No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

The questions presented by the Government are as follows:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

Respondent proposes that the following question presented be added as well:

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

PARTIES TO THE PROCEEDING

Petitioner is the National Labor Relations Board.

Respondent is Noel Canning, a division of the Noel Corporation.

The International Brotherhood of Teamsters Local 760 is also a party to this proceeding as it was an intervenor in the court of appeals.

RULE 29.6 DISCLOSURE

Respondent Noel Canning is a division of The Noel Corporation. Noel Canning has no other parent corporations, and no other publicly held company has a 10% or greater ownership interest in Noel Canning. Noel Canning is engaged in the bottling and distribution of soft drinks in Central and Eastern Washington and Northern Oregon.

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STATEMENT OF THE CASE

On January 4, 2012, the President purported to appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board (the "Board"). Even though (1) the Senate had convened the day before to commence the Second Session of the 112th Congress, (2) the Senate convened another session two days later, and (3) the vacancies to which these individuals were appointed all arose prior to the supposed "recess," the President asserted that these appointments were to "fill up . . . Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. In so doing, the President did something that none of his predecessors had ever before done: He attempted to make intrasession "recess" appointments during a three-day break in Senate business. The Board then proceeded to issue a number of orders, including the one against Respondent Noel Canning, all of which presumed that Ms. Block and Messrs. Flynn and Griffin had been lawfully appointed.

Set forth below are the facts and circumstances surrounding this unprecedented assertion of executive power.

1. Under 29 U.S.C. § 153(b), the Board may not operate unless it has a quorum of three lawfully appointed members. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). Prior to January 3, 2012, the Board operated with two Senate-confirmed members—Chairman Pearce and Member Hayes, both of whom were confirmed by the Senate on June 22, 2010—and a third—Craig Becker—who had been "recess" appointed on March 27, 2010, during a seventeen-day intrasession

"recess." *See* 156 Cong. Rec. D355 (daily ed. Mar. 26, 2010). Even if Becker's 2010 "recess" appointment were valid, it is undisputed that it expired, at the latest, on January 3, 2012, when the first Session of the 112th Congress concluded and the second Session began. *See* U.S. Const. art. II, § 2, cl. 3. Consequently, on January 3, 2012, the Board had only two members and lacked the statutorily required quorum.

a. At that time, the Senate was operating under an adjournment order adopted on December 17, 2011. The adjournment order required the Senate to convene into "pro forma sessions" every three days:

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro forma session the Senate adjourn until the following pro forma session.

Pet.App. 91a. The Senate had to convene regular sessions to satisfy its obligation under the Constitution's Adjournment Clause, which provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]" U.S. Const. art. I, § 5, cl. 4. Here, the House of Representatives did not consent to a Senate adjournment exceeding three days, and the Senate satisfied the Adjournment Clause by convening so-called "pro forma" sessions. These sessions are commonly referred to as "pro forma" sessions due to their short duration. *See, e.g.*,

Henry B. Hogue, Congressional Research Service, RS 21308, *Recess Appointments: Frequently Asked Questions* 4 (2012).[1]

Since the 1920's, Congress has "commonly and without objection" used pro forma sessions to satisfy the Adjournment Clause.[2] 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee). The Senate is fully capable of conducting business at pro forma sessions. For example, on December 23, when operating in accordance with the adjournment order quoted above (the same order in effect on the day of the appointments at issue), the Senate passed (and the President signed) "a 2-month extension of the reduced payroll tax, unemployment insurance, TANF, and the Medicare payment fix[.]" 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And on January 3, 2012, the Senate convened a "pro forma" session to satisfy its constitutional obligation under the Twentieth Amendment to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2. Similarly, on August 5, 2011, the Senate passed (and the President signed) the Airport and Airway Extension Act of 2011, 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011), during a "pro forma" session convened pursuant to an adjournment order indistinguishable from the

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[1] Sundays do not count for legislative time computations, such that four-day breaks including a Sunday are interchangeable with three-day breaks not including a Sunday. Sunday is a *dies non* in congressional practice. 5 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* § 6673 (1907).

[2] *See, e.g.*, 8 Clarence Cannon, *Precedents of the House of Representatives* § 3369, at 820 (1935) (describing a 1929 instance where the House "provid[ed] for merely formal sessions"); 95 Cong. Rec. 12,586 (Aug. 31, 1949) (Senate pro forma session).

adjournment order here, *see* 157 Cong. Rec. S5292 (daily ed. Aug. 2, 2011). Each of these actions was taken by unanimous consent, which is the same procedure the Senate uses to pass most legislation and confirm most nominees. *See* Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013).

Moreover, until now, the political branches have recognized that pro forma sessions preclude recess appointments. Senator Robert Byrd first invoked them in 1985 as part of a compromise with President Reagan, in which the President agreed to provide the names of potential recess appointees "in sufficient time in advance that [the Senate] could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place." 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe). Implicit in this compromise was the shared premise that the Senate could have prevented the President from making recess appointments by convening pro forma sessions. Senator Reid continued the practice in 2007, successfully preventing President Bush from making recess appointments. *See* Hogue, *supra* at 8. The current Administration has likewise acknowledged that pro forma sessions preclude recess appointments, explaining to this Court in *New Process Steel* that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk, Supreme Court of the United States 3 (April 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("Solicitor General

Letter"), including when the Senate was convening pro forma sessions every three days, *see* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (Sen. Reid) ("[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.").

