No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW") comprises over 600 member organizations representing millions of employers nationwide. An important function of CDW is to provide a collective voice to its membership on issues of national concern to the business community. CDW regularly advocates for its members on a range of labor issues and files *amicus curiae* briefs in cases of particular importance to its members.

This is such a case. Because the vast majority of CDW's members are subject to the National Labor Relations Act ("NLRA"), CDW has an interest in ensuring that the National Labor Relations Board (the "Board") does not issue binding decisions affecting thousands upon thousands of employers without a lawfully constituted quorum.

The court of appeals correctly held that the Board lacked a quorum because three of its five members were unlawfully appointed without the Senate's constitutionally required advice and consent. But it

[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intent to file this brief. S. Ct. Rule 37.2(a). The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

is important that such constitutional barriers be respected on a national scale; not circuit-by-circuit. There is nothing to gain – and much to lose – by delaying review and allowing litigants to seek further lower-court rulings on an issue that indisputably warrants this Court's review. Accordingly, CDW has a substantial interest in whether this Court grants the petition.

STATEMENT

1. The Appointments Clause requires the President to obtain the advice and consent of the Senate before appointing high-ranking public officials. U.S. Const. art. II, § 2, cl. 2. This advice-and-consent requirement places an important constraint on the President's appointment power. The Framers understood that the Senate would be "an excellent check upon a spirit of favoritism in the President." The Federalist No. 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), at 513.

The Recess Appointments Clause immediately follows the Appointments Clause and allows the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The recess-appointment power was intended as an "auxiliary method of appointment" in times of genuine necessity. The Federalist No. 67, *supra*, at 455. At the time of the Framing, Congress would often recess for six to nine months at a time, and the Framers understood that important vacancies could occur while the Senate was away. The President therefore was given the power to fill those vacancies "which it might be necessary for the public service to fill without delay." *Ibid*.

2. This case arises from the President's invocation of the Recess Appointments Clause to appoint three members to the Board on January 4, 2012, without the Senate's advice and consent.

Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). By statute, the Board must have three validly appointed members to have a quorum. *Id.* § 153(b). Without a quorum, the Board is powerless to act. *New Process Steel, L.P.* v. *NLRB,* 130 S. Ct. 2635, 2644-45 (2010).

On January 3, 2012, the first session of the 112th Congress came to a close. At that time, the commission of one of the Board's members – Craig Becker, a prior recess appointee – expired automatically. The resulting vacancy left the Board with only two members, and thus no quorum.

The next day, January 4, 2012, the President announced that he "refuse[d] to take 'no' for an answer" from Congress in connection with this and other vacancies. See Helene Cooper, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1. The President declared that he was relying on the recess-appointment power unilaterally to appoint Sharon Block, Terence Flynn, and Richard Griffin to the Board. *Ibid.*[2]

The Senate was regularly holding sessions at the time. Between December 17, 2011, and January 23, 2012, the Senate was convening "pro forma"[3] every

---

[2] The President appointed Richard Cordray to the Consumer Financial Protection Bureau at the same time.

[3] "Pro forma," in congressional parlance, generally refers to a session of brief duration convened principally to comply with

three days to satisfy its constitutional obligation not to adjourn for more than three days without the House's consent. See U.S. Const. art. I, § 5, cl. 4 (Adjournments Clause). In fact, on January 3, 2012 – the day before the President issued the appointments – the Senate assembled in that fashion to commence the second session of the 112th Congress pursuant to the Twentieth Amendment. See 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[4]

The Senate's December 17, 2011, scheduling order contemplated that there would be "no business conducted" at these sessions. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But the Senate did conduct business during these sessions: On December 23, 2011, at the President's request, the Senate passed a bill extending the payroll tax cut for two months. *Id*. at S8789 (daily ed. Dec. 23, 2011).

On January 12, 2012, the Office of Legal Counsel released an opinion concluding that the President's recess appointments were proper. The opinion argued, in principal part, that the President has the unilateral power to judge the existence *vel non* of a "real and genuine recess." See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 5 (2012) ("OLC Opinion"). Thus, not-

---

the Adjournments Clause. "[T]he term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself . . . a pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS report).

