position is entirely consistent with a distinction between a recess covered by the Recess Appointments Clause and an adjournment. The Adjournment Clause makes clear that the taking of a legislative break of three days or less "during the Session of Congress" is still an "adjourn[ment]." Art. I, § 5, Cl. 4. But as noted below, *see infra* p. 40, the Executive has long understood that such short intra-session breaks do not trigger the President's recess-appointment authority.

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

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

a. The Recess Appointments Clause ensures that vacant offices may be temporarily filled when the Senate is unavailable to offer its advice and consent; and it simultaneously frees the Senate from the obligation of being "continually in session for the appointment of officers." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause enables the President to meet his continuous responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, which requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926).

Those purposes apply without regard to whether a recess occurs during a session or between sessions. The Senate is equally unavailable for advice and consent during intra-session and inter-session recesses. The President is no less in need of officers to execute the laws. And, for the Nation, it will often be equally "necessary for the public service to fill [certain vacancies] without delay." *Federalist No. 67*, at 455. Indeed, the need to fill vacancies may be greater during intra-session recesses, which have often, especially in modern Senate practice, accounted for more of the Senate's absences than have inter-session recesses. *See Congressional Directory* 529-38.

b. There is no reasonable basis to fear that Presidents will use intra-session recess appointments to evade the Senate. *See Noel Canning,* 705 F.3d at 503. The authority to make intra-session recess appointments has been accepted for nearly a century, yet Presidents routinely seek Senate confirmation when filling vacant offices—and have strong incentives to do so, because recess appointments are only temporary and because seeking Senate consent alleviates inter-Branch friction. Moreover, the Third and Fourth Circuits misapprehended the government's arguments when they indicated that the government's position would permit appointments in intra-session breaks shorter than three days. *See New Vista*, 719 F.3d at 230; *Enterprise Leasing Co.*, 722 F.3d at 649. The Executive has long understood that such short intra-session breaks—which do not genuinely

render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the President's recess-appointment authority. *See, e.g.*, 33 Op. Att'y Gen. 20, 24-25 (1921); 16 Op. O.L.C. 15, 15-16 (1992); *see also* *Wright* v. *United States*, 302 U.S. 583, 593-96 (1938) (making similar point in construing Pocket Veto Clause); Art. I, § 5, Cl. 4 (Adjournment Clause, providing that legislative breaks of three days or less do not require the other House's consent).

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

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

days before the session ended. *See Congressional Directory* 528-29, 533-34, 536. The Framers were also well aware that various vicissitudes might prevent a legislature from returning on schedule, which could shorten, or even eliminate, the part of a session that would otherwise follow an intra-session recess.[11] In such situations, the uniform termination date ensures that there will always be at least one full session during which an appointee may carry out the duties of the office while the President and the Senate engage in the nomination-and-confirmation process.

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

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

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

See Appendix A, Petitioner's Opening Brief, *NLRB v. Noel Canning*, No. 12-1281 (S. Ct.) ("*Noel Canning* App. A"), *available at* http://www.justice.gov/osg/briefs/2013/3mer/2mer/2012-1281.mer.aa.pdf.

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

To be sure, for a relatively brief period beginning in 1901, the Executive Branch took a different view. Attorney General Knox concluded that "the Recess" did not include intra-session recesses, in large part because he could otherwise "see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday." 23 Op. Att'y Gen. 599, 600, 603 (1901). In doing so, however, Knox had to reject the only judicial precedent on point. *See Gould* v. *United States*, 19 Ct. Cl. 593, 595-96 (1884) (endorsing validity of 1867 intra-session appointment). And Knox's approach was

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

> the period of time when the Senate is *not sitting in regular or extraordinary session* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

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

b. The frequency of intra-session recesses—and appointments—increased dramatically during World War II and the beginning of the Cold War. During the 1940s, presidents made thousands of intra-session recess appointments during the Senate's increasingly frequent months-long recesses, including Dwight

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

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

c. Such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). Especially in the separation-of-powers context, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *id*. at 690 ("[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of

which is in any respect of doubtful meaning.") (internal quotations marks and citation omitted); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).[12]

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

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

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

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

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

a. The Recess Appointments Clause gives the President "Power to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, Cl. 3. President Jefferson recognized in 1802 that the Clause "is certainly susceptible of [two] constructions," because it "may mean 'vacancies that may happen to *be*' or 'may happen to *fall*' " during the recess.[13] That conclusion follows from the plain meanings of the terms "happen" and "vacancy."