Thus, until January 4, 2012—when the President made the appointments at issue—no President had ever attempted to make recess appointments where the Senate was convening in pro forma sessions every three days.

b. Nevertheless, on January 4, 2012, the President unilaterally asserted that the Senate was in "recess" and proceeded to make the appointments at issue, making him the first President in history to attempt an intrasession recess appointment while the Senate was convening sessions every three days.

The nominations for two of the three appointees—Block and Griffin—were quite recent at the time. The President had nominated Block and Griffin just three weeks earlier, and on the day of the appointments, their committee questionnaires and background checks had not even been submitted to the Senate. *See* Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions, *NLRB Recess Appointments Show Contempt for Small Businesses* (Jan. 4, 2012).

The next week, the Department of Justice's Office of Legal Counsel released a memorandum, dated January 6, 2012, outlining the legal rationale underlying the appointments. The OLC Memorandum asserted that "the President is . . . vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate,"

concluding that the Senate is in recess whenever the President determines that it is "unavailable . . . to 'receive communications from the President or participate as a body in making appointments.'" *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Session*s, 36 Op. O.L.C. slip op. at 5 (2012) ("OLC Memo") (citation omitted). Key to this conclusion was the assertion that "Congress's provision for pro forma sessions . . . does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause." *Id.* at 9.

2. Noel Canning is a company engaged in the bottling and distribution of soft drinks in Yakima, Washington and is part of the Noel Corporation. The Board's decision involves a dispute between Noel Canning and Teamsters Local 760, in which the Board found that Noel Canning violated the National Labor Relations Act by refusing to execute and enter a collective bargaining agreement that had allegedly been verbally agreed upon. Pet.App. 2a.

The Administrative Law Judge's Order against Noel Canning was issued in September of 2011. Shortly thereafter, Noel Canning filed exceptions before the Board, and fully completed its related briefing on December 27, 2011—eight days before the President made the "recess" appointments at issue. Resp. C.A. App. A3. The Board then issued its decision against Noel Canning on February 8, 2012. Pet.App. 2a.

3. Noel Canning promptly filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit, challenging the validity of the "recess" appointments, and thus the Board's quorum. Noel

Canning pointed out that, under longstanding Executive Branch practice, the President could not make intrasession "recess" appointments where, as here, the Senate had not adjourned for more than three days under the Adjournment Clause. When Attorney General Daugherty first asserted the authority to make intrasession recess appointments in 1921, he acknowledged that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of [three days] is taken." *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). Daugherty thus determined that the Adjournment Clause's three-day rule set the constitutional floor for intrasession recess appointments. Resp. C.A. Br. 29-68. Noel Canning further argued that under the original meaning of the Recess Appointments Clause, the President's recess-appointment power was (1) "limited to *inter*session recesses (those occurring between sessions)" and (2) could only be used to "make recess appointments . . . to positions that became vacant *during* the recess." *Id.* at 70-71.[3]

4. The court of appeals granted the Petition for Review, agreeing with Noel Canning that the appointments violated the Clause as originally

[3] The Teamsters erroneously contend that the D.C. Circuit's holding was "based on an interpretation of the Recess Appointments Clause that had not been advanced by any party or amicus." Teamster's Br. 3. But as counsel delivering argument on behalf of Noel Canning explained at argument below: "We have briefed [those] issues, they are in the briefs, they're presented to the Court for decision." C.A. Or. Arg. Tr. 13. Moreover, Amicus Landmark Legal Foundation devoted virtually its entire brief to the original understanding of the Recess Appointments Clause. *See* Amicus Landmark Legal C.A. Br. 6-19.

understood, and not addressing its narrower argument. The court noted that Noel Canning had no obligation to ask the Board to decide issues it lacked the power to adjudicate, Pet.App. 11a-15a, and proceeded to consider Noel Canning's constitutional arguments on the merits. The court first held that the appointments violated the Recess Appointments Clause's limitation to "the Recess" that corresponds to every Senate "Session," i.e., the intersession recess. Pet.App. 18a-35a.[4] A majority of the panel further held that recess appointments can be used only to fill those vacancies which "happen during the recess of the Senate." *Id.* 35a-52a. The court of appeals thus held that, as the Board "conceded at oral argument," the "appointments at issue were not made during the intersession recess" and were therefore invalid. *Id.* 34a. A majority of the panel further held that the appointments were invalid because vacancies must be filled "during the same recess in which [they] arose." *Id.* 51a.

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[4] On May 16, 2013, the Third Circuit joined the D.C. Circuit in holding that the President's recess appointments authority obtains only during an intersession recess and, therefore, the President's appointment of Craig Becker as a Member of the Board on March 27, 2010, was invalid because it was during an intrasession break. *NLRB v. New Vista Nursing and Rehab.*, Nos. 11-3440, 12-1027, 12-1936, 2013 WL 2099742, at *11-30 (3d Cir. May 16, 2013). The court considered the legality of Becker's "recess" appointment *sua sponte* (the Petitioner had not challenged that appointment in its petition for review), after determining that the three-member-composition requirement for a panel of the NLRB was jurisdictional. *Id.* at *11-19. Because the court did not address the January 4, 2012, appointments at issue in this case, the court was not squarely presented with the Government's claim that pro forma sessions are constitutional nullities.

ARGUMENT

Respondent does not oppose certiorari because this case presents a constitutional question of extreme importance. The D.C. Circuit's decision further calls into question the current authority of two major executive agencies to perform their statutory duties, a question of particular import given that the D.C. Circuit effectively has national jurisdiction over the federal Government.[5] Certiorari is therefore appropriate.