[4] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2.

withstanding the Senate's pro forma sessions, the President could "properly conclude that the Senate [was] unavailable" – and make recess appointments on that basis. *Id*. at 9.

3. On February 8, 2012, the newly constituted Board issued a decision adverse to Respondent Noel Canning. Noel Canning petitioned for review of that decision in the United States Court of Appeals for the D.C. Circuit. Noel Canning argued, among other things, that the President's January 4 appointments were unconstitutional because the Senate was not actually in recess when the President purported to exercise his recess-appointment power. Resp. C.A. Br. 29-36. Accordingly, Noel Canning explained, the Board lacked a quorum of validly appointed members and its order therefore lacked the force of law.

The court of appeals granted the petition and vacated the Board's order. Pet. App. 1a-55a. The court held that the January 4 appointments were unconstitutional for two reasons. *First*, a unanimous court held that the Recess Appointments Clause allows the President to make recess appointments only during the "inter-session" recess between two sessions of Congress.[5] *Second*, a two-judge majority further held that the Recess Appointments Clause extends only to those vacancies that actually "happen," or arise, during the recess in which appointments are to be made.

---

[5] The Third Circuit recently joined the D.C. Circuit in holding that the Recess Appointments Clause does not countenance intra-session recess appointments. See *NLRB* v. *New Vista Nursing and Rehabilitation*, No. 11-3440, Slip at 101 (Mar. 19, 2013) (holding, *sua sponte*, that Member Becker's March 2010 intra-session recess appointment was unconstitutional).

Because the appointments failed on those grounds, the court of appeals did not squarely address the narrower (and equally dispositive) question whether the President may lawfully make intra-session recess appointments where, as here, the Senate is convening every three days in accordance with the Adjournments Clause.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the President violated the Constitution when he appointed Members Block, Flynn, and Griffin to the Board on January 4, 2012. That decision, however, is not the final word on this subject. This Court's review is necessary to establish a nationally uniform rule and to reject once and for all the government's misguided view of the Recess Appointments Clause.

In fact, this case is even more significant – and more deserving of immediate review – than the petition reflects. Even if the government were correct that the D.C. Circuit erred in its interpretation of the Recess Appointments Clause, the January 4 appointments are unconstitutional for a more fundamental reason: Because the Senate did not adjourn for more than three days under the Adjournments Clause, the Senate was not in *any* sort of recess – intra-session or otherwise – on January 4, 2012. That is, regardless of what kind of break in Senate proceedings constitutes "the Recess" under the Recess Appointments Clause, it cannot possibly be one for which the Senate would not even require the House's consent.

The questions presented by the government are conspicuously under-inclusive in this regard. Indeed, although it is not apparent from the petition, the January 4 appointments were quite literally

unprecedented. To our knowledge, no President in history has attempted an intra-session recess appointment during such a brief adjournment. This abrupt departure from historical practice conflicts with the purpose of the Recess Appointments Clause and is a startling encroachment on the Senate's advice-and-consent function.

What is more, the government has defended these appointments on the basis that the President has sole discretion to judge whether the Senate is "functionally" in recess – *even if it is regularly holding sessions*. This functional-recess approach is untenable. Not only is it atextual, it is also dangerously unworkable and would afford the President virtually unchecked authority to define the scope of his own recess-appointment power. The government's approach violates core constitutional prerogatives of the Senate – our system of checks and balances is undermined when one branch claims the authority to define its own exceptions to another branch's oversight. In any event, the government's argument fails on its own terms, because pro forma sessions are "real" sessions in which the Senate can (and does) perform legislative functions.

The D.C. Circuit correctly rejected the government's "functional-recess" approach, but it remains the administration's position on the matter. If left intact, the same theory may be invoked to support additional unlawful appointments in other circuits. The Court should grant the petition in order to conclusively repudiate the government's erroneous view of the President's recess-appointment power.

ARGUMENT

The government's petition raises constitutional issues of obvious significance. This case implicates

questions concerning the scope of the Recess Appointments Clause and the separation-of-powers principles upon which it is based. The fundamental and nationwide importance of these issues is beyond serious dispute.