A vacancy is not an instantaneous event. It is, rather, "[t]he fact *or condition* of an office or post *being*, becoming, or falling vacant." 19 *OED* 383 (emphases added). In 1787, a vacancy was understood as a continuing "state." 2 Johnson, *Dictionary* s.v. "vacancy" ("State of a post or employment when it is unsupplied."). Thus, the state of being vacant is something that "may happen," and continue happening, as long as the office is unfilled. Just as World War II, which began in 1939, can be said to have happened in the 1940s, so too does a vacancy happen for as long as the office's state of being vacant persists.

For those reasons, Attorney General Wirt noted in 1823 that the reference to " 'vacancies that may *happen* during the recess of the Senate' " "seems not perfectly clear." 1 Op. Att'y Gen. 631, 631. On one hand, "[i]t may mean

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

'happen to take place:' that is, '*to originate*.' " *Ibid*. But it may also mean " 'happen to exist.' " *Id*. at 632. Wirt observed that the former reading "is, perhaps, more strictly consonant with the mere letter" of the Clause, but he concluded that the latter is "the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language." *Id*. at 633-34.

b. This reading does not render the phrase "that may happen" superfluous. *Cf. Noel Canning*, 705 F.3d at 507. Without that phrase, the Clause would let the President "fill up all Vacancies during the Recess of the Senate." It could then be thought to permit the President to fill a known *future* vacancy during a recess. Construing the text to refer to vacancies that "happen to exist" during the recess confines the President to filling vacancies that actually exist during the recess.[14]

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

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

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

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

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

Nor has the underlying problem been eliminated by high-speed communications. In June 1948, the Secretary of Labor died ten days before a lengthy intra-session recess.[15] When the Senate returned for 12 days, President

[15] *Lewis Schwellenbach Dies at 53*, N.Y. Times, June 11, 1948, at 1; *Congressional Directory* 528.

Truman promptly nominated a successor, but Senator Taft opposed a quick confirmation vote, even though the Senate was about to recess again for several months. *See* 94 Cong. Rec. 10,187 (Aug. 7, 1948). Taft explained that the President could make a recess appointment while the Senate followed its usual process of referring the nomination to committee. 94 Cong. Rec. at 10,187. Under *Noel Canning* that sensible course was unconstitutional.

b. The D.C. Circuit's construction would also prevent the President from filling offices created shortly before recesses. For instance, the office of the Solicitor General was created 14 days before a Session's end in 1870.[16] The first Solicitor General, Benjamin Bristow, began his tenure as a recess appointee, even though that vacancy pre-existed his appointment.[17] *See also Noel Canning* App. B (noting recess appointments to the newly created positions).

c. *Noel Canning* suggested that problems associated with unfilled vacancies could be ameliorated if Congress were to provide more broadly for officials to be "acting" be held over beyond the ends of their terms. 705 F.3d at 511. But hold-over provisions are useless in the case of death or resignation, and the very existence of the Recess Appointments Clause shows that Framers did not think "acting" official fully solved the problem. Moreover, some offices, such as

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

[17] 79 U.S. (12 Wall.) iii (1872).

Article III judgeships, cannot be performed on an acting basis at all. And it may be impractical to rely for significant periods of time on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced.

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

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

By 1862, Attorney General Bates advised President Lincoln that the question was "settled in favor of the power [to fill a vacancy existing during a recess], as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." 10 Op. Att'y Gen.

356, 356. Lincoln followed that advice, and recess appointed a Supreme Court Justice to a preexisting vacancy.[18]

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

Since then Attorneys General (and Assistant Attorneys General) have repeatedly endorsed Wirt's reasoning and conclusion, as have the Second, Ninth, and Eleventh Circuits. *See Evans*, 387 F.3d at 1226-27 (11th Cir.) (en banc); *Woodley*, 751 F.2d at 1012-13 (9th Cir.) (en banc); *Allocco*, 305 F.2d at 709-15 (2d Cir.); *see also, e.g.*, 41 Op. Att'y Gen. 468 (1960); 30 Op. Att'y Gen. 314 (1914); 26 Op. Att'y Gen. 234 (1907); 17 Op. Att'y Gen. 521 (1883); 20 Op. O.L.C. at 161 (1996); 13 Op. O.L.C. 271, 272 (1989); 6 Op. O.L.C. at 586 (1982); 3 Op. O.L.C. 314 (1979).

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

b. As *Farrow* indicated, the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies have long been seen as congressional acquiescence in such appointments, because those restrictions are predicated on the existence of the underlying appointment power. *See Farrow*, 3 F. at 115 (discussing 1863 statute); *see also* 41 Op. Att'y Gen. at 466. The original Pay Act postponed the payment of recess appointees who filled vacancies that first arose while the Senate was in session, deferring salaries until confirmation. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. But Congress later relaxed the statute, providing conditions under which even such appointees may be paid before confirmation. *See* Act of July 11, 1940, ch. 580, 54 Stat. 751. Had it believed such appointments unconstitutional, Congress presumably would have gone much further to restrict them. *Cf.* Tenure of Office Act, ch. 154, § 3, 14 Stat. 430-31 (purporting to limit recess-appointment power to vacancies that happen "by reason of death or resignation").