The Government, however, has phrased the questions presented so narrowly that answering them could potentially leave the validity of the "recess" appointments at issue unresolved. In particular, the Government's proposed questions do not encompass the core issue of whether the President may make "recess" appointments where, as here, the Senate is convening "sessions" every three days. If the Court grants certiorari, it should decline to adopt only the abstract questions presented by the Government—questions that, even if (erroneously) resolved in the Government's favor, would *not* decide this case and would *not* resolve the validity of "every final decision of the Board since January 4, 2012." Pet'n 30. While the Respondent is always free, and would remain free, to argue any basis for affirmance supported by the record, *see, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), the more prudent course would be for the Court to adopt an additional Question Presented that explicitly encompasses the validity of the appointments here.

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[5] At the same time the President made the appointments at issue here, he purported to "recess" appoint Richard Cordray as head of the Consumer Financial Protection Bureau.

Doing so would ensure that the Court benefits from full briefing on all constitutional issues underlying the D.C. Circuit's judgment, maximize the Court's flexibility in resolving this dispute, and, most importantly, ensure that the Board is not hampered by additional litigation over the January 4, 2012, "recess" appointments in the event that this Court rejects the two rationales relied upon by the court of appeals. To facilitate the Court's consideration, Respondent has proposed an additional Question Presented. In the alternative, the Court could rephrase the Question Presented to address "whether the President's January 4, 2012, 'recess' appointments to the National Labor Relations Board were invalid."

If the Court grants certiorari, it should affirm the court of appeals. Both rationales on which the court of appeals relied to invalidate the January 4, 2012, appointments were correct. The supposed "recess" occurred during the Senate's Session, and the relevant vacancies all predated that Session, such that these appointments violated *both* of the Clause's clear textual limits. Moreover, the President made these appointments during a three-day break, at a time when the Senate was fully capable of confirming nominees. For all of these reasons, the judgment of the court of appeals was correct.

I. THE D.C. CIRCUIT'S RATIONALES FOR INVALIDATING THE JANUARY 4, 2012, APPOINTMENTS WERE CORRECT.

A. The President Has The Power To Make Recess Appointments Only During Intersession Recesses.

For the first century-and-a-half of the Republic, no President asserted the power to make intrasession recess appointments.[6] That is likely because this modern practice contravenes the plain text of the Clause and conflicts with the long history that predates this practice's conception. The D.C. Circuit was thus entirely correct to hold that the President's recess appointment power is limited to "the Recess" that occurs between each Senate Session.

1. Foremost, as the D.C. Circuit explained, the Clause refers to "the Recess" rather than "a Recess." Pet.App. 19a-20a. By using the definite article, the Clause limits its application to a specific type of "recess"—"the Recess" that occurs following each Senate Session. Had the Founders meant "any Recess," the Clause would say "during *a* Recess of the Senate." The Government's interpretation, by contrast, requires ignoring "the," focusing on "Recess," and then defining "recess" to mean any "'period of cessation from usual work.'" Pet'n 13

[6] The Government notes that President Andrew Johnson may have made intrasession recess appointments. Pet'n 22. But the Johnson Administration never publicly acknowledged that these appointments were made during the Senate's Session and never attempted to justify their legality. Moreover, all were made "when Johnson was battling with the Republican Congress that impeached him." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1572 (2005).

(quoting 13 *Oxford English Dictionary* 322-23 (2d ed. 1989)). If that were the correct construction, then the Clause would allow recess appointments during *any* break in Senate business, including at lunchtime or overnight. That, however, is obviously not what the Constitution provides, as even the Government concedes. The Clause refers to "*the* Recess" and must be read in its entirety.

The Clause's structure confirms what the text suggests. By providing that a recess appointment expires "at the End of [the Senate's] next Session," U.S. Const. art. II, § 2, cl. 3, the Clause creates a "dichotomy" between "'the Recess' and the 'Session,'" under which "the Senate is in session, or it is in the recess." Pet.App. 20a. The Clause likewise deploys textual symmetry between "the Recess" and the Senate's "next Session." Appointments are permitted during "the Recess" preceding the "next Session," and that "next Session" then delimits the length of any such appointments. All recess appointees serve for one Senate Session, ensuring that the Senate always has one full Session to consider confirmation. Once the Senate has that opportunity to act, the need for an emergency appointment dissipates. As Justice Story long-ago explained, "the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." 3 Joseph L. Story, *Commentaries on the Constitution of the United States* § 1551 (1833); *see also New Vista Nursing*, 2013 WL 2099742, at *22 ("The Clause's function is [] fulfilled once an opportunity for the Senate to act has come and gone.").

Finally, the Government's interpretation creates an inexplicable anomaly: intrasession recess appointees serve twice as long as their intersession counterparts. Recess appointments "expire at the End of [the Senate's] next Session." Under the correct construction of the Clause, such appointments can only be made in the intersession break and all therefore last one Senate Session. Under the Government's view, however, appointments can be made in breaks *during* a Session, which means that some last nearly two years (until the end of *that* Session *and* the "next Session"). That is precisely what happened here. The Government claims that these "recess" appointments were made on the second day of the Second Session of the 112th Congress, such that they last through the remainder of that Session, as well as the entire First Session of the 113th Congress (the "next Session"). The Government offers no explanation for why the Constitution would empower Presidents to double the length of recess appointments through strategic timing. None exists.