Moreover, certain of the underlying questions have engendered disagreement among lower courts. In particular, the D.C. Circuit's interpretation of the phrase "that may happen" conflicts with constructions endorsed by other courts of appeals. See *Evans* v. *Stephens*, 387 F.3d 1220, 1226-27 (11th 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). These disagreements are detailed in the government's petition (at 23-24) and will not be rehearsed here.

The Court's review is also necessary to provide guidance to courts that are currently confronting these questions. Petitions for review and cross-applications for enforcement of Board decisions are pending before at least eight courts of appeals; resolution of these cases depends on the validity of the January 4 appointments. The D.C. Circuit alone is holding more than thirty such cases in abeyance. See, *e.g.*, *Sabo, Inc.* v. *NLRB,* No. 13-1010 (order filed 1/25/2013); *NOVA Southeastern Univ.* v. *NLRB*, No. 11-1297 (order filed 2/19/2013). This urgent need for guidance is likewise explained in the government's petition (at 11-12, 29-31), and needs no repetition.

All of this is more than enough to warrant this Court's review, but there is another reason to grant the petition. As explained below, the January 4 appointments were an unprecedented invocation of the President's recess-appointment power. The

government has defended those appointments with a breathtaking view of the Recess Appointments Clause. Such "hydraulic pressure" by one branch of government "to exceed the outer limits of its power" is precisely what this Court must guard against. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

THE GOVERNMENT'S THEORY OF THE RECESS-APPOINTMENT POWER IS UNPRECEDENTED AND UNTENABLE

A. The Senate Was Not In Recess On January 4, 2012

It has long been settled that the President may not make intra-session recess appointments unless, at a minimum, the Senate has "adjourn[ed] for more than three days" under the Adjournments Clause. See U.S. Const. art. I, § 5, cl. 4. The government concedes as much: "[T]he Executive has long understood that such short intra-session breaks, which do not genuinely render the Senate unavailable to provide advice and consent, do not trigger the President's recess-appointment authority." Pet. Br. 21.

This baseline principle has deep roots. Attorney General Daugherty – perhaps the most oft-cited authority for the practice of intra-session recess appointments – confirmed long ago that the Adjournments Clause is a structural constraint on the Recess Appointments Clause. See *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). He declared that if the Senate has not adjourned for more than three days, "no one . . . would for a moment contend that the Senate is not in session." *Ibid.*

It is also sensible to read these Clauses together, because they turn on the same basic fact of the Senate's availability. The Adjournments Clause was intended to prevent one house of Congress from unilaterally disabling itself (at the expense of the other) "without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 368 (Jonathan Elliott ed., 2d ed. 1836) (Virginia convention) (remarks of James Madison). Similarly, the Recess Appointments Clause – at a time of extended recesses and limited communication – guarded against "public inconveniences"[6] by allowing the President to fill vacancies that were "necessary for the public service to fill without delay." The Federalist No. 67, *supra*, at 455.

Because the Framers considered three-day breaks *de minimis* periods of congressional unavailability under the Adjournments Clause, the appointment-by-necessity function of the Recess Appointments Clause would likewise be out of place during such brief adjournments. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 419-21 (2005) (explaining why Clauses should be read together). Even the United States has urged that it would make "eminent sense" to "apply the three-day rule explicitly set forth in the Adjournment Clause" in construing the Recess Appointments Clause. Reply Brief for Intervenor United States at 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc). Similarly, this Court has employed the

---

[6] See 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 135 (Archibald Maclaine)

Adjournments Clause's three-day rule to construe other constitutional provisions that hinge on congressional availability. See *Wright* v. *United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

Prior administrations have long hewn to this principle. To our knowledge, no President in history has attempted an intra-session recess appointment when the Senate has not adjourned for more than three days under the Adjournments Clause. In the last thirty years, the shortest intra-session recess in which a recess appointment was made was ten days. See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions*, at 3 (2012).