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

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

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

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

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

The D.C. Circuit believed its departure from long-established practice was justified by "evidence of the earliest understanding of the Clause," *Noel Canning*,

705 F.3d at 508. There was, however, no such settled "earliest understanding," and therefore nothing that could suffice to outweigh the deeply engrained practice discussed above. To the contrary, the issue was repeatedly subject to debate or uncertainty during the administrations of all of Monroe's predecessors. And each of those Presidents made appointments, or expressed views, that were inconsistent with the D.C. Circuit's conclusion.

a. During the Washington administration, Attorney General Randolph believed that the President could not make a recess appointment to a vacant office because the vacancy had "commenced" or "may be said to have *happened*" on April 2, 1792, when the office was created, because Congress was then in session.[19]

Yet President Washington himself made at least two recess appointments to fill vacancies that predated the recesses in which they were filled. On November 23, 1793, Washington commissioned Robert Scot as the first Engraver of the Mint—a position created in 1792 by the same statute Randolph had addressed but never filled.[20] And on October 13, 1796, Washington recess-appointed William

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[19] Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers Of Thomas Jefferson* 166 (John Catanzariti ed., 1990).

[20] *See* Monroe H. Fabian, *Joseph Wright: American Artist, 1756-1793*, at 61-62 (1985) (explaining that Joseph Wright was performing some engraver duties, but was never commissioned before his death in September 1793); 27 *The Papers of Thomas Jefferson* 192 (John Catanzariti ed., 1997) (noting Scot's commission); S.

Clarke to be the United States Attorney for Kentucky, an office that had been vacant for at least two years.[21]

b. In the Adams administration, the question recurred. Attorney General Lee concluded statutory authority allowed the President to make the appointment in question,[22] but Adams indicated a contrary view, writing that his authority stemmed from "the Constitution itself. Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution. * * * I have no doubt that it is my right and my duty to make the provisional appointments."[23]

c. President Jefferson appears to have made recess appointments to vacancies first arising before the recess in which he was acting. Indeed, in 1801, he recess-appointed District Attorneys and Marshals for the newly-created District

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Exec. Journal, 3d Cong., 1st Sess. 142-43 (1793) (naming no predecessor in Scot's nomination); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246.

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

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

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

of the Potomac and District of Ohio[24] —even though all four positions had been created during the Session.[25]

Moreover, as noted, Jefferson acknowledged that the Clause "is certainly susceptible of both constructions" discussed above; he suggested that his administration should eventually attempt to "establish a correct & well digested rule," but he concluded, in January 1802, that it was "better to give the subject a go-by for the present."[26]

d. Similarly, when a district judge left office shortly before the end of the Senate's session, President Madison issued a recess appointment to fill that vacancy.[27] And when legislation signed on the last day of the Senate's session created new positions, *see* Ch. 95, 3 Stat. 235; S. Journal, 13th Cong., 3d Sess.

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[24] *See* S. Exec. Journal, 7th Cong., 1st Sess. 400-01 (1802) (commission issued to Walter Jones, Jr., as District Attorney for Potomac during "the late recess"); Letter from Levi Lincoln to Jefferson (Apr. 9, 1801), in 33 *The Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting George Dent's acceptance of Marshal position for Potomac); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Washington, D.C.* 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent's recess appointment); 36 *Papers of Thomas Jefferson* 328, 331, 332 (including "William Mc.Millan" and "James [T]indlaye" in the "vacancies unfilled" portion of the key and noting recess appointments to Ohio positions); *see also Noel Canning* App. B 65a-66a.

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

[26] 36 *Jefferson Papers* at 433 (letter to Nicholas).

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

689-90 (1815), Madison filled them with recess appointees. *See* S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointments of Roger Skinner and John W. Livingston); *see also Noel Canning* App. B 67a. In 1815, Madison also recess-appointed the first United States Attorney and Marshal for the Michigan Territory—more than *two years* after the positions' creation.[28]

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

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

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's petition for review and enforcing the Board's Order in full.

ORAL ARGUMENT STATEMENT

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

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September 2013

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627	*	
Petitioner/Cross-Respondent	*	Nos. 13-9547, 13-9564
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 17-CB-72671
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,869 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 18th day of September, 2013

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD	*	
Respondent/Cross-Petitioner	*	

ADDITIONAL CERTIFICATIONS REQUIRED BY CIRCUIT RULES

1. I certify that there are no required privacy redactions.

2. I certify that the hard copies submitted to the court are exact copies of the electronic version.

3. I certify that the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 12.1.2015.215, last updated on September 17, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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

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