2. The Clause's history and application decisively support this construction. Most importantly, other than a few unexplained appointments by President Andrew Johnson, *see supra*, no President attempted to make intrasession recess appointments until the 1920s (or really the 1940s). *See* Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2212 (1994) ("Frequent presidential use of the recess appointment power during intrasession recesses began in 1947."); *see also New Vista*, 2013 WL 2099742, at *25 ("From ratification until 1921, there was a rough consensus that recess appointments could be made only during intersession breaks.").

And even then, Presidents were initially sparing in their use of this "power," with President Carter being perhaps "the first modern president to utilize the clause expressly to avoid the Senate's advice and consent." Carrier, *supra*, at 2213. That century-and-a-half of executive restraint strongly "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 908 (1997); *see also* Pet.App. 24a (the "early understanding of the Constitution" is "more probative of its original meaning than anything to be drawn from administrations of more recent vintage").[7]

The Government's attempt to marshal contrary historical examples only proves how wrong it is. For instance, as its leading example, the Government notes that "the Articles of Confederation empowered the Continental Congress to convene the Committee of the States 'in *the recess* of Congress,'" Pet'n 13 (quoting Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1), and then asserts that "[t]he one occasion on which that authority was exercised was an intra-session recess." Pet'n 14. That is incorrect.

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[7] The Government's observation that "until the Civil War, there were no intra-session recesses longer than 14 days," Pet'n 22, is irrelevant. Foremost, the Government completely ignores the *post*-Civil War *decades* of executive restraint. And further, the Government recognizes that there were multiple intrasession recesses pre-Civil War, *id.*—and even more if one were to adopt a definition of "the Recess" that encompasses every "'[r]emission or suspension of business or procedure.'" *Id.* at 13 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828)). That no President attempted to make recess appointments during any of those breaks strongly suggests that no President believed such appointments would be lawful.

It is true that: (1) the Articles of Confederation empowered the Continental Congress to convene a Committee of the States "in the recess of Congress," Articles of Confederation of 1781, art. IX, para. 5; (2) the Articles provided for Congress to convene "on the first Monday in November," *id.*, art. V, para. 1; and (3) in the example the Government invokes, the Continental Congress "adjourned . . . to meet at Trenton on the 30th day of October next," 27 *Journals of the Continental Congress* 555-56 (Gaillard Hunt ed., 1784). What the Government overlooks, however, is that the Journals of the Continental Congress reflect *no meeting* on October 30, 1784—a *Saturday*. Rather, the Congress reconvened to commence the new congressional Session on the subsequent Monday, "the first Monday in November" of 1784, just as the Articles of Confederation provided. *See id.* at 641 ("Trenton, Monday, November 1, 1784"). This means, of course, that the recess the Government invokes was actually an *inter*session recess rather than an *intra*session recess. The fact that the Continental Congress never convened a Committee of the States outside of this intersession recess further confirms that "the Recess" means "the Recess" which follows each Congressional "Session."[8]

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[8] The Government appears to make a similar mistake in invoking supposed intrasession recesses in Pennsylvania and Vermont at Pet'n 14. *See* Robert G. Natelson, *The Origins and Meaning of 'vacancies that may happen during the Recess' in the Constitution's Recess Appointments Clause*, 37 Harvard J.L. & Pub. Pol'y at 18 n.61 (forthcoming 2014), *available at* http://ssrn.com/abstract=2257801 (explaining that the same Vermont recess the Government invokes was an *inter*session recess and providing similar examples from Pennsylvania).

Moreover, numerous provisions in other founding-era legislative documents explicitly use "the recess" to describe the break between legislative sessions. For example, the Massachusetts Constitution stated:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [that is, the Massachusetts legislature], to adjourn or prorogue the same at any time the two Houses shall desire; . . . *and, in the recess of the said Court, to prorogue the same, from time to time, not exceeding ninety days in any one recess*; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same.

Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. V (emphasis added). This provision sets up a dichotomy between "the session of the General Court" (wherein the Governor may "adjourn or prorogue") and "the recess of the said Court" (wherein the Governor may only "prorogue" for up to "ninety days"). By creating a dichotomy between "the session" and "the recess," the Massachusetts Constitution made clear that "the recess" could never occur *during* a legislative session and thus could occur only *between* legislative sessions. *See also New Vista*, 2013 WL 2099742, at *15 n.15 (explaining as much). Numerous other contemporaneous founding-era state constitutions and legislative documents likewise use "the recess" to refer to intersession recesses only. *See, e.g.*, Natelson, *supra*, at 20-24.

Finally, the Government cites stray uses of "the recess" in personal correspondence and speeches on unrelated topics. Pet'n at 14. For example, the

Government invokes the following letter from George Washington:

> I regret not having had it in my power to visit New York during the adjournment of the Convention, last Month.—not foreseeing with any precission the period at which it was likely to take place or the length of it, I had put my carriage in the hands of a workman to be repaired and had not the means of mooving during the recess but with, or the curtisy, of others. . . .

3 *The Records of the Federal Convention of 1787* 76 (Max Farrand ed., 1911) (letter to John Jay). Plainly, the future first President was not engaging in legal analysis.