Thus, although not squarely addressed by the court of appeals,[7] the January 4 appointments were quite literally unprecedented. The Senate never obtained – and did not even seek – the House's consent to adjourn for more than three days. As a consequence, the Senate was constitutionally required to (and did) convene every three days. When the appointments were made, the Senate was

---

[7] Because the court held that the Recess Appointments Clause does not permit *any* intra-session recess appointments, it necessarily rejected the alternative proposition that "the Recess" means "any adjournment of more than three days pursuant to the Adjournments Clause." Pet. App. 29a (noting that these Clauses "exist in different contexts" and "should [not] be read together"). The court's *dicta*, however, should not be read to cast doubt on the logical and well-supported relationship between the Clauses if this Court were to hold that intra-session recess appointments are permitted. See *New Vista*, Case No. 11-3440, Slip at 91 (noting that a durational limitation on intra-session recess appointments is superior to the government's "functionalist" approach).

not in "recess" as that term has ever been understood.

B. The President May Not Unilaterally Declare A Session Of Congress To Be A "Functional" Recess

In the court of appeals, the government defended the President's appointments on the ground that the Senate was not "really" holding sessions at the time of the appointments. The government insisted that the Senate's pro forma sessions, at which no business was conducted, were "functionally indistinguishable" from a recess. Pet. C.A. Br. 38. Thus, the President could infer that the Senate was "really" in an undeclared *twenty*-day recess, from January 3 to January 23, 2012, and make recess appointments on that basis. *Id*. at 35-47.

The D.C. Circuit correctly rejected the government's functional-recess theory. Pet. App. 29a-30a. But this theory remains the official position of the administration and creates a risk of future unlawful appointments in other jurisdictions. This Court's review is therefore warranted.

1. The Government's Functional-Recess Approach Is Flawed And Unworkable

According to the government, the President has exclusive discretion to gauge the quality of a Senate session and assess whether the Senate is "functionally" in recess. See OLC Opinion, *supra*, at 13 ("[T]he President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause."). The government advocated that same position before the court of

appeals. This functional-recess approach is untenable for several reasons.

a. Most fundamentally, the government's approach flouts the bright-line rule explained above: Any intra-session recess appointment requires, at a minimum, that the Senate adjourn for more than three days under the Adjournments Clause. The Senate never did that. Indeed, because the Senate never obtained the House's consent, it could not lawfully adjourn for more than three days. How could the Senate be in a twenty-day recess when the Constitution commands that it *not* be?

The government offers two responses. *First*, it posits that a pro forma session might satisfy the Adjournments Clause, yet not interrupt a recess under the Recess Appointments Clause, because the Clauses serve different functions. Whereas "[t]he Adjournments Clause relates to internal operations" and "purely internal matters," the government contends, "the Recess Appointments Clause defines the scope of an exclusively Presidential power" and "has ramifications far beyond the Legislative branch." Pet. C.A. Br. 49-50.

This argument is circular: The government simply relies on one assumed conclusion (the Adjournments Clause concerns only Congress) to support another (the Adjournments Clause cannot affect the President's appointment power). In any event, the argument requires one to accept that the Senate could be in "session" for one constitutional provision while simultaneously in "recess" for another. The Constitution supports no such dissonance. The Senate is either constitutionally available, or it isn't. There is no reason to presume that the Framers more abhorred unfilled vacancies

than they did "the evils which might result from the want of a proper concert and good understanding between the houses." See 1 St. George Tucker, *Blackstone's Commentaries* Note D, 206 (1803) (describing original intent of Adjournments Clause).

Second, the government suggests that perhaps the Senate did adjourn for more than three days – it just did so unconstitutionally. Pet. C.A. Br. 50-51.[8] This argument is contradicted by nearly a century of congressional practice. Congress has consistently and without challenge convened pro forma sessions to satisfy the Adjournments Clause since the 1920s. See, *e.g.*, 71 Cong. Rec. 3045 at 3228-29 (1929) (House resolution scheduling pro forma sessions); 96 Cong. Rec. 16,980 (Dec. 22, 1950) (Senate resolution scheduling pro forma sessions); *id*. at 17,020 (Dec. 26, 1950) (same); *id*. at 17,022 (Dec. 29, 1950) (same); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 126 Cong. Rec. 2574 (Feb. 8, 1980) (same); 127 Cong. Rec. 190 (Jan. 6, 1981) (same). This "[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).[9]

---

[8] The government muses that perhaps the Senate obtained the House's tacit consent to enter a recess. Pet. C.A. Br. 51-52 & n.31. That is wrong. In fact, many members of the House openly *forswore* any such consent. See Resp. C.A. Br. 8-9 (discussing letter from 78 representatives directing that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing") (quoting Press Release, Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments* (May 25, 2011)).