In any event, these colloquial uses of the term "recess" prove too much. Legislators routinely refer to all sorts of breaks—lunch breaks, weekend breaks, ten-minute breaks—as being "recesses." *See, e.g.*, 158 Cong. Rec. S3388 (daily ed. May 21, 2012) ("Senate recess from 12:30 until 2:15 p.m. to allow for the weekly caucus meetings"); 158 Cong. Rec. S3154 (daily ed. May 15, 2012) ("the Senate, at 12:40 p.m., recessed until 2:15 p.m"); 154 Cong. Rec. S7578 (daily ed. July 28, 2008) ("stand in recess until 10 a.m. [tomorrow]"). But not even the Government claims that the President may make recess appointments every time the Senators break for lunch. *See* Pet'n 27.

3. The Clause's purpose supports what the text says and the history shows. Alexander Hamilton explained that "[t]he ordinary power of appointment is confided to the President and Senate *jointly*," with the recess appointment power embodying a mere

"auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961). The Founders greatly preferred the "general method," *id.*, because Senate confirmation provided "an excellent check upon a spirit of favouritism in the President," *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961), and thus confined the "auxiliary method" to "temporary appointments 'during the recess of the Senate,'" *id.* at 409 (Federalist 67). The Federalist Papers make clear that the "central purpose" of the Clause is to provide an emergency power available only in narrow circumstances, not a broad power that could enable the "auxiliary method" to swallow the "general" rule by giving the President unfettered "discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments." OLC Memo at 23.

The Government notes that "in recent decades, the Senate's intra-session recesses have often lasted longer than its inter-session recesses." Pet'n 15. But that, too, only undermines the Government's position. Intrasession recesses have become more common due to technological advances, which enable Senators to conveniently travel to their states throughout the Session. Nowadays, Senators are likewise perpetually available to receive Presidential requests and tend to governmental business. This increase in Senate availability should *lessen* the frequency of recess appointments because it eliminates the condition—Senate unavailability—which justified them in the first place.

Yet, instead, the opposite has happened, with over half of all intrasession recess appointments occurring in the last 30 years. Pet'n 17-18 (noting that there have been over 300 intrasession recess appointments since 1981). What was originally intended as an emergency stop-gap power is thus being transformed by the Executive Branch into the very "absolute power of appointment" that the Framers rejected. *The Federalist No. 76*, *supra,* at 456; *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[O]ur inquiry is sharpened rather than blunted by the fact that [the challenged practice is] appearing with increasing frequency.").

4. The Government claims that a 1905 Senate Judiciary Committee Report endorses a "functional approach," under which "the Recess" includes intrasession breaks. Pet'n 16. But the Government draws this conclusion only by divorcing the Report from its historical context. That context makes clear that the Committee's Report was intended to ensure that only substantial *inter*session breaks enabled recess appointments. The Report does not even address—let alone endorse—the possibility of *intra*session appointments. Indeed, just four years before the Senate Committee issued its Report, the Executive Branch expressly *disclaimed* the authority to make intrasession recess appointments.

On December 24, 1901, Attorney General Knox wrote a letter to President Theodore Roosevelt advising the President that he lacked the power to make recess appointments during intrasession breaks. Knox began by observing "that the phrase" in the Clause is "'*the* recess.'" *President – Appointment of Officers – Holiday Recess*, 23 Op.

Att'y Gen. 599, 600 (1901) (emphasis in original). Knox explained that the "period following the final adjournment for the session" is "*the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.* at 601 (emphasis in original). An intrasession break, by contrast, "is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* (emphasis in original).

The ink was hardly dry on Knox's letter when the Senate Judiciary Committee published its Report. Moreover, the Committee published this Report in objection to President Roosevelt's making intersession recess appointments at a time when the Senate had not gone into recess, on the basis of Roosevelt's assertion that "the Recess" occurred in "the brief instant between . . . two gavel strikes." Rappaport, *supra*, at 1555 n.209. It is thus clear that the Committee—which drafted its Report to *protest* an improper use of the President's *inter*session recess appointments power at a time when *no* President had *ever* asserted the power to make *intra*session recess appointments—never intended to endorse a free-floating "functional" test in which any break can become "the Recess." The 1905 report therefore does not even arguably support the Government's broad view of the Executive's recess appointments power.[9]

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[9] The Teamsters claim that the Committee's Report "reject[ed] Attorney General Knox's understanding [of] the term 'recess' as used in the Recess Appointments Clause . . . ." Teamsters Br. 6. The Teamsters provide no authority for this assertion, which is clearly wrong. The Committee's Report never mentions Knox's opinion and certainly never concedes that the President's recess appointments power exists during all Senate breaks. To the contrary, the Senate clearly believed—as did every Executive

5. Finally, the Government assures the Court that despite modern Presidents adopting the intrasession construction, there has been no "evasion" of the advice-and-consent requirement. Pet'n 22. The January 4, 2012, appointments definitively refute this claim. The same day that the President purported to appoint the Board members at issue, he also "recess" appointed Richard Cordray as the head of the Consumer Financial Protection Bureau. That appointment was made for the *explicit purpose* of evading advice and consent. As the President stated at the time: "I refuse to take no for an answer."[10] The President's view was that "when Congress refuses to act . . . I have an obligation as President to do what I can without them." *Id.* Preventing such evasion is, of course, precisely why the separation of powers doctrine establishes "high walls and clear distinctions." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); *see also, e.g.*, *New Vista*, 2013 WL 2099742, at *28 ("[T]he Board's . . . unavailable-for-business criteria are almost by definition a 'low wall' that contain 'vague distinctions' which will

(continued…)

official to opine on the topic by that point—that the Clause is limited to *inter*session recesses only: "The theory of 'constructive recess' constitutes a heavy draft upon the imagination, for it involves a constructive *ending of one session*, a constructive *beginning of another*, and a constructive recess *between the two*." S. Rep. No. 58-4389, at 3 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (emphases added).

[10] The White House, Remarks by the President on the Economy, http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript.

make them difficult for the Senate and the president to predictably apply.").

The Government also notes that the court of appeals' decision "would allow the Senate to disable the President from making recess appointments even when the Senate is unavailable to give its advice and consent." Pet'n 23. But should the President ever need the Senate's attention while the Senators are away, the President retains the power to convene the Senate for the purpose of confirming nominees. U.S. Const. art. II, § 3 ("[The President] may, on extraordinary Occasions, convene both Houses, or either of them . . . ."). And regardless, the Senate would *still* have the power to foreclose recess appointments while refusing to confirm nominees under the Government's construction of the Recess Appointments Clause. *See* OLC Memo at 1 ("The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session . . . .").

B. The President Cannot Use Recess Appointments To Fill Preexisting Vacancies.

Similarly, whether the President could use his recess appointments power to fill vacancies that arose during the Senate's session and continued into the recess is an issue that occurred frequently in the years following ratification. There is thus a great deal of historical evidence, and it demonstrates that the Founders did not believe Presidents could make recess appointments to fill vacancies that arose prior to "the Recess." This makes sense, given that the text could not be clearer: recess appointments may be used to fill only those "Vacancies that may happen

during the Recess." U.S. Const. art. II, § 2, cl. 3. Here too, the D.C. Circuit was correct.

1. The Recess Appointments Clause empowers the President to "fill up all Vacancies that may happen during the Recess." U.S. Const. art. II, § 2, cl. 3. In 1789, "happen" was (as it still is) a verb that expresses the sudden occurrence of an event. *See, e.g.*, 1 Samuel Johnson, *A Dictionary of the English Language* 965 (1755) (defining "[h]appen" as "[t]o fall out; to chance; to come to pass"); Natelson, *supra*, at 36-37 (gathering similar definitions from other founding-era dictionaries). Plainly, an event "'come[s] to pass,' only when it first arises." Pet.App. 36a-37a. Thus, the only sensible reading of the text is that the vacancy must "fall out" or "come to pass" during the recess.

The Government contends "that may happen" really means "that happen *to exist*." Pet'n 27 (emphasis added). But in addition to being textually implausible, this strained interpretation would "effectively read[] the phrase out of the Clause." Pet.App. 36a. If the phrase "happen during" really meant "happen to exist during," then the words add nothing but ambiguity. Had the Founders intended for recess appointments to be available for filling all vacancies—whenever those vacancies arose—then they would have written the provision as follows: "The President shall have Power to fill up all Vacancies ~~that may happen~~ during the Recess of the Senate." This is, perhaps, why even Attorney General William Wirt, the first to adopt the Executive Branch's interpretation, readily conceded that the arise-during construction (embraced by the court of appeals) "is, perhaps, more strictly consonant

with the mere letter" of the Constitution. *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 633-34 (1823); *see also* Natelson, *supra*, at 41-47 (collecting numerous founding-era examples of "happen" referring to a discrete event).

2. Here, too, history confirms what the text says. The nation's first Attorney General, Edmund Randolph, authored an opinion denying the President's authority to fill vacancies that first arose during a Senate Session. *See* Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 *The Papers of Thomas Jefferson* 165-67 (John Catanzariti et al. eds., 1990). Randolph explained that, consistent with the purpose of the Recess Appointments Clause as an emergency device, its terms must be "interpreted strictly." *Id.* at 166. Numerous other founding-era figures agreed. *See, e.g.*, Rappaport, *supra*, at 1518 ("A wide range of leading figures from the Framers' generation read the Recess Appointments Clause to [authorize only the filling of vacancies that arise during recesses]."); *see also* Pet.App. 40a (Senator Christopher Gore arguing that "'[i]f the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen . . . .'") (quoting 26 Annals of Cong. 653 (1814)).

Further, President Washington regularly followed a procedure whereby he would nominate appointees without their consent prior to the recess and attempt to secure confirmation. Pet.App. 38a-39a. Then, if the person declined the appointment, he would treat the ensuing vacancy as one which "happened" during the recess. *Id.* Had President Washington and the

early Senate "understood the word 'happen' to mean 'happen to exist,' this convoluted process would have been unnecessary." *Id.* 39a.

The Government's counter-examples are unpersuasive. First, the Government argues that President John Adams endorsed the "happen to exist" interpretation, though the Government notes that Adams ultimately declined to act on that view. Pet'n 24 n.9. In so noting, the Government glosses over the fact that Adams likely failed to act because everyone consulted appears to have advised that Adams could *not* use recess appointments to fill preexisting vacancies. In addition to the then-outstanding opinion of Attorney General Randolph (noted above):

- Adams's Secretary of War, James McHenry, who received the President's query, doubted that the "happen to exist" interpretation was correct. As he noted in inquiring with Alexander Hamilton: "It would seem, that under this Constitutional power, the President cannot alone make certain appointments or fill up vacancies that may happen during a session of the senate . . . ." 23 *The Papers of Alexander Hamilton* 70 (Harold Syrett ed., 1976).
- Hamilton's response confirmed McHenry's doubt: "It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." *Id.* at 94.
- McHenry also consulted Adams's Attorney General, Charles Lee, "who considered an office created during the session of the Senate, and not filled by appointment, by and with the advice and consent of the Senate, as a vacancy

> happening during the session, which the President cannot fill, during the recess . . . ." 8 *The Works of John Adams* 647 n.1 (Charles Francis Adams ed., 1853).