[9] This should not be confused with the government's argument that historical practice supports its view of the Recess Appointments Clause. See Pet. 17-18. Although intra-session

b. The functional-recess approach is also dangerously unworkable. The Adjournments Clause has long stood as a bright-line limit on intra-session recess appointments. Casting aside that barrier would afford the President virtually unbounded authority to declare the Senate in recess. If the touchstone is simply whether *the President* concludes that the Senate, though holding sessions, is "unavailable to perform its advise-and-consent function," OLC Opinion, *supra*, at 23, then nothing would preclude the President from declaring a de facto "recess" in any number of situations. Suppose, for example, that the Senate is engaged in lengthy debate or, in the President's view, simply taking too long to consider a nomination. Separation of powers principles do not evaporate in times of protracted political debate or even genuine impasse.

The separation of powers "is a prophylactic device" that "establish[es] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The government's approach is barely a line in the sand. How robust must a session be to constitute a "real" session? Will thirty Senators for sixty minutes suffice? Sixty Senators for thirty minutes? What if all Senators are in attendance, but they take up little or no business? There is no sufficient limiting principle to the government's position. The court of appeals

---

recess appointments have occurred with some frequency in the last century, the practice was expressly disavowed by the Framers. See Pet. App. 20a-23a. The use of pro forma sessions does not have a similarly fractured history. There is no evidence that the Framers contemplated two types of sessions – some "real" for constitutional purposes, and others not.

rightly observed that the functional-recess test would "eviscerate the Constitution's separation of powers." Pet. App. 29a.

Not only that, but the government's approach is hopelessly backward-looking. It will not be clear *ex ante* whether the Senate has entered a "functional" recess because that determination depends on the nature and quality of sessions yet to occur. The government relies on the fact that the Senate "in fact conducted no business" between January 3, 2012 and January 23, 2012, to justify recess appointments that were made on *January 4, 2012*. Pet. C.A. Br. 34. If the Senate *did* conduct business on January 5, 2012, could anyone dispute that the Senate was not in recess – even a "functional" one – for more than 48 hours?[10]

c. History and practice likewise militate against the government's position. As far as we can determine, no President has ever attempted an intra-session recess appointment unless the Senate has adjourned for more than three days with the House's consent. Such "prolonged reticence would be

---

[10] The government points out that the Senate stated in advance that "no business [would be] conducted" at its pro forma sessions. See 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But that cannot be dispositive. For starters, the Senate does not always state that it intends to conduct no business during a series of pro forma sessions. See 154 Cong. Rec. S10,504 (daily ed. Oct. 2, 2008) (providing that there would be "no business conducted, except with the concurrence of the two leaders"); *id.* at S6336 (daily ed. June 27, 2008) (order silent on whether business would be conducted). More importantly, business can *always* be conducted in a pro forma session by unanimous consent – exactly what occurred here, when the Senate *passed a bill* during one such session. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing payroll tax-cut extension).

amazing if [the practice] were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230. In fact, only once in history has a President attempted an *inter*-session recess appointment under those circumstances. And that incident is a case study for why "high walls and clear distinctions," *id.* at 239 – not boundless Executive discretion – are necessary in this area:

When the clock struck noon on December 7, 1903, President Theodore Roosevelt made 160 recess appointments during what he deemed a "constructive recess" in the moments-long period between the first and second sessions of the 58th Congress. See Hogue, *supra*, at 10. The tactic was widely condemned by Congress. In a 1905 report discussing the incident, the Senate Judiciary Committee lamented that "[t]he theory of 'constructive recess' constitutes a heavy draft upon the imagination." S. Rep. No. 4389,
58th Cong., 3d Sess. 2 (1905) (reprinted in 39 Cong. Rec. 3823 (1905). In words especially befitting the present case, the Committee admonished that