The Government also invokes recess appointments by President Washington that supposedly filled preexisting vacancies. Pet'n 25. But whatever the underlying facts, *see* Pet.App. 38a-39a, President Washington clearly *believed* that his recess appointments filled vacancies that arose during the recess. When informing the Senate of his appointments, Washington carefully explained: "I nominate the following persons to fill the offices annexed to their names respectively; to which, having *fallen vacant during the recess of the Senate*, they have been appointed." S. Journal, 3d Cong., 1st Sess. 142-43 (1793) (announcing the appointment of Robert Scott as Engraver of the Mint) (emphasis added); *see also* S. Journal, 4th Cong., 2d Sess. 216-17 (1796) (announcing the appointment of William Clark to an office "which became vacant during the recess of the Senate"). President Washington's publicly stated belief that these vacancies arose during the recess is far more persuasive than the Government's inchoate retracing of when those vacancies supposedly arose.[11]

3. The Clause's purpose supports this construction. Under the Government's

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[11] The Government likewise makes amorphous references to appointments by President Madison (and also by President Jefferson). Pet'n 25 & n.11. But President Madison never asserted the power to make recess appointments to preexisting vacancies, and it is unclear whether his appointments were to preexisting vacancies at all. *See* Rappaport, *supra*, at 1534-35 (disputing the Madison example); *see also id.* at 1529-34 (showing that Jefferson never made any such appointments).

interpretation, Presidents are free to avoid advice-and-consent by simply "wait[ing] for a 'recess' (however defined) and then fill[ing] up all vacancies." Pet.App. 37a. Such a practice would far outstrip the purpose of the Clause, which was to supply "an auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, *supra,* at 409. The "general method" is "inadequate" only when the vacancy arises during the Senate's absence. In that circumstance, there is no opportunity for the Senate to address the immediate vacancy. Should the vacancy arise before the Senate departs, however, no exigency would justify a recess appointment because the President has an opportunity to use the "general method" of appointment while the Senate is still in session.

The Government attempts to sidestep this reasoning by characterizing the "Clause's basic object" as "ensuring a genuine opportunity for vacancies to be filled, even if temporarily, at all times." Pet'n 25-26. The Government provides no authority for this supposedly "basic object," but, regardless, it is clear that the "happen during" construction does not disserve it. The Senate calendar is not etched in stone. Even if a vacancy arises just before the Senate's scheduled recess, the Senate is fully capable of staying in Session and confirming nominees. The President, moreover, could *require* the Senate to remain in Session by invoking his power to convene either House of Congress. *See* U.S. Const., art. II, § 3. If the vacancy is not important enough to fill on an expedited schedule, that simply proves the "general method" of Senate confirmation is adequate.

Finally, the Government attempts to invoke congressional acquiescence. Pet'n 28. Here again, the Government misreads the historical record. The 1863 statute the Government cites was a congressional attempt to *constrain* the President. It provided that no salary shall be paid to any recess appointee if the "vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate." Act of Feb. 9, 1863, 12 Stat. 646 (1863). Congress passed this statute just twelve days after the Senate Judiciary Committee issued a report forcefully rebutting the "happen to exist" construction, as well as affirming the (then-uncontroversial) intersession construction:

> When must the vacancy . . . and the appointment to which is thus found to terminate, accrue or spring into existence? . . . We think the language too clear to admit of reasonable doubt, and that . . . this period must have its inceptive point after one session has closed and before another session has begun.

S. Rep. No. 37-80, at 3 (1863). These actions are thus examples of Congress attempting to *defend* its prerogatives.

In any event, even if Congress had somehow acquiesced, such acquiescence would be irrelevant. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). That is because the "structural principles secured by the separation of powers protect the individual." *Bond v. United*

States, 131 S. Ct. 2355, 2365 (2011). The Executive and Legislative Branches can no more bargain away the structural protections of the Constitution than they can bargain away the First Amendment. The court of appeals was thus correct to reject this supposed "acquiescence."

II. THE D.C. CIRCUIT'S JUDGMENT SHOULD ALSO BE AFFIRMED BECAUSE A THREE-DAY INTRASESSION BREAK IS NOT "THE RECESS."

The D.C. Circuit's invalidation of the President's "recess" appointments is also correct for another reason that the court did not address. In addition to violating the Clause's clear textual limitations, the January 4, 2012, appointments contravened longstanding executive practice recognizing that a break of less than three days is not "the Recess." At the time that the President made these appointments, the Senate had convened the day before to commence the Second Session of the 112th Congress, and convened again two days later. Given the Government's agreement that "the Executive has long understood that [three day] intra-session breaks . . . do not trigger the President's recess appointment authority," Pet'n 21, the January 4, 2012, appointments were invalid by any measure.

1. It appears that, since the founding, no President has previously attempted to make recess appointments during a break in the Senate's Session of less than three days. *See* Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* 12 (2012). Such short breaks cannot possibly constitute "the Recess" within the meaning of the

Constitution. Otherwise, every weekend, night, or lunch break would be "the Recess" too—a construction that would upend the appointments process.

Attorney General Harry Daugherty articulated this limit in his opinion adopting the intrasession view for the first time, arguing that:

> If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) . . . [N]o one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.

33 Op. Att'y Gen. at 24-25.

As noted above, Presidents Reagan and Bush recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions, as did President Obama at the beginning of his Administration. As the Administration told this Court: "[T]he Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Solicitor General Letter, *supra*, at 3, including during a period when it was convening pro forma sessions every three days. 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (Sen. Reid). Thus, until January 4, 2012, all Presidents to confront the issue had recognized that recess appointments are impermissible when the Senate is

convening pro forma sessions every three days.

2. The Government has argued that the Senate's sessions were constitutional nullities because "no business can be conducted" at those sessions. OLC Memo at 17. But that is not the President's decision to make. The Senate said it was convening in sessions and actually convened in such sessions. That is dispositive. Just as the Executive Branch cannot second-guess the Senate's method for determining whether it has a proper quorum, *United States v. Ballin*, 144 U.S. 1, 6 (1892), it cannot second-guess the Senate's representations about whether it is convening in a Senate session. *See, e.g.*, *id.* (each house of Congress determines when it "is in a condition to transact business"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (attestations of "the two houses, through their presiding officers" are "sufficient evidence" that a bill "passed Congress"); Laurence H. Tribe, *American Constitutional Law* § 4-13 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself").

In any event, the Executive Branch's assertion that "no business can be conducted" at pro forma sessions is plainly wrong. "[A] pro forma session is not materially different from other Senate sessions," 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (citation omitted), and the Senate was clearly capable of doing business—and indeed, *actually did* do business—at these sessions. As noted above, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011 during a pro forma session scheduled by the same adjournment order in effect on January 4, 2012. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011)

(passing H.R. 3765). Similarly, at an indistinguishable pro forma session in August of 2011, the Senate passed the Airport and Airway Extension Act of 2011. *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). And just one day before the "recess" appointments here, the Senate convened to commence the Second Session of the 112th Congress, 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012), as well as to discharge its obligation under the Twentieth Amendment to "assemble at least once in every year" in a meeting that "shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. In all of these instances, the Senate conclusively demonstrated its ability to do business at pro forma sessions.

The Senate could have likewise confirmed or rejected all pending nominations at any of those sessions. It merely needed to do so by unanimous consent—the procedure that the Senate uses to do most of its business, *see, e.g.*, 156 Cong. Rec. S7137-38 (daily ed. Sept. 15, 2010) (Sen. Coburn) (explaining as much), including confirming nominees, *see* Rybicki, *supra*, at 9. The Senate was fully capable of acting through the presiding Senator at any of the pro forma sessions because "the Senate operates on the absolute assumption that a quorum is always present until a point of no quorum is made." *See* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Senate Precedents and Statistics* 1038 (1992). Indeed, on days when even the Government would concede that the Senate is in session, there are typically only a handful of senators on the floor, accompanied by a retinue of Senate staff. *See* Betsy Palmer, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1

(2010) (noting that it is "unusual for as many as 51 Senators to be present on the floor at the same time").

3. In short, the Senate convened regularly throughout the supposed "recess." It passed a bill, it commenced the Second Session of the 112th Congress, and it was fully available to confirm the President's nominees. For this reason, too, the so-called "recess" appointments were invalid.

III. ANY POSSIBLE DISRUPTION DUE TO THE D.C. CIRCUIT'S JUDGMENT IS LEGALLY IRRELEVANT AND LARGELY AVOIDABLE.

The Government also contends that the D.C. Circuit's decision "threatens a significant disruption of the federal government's operations." Pet'n 30. These concerns are largely overstated. As the court of appeals carefully explained, there are numerous steps Congress and the President could take to mitigate any consequences of enforcing the Constitution. Pet.App. 44a-46a.[12]

More importantly, though, to the extent that the D.C. Circuit's judgment would cause disruption, such disruption is both legally irrelevant and largely avoidable.

1. Foremost, any potential inefficiency from enforcing the Recess Appointments Clause is irrelevant. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of N.Y.*, 524 U.S. 417, 449

[12] The Teamsters close their brief with a fusillade of attacks on Noel Canning, all apparently intended to undermine the D.C. Circuit's judgment. *See* Teamster's Br. 10. The Teamsters provide no citations to support these false assertions. All should be disregarded. *See* Resp. C.A. Br. 73-76.

(1998) (Kennedy, J., concurring). As this Court explained in *Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. at 944; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) ("[W]hile a government of 'opposite and rival interests' may sometimes inhibit the smooth functioning of administration, *The Federalist No. 51*, at 349, '[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.'" (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

In *Chadha*, like here, this Court confronted hundreds of instances over many decades in which the political branches had transgressed the Constitution's allocation of powers. The Court noted that the Government could offer numerous policy rationales to justify these transgressions, but it nonetheless held that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." 462 U.S. at 945. The same is true here.

2. Finally, to the extent that the Court is concerned about the consequences of enforcing the Clause's textual limitations, those consequences can be avoided by simply affirming the court of appeals on the narrowest ground the record presents. As explained above, the January 4, 2012, appointments were invalid for the additional reason that the President made them during the Senate's Session, at

a time when the Senate had not adjourned for more than three days. Because no President has ever before attempted intrasession recess appointments in those conditions, affirming the court of appeals on that basis would not call any appointments into question beyond those made on January 4, 2012.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with the additional Question Presented proposed by Respondent.

Respectfully submitted,

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