> the Framers [in drafting the Recess Appointments Clause] were providing against a real danger to the public interest, not an imaginary one. *They had in mind a period of time during which it would be harmful if an office were not filled*; *not a constructive, inferred, or imputed recess, as opposed to an actual one.*

Ibid. (emphasis added).

d. If there were any doubt whether the Senate was "really" in session, the benefit of that doubt lies firmly and exclusively with the Senate. The Constitution grants Congress plenary power to "determine

the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, this Court has confirmed that "all matters of method [of proceeding] are open to the determination of the house." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). Part and parcel of that power is the Senate's ability to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." *Id.* at 6; see Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, cl. 1-4, Doc. 14 (stating that "[e]ach house of Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting").

Courts will not second-guess a determination by Congress that it has duly assembled. Even the judicial inquiry into whether a bill was lawfully passed is a narrow one: If Congress says that it was, then that settles the matter. See *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892). This principle is firmly grounded in the separation of powers and the "respect due to a coordinate branch of the government." *Id.* at 673. It would flout that principle for the President to cross-examine (and conclusively judge) whether the Senate is "functionally" in recess when that body declares itself to be in session.

The government protests that the Senate cannot deprive the President of the power to make recess appointments by falsely declaring itself in session when it is actually unable to fulfill its advice-and-consent function. See Pet. C.A. Br. 60-65. Even if that were true, it is beside the point. As explained below, the Senate *can* provide advice and consent during pro forma sessions, just as it can fulfill other core legislative functions. Surely it is in the Senate's

broad rulemaking power to declare itself in session at a time when it could, and proximate to this instance did, pass legislation.

The Recess Appointments Clause was "carefully devised" to not "in the slightest degree chang[e] the policy of the Constitution, that [] appointments are only to be made with the participation of the Senate." S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905). The Senate can abrogate (or eliminate) the President's recess-appointment power by choosing to remain "perpetually in session . . . for the appointment of officers." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1557, at 416 (3d ed. 1833). That is precisely what the Senate did when it elected, consistent with its rules, to remain in session between December 17, 2011, and January 23, 2012. It is neither remarkable nor troubling that the President's "auxiliary" appointment power was rendered unnecessary as a consequence.

2. The Senate Was Not In A "Functional" Recess

Even if the Recess Appointments Clause justified the session-by-session holistic assessment urged by the government, the January 4 appointments are still invalid. The Senate's pro forma sessions were real sessions – not metaphysical ones. The Senate was not in a "functional" recess.

a. Most fundamentally, the Senate was capable of performing legislative functions during its pro forma sessions. This is not post hoc speculation – the Senate actually *passed legislation* during the period in question. At the Senate's December 23, 2011, pro forma session, the Senate passed by unanimous consent the Temporary Payroll Tax Cut Continua-

tion Act of 2011. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765) The President later signed that bill into law. In fact, the bill was passed at the *President*'s urging – belying any claim that the Senate was incapable of acting on presidential requests (or nominations) during this period. *Contra* OLC Opinion, *supra*, at 1 (defending appointments on ground that Senate's pro forma sessions rendered it unavailable to "participate as a body in making appointments").

This was no anomaly. The Senate and the House have used pro forma sessions to conduct business on many occasions. For instance, at a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Even more recently, in a pro forma session on September 28, 2012, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). Indeed, according to the Congressional Research Service, the House "regularly permits business on pro forma days, including the introduction and referral of legislation, the filing of committee reports and co-sponsorship forms, and the receipt and referral of executive communications and Presidential messages." *Id.* at S5954 (Aug. 2, 2012).

The government touts the fact that the Senate's scheduling order contemplated that there would be "no business conducted" at the sessions in question. Pet. C.A. Br. 31 (quoting 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011)). That is true, but beside the point. The relevant inquiry under the Recess Appointments Clause is whether the Senate is *capable* of acting on appointments – not whether it intends to do so. See OLC Opinion, *supra*, at 10

("[T]he recess appointment power is required to address situations in which the Senate is *unable* to provide advice and consent on appointments.") (emphasis added). The government confuses the Senate's ability to act with its willingness to do so. Quite obviously, the advice-and-consent function includes the power to withhold consent. It would turn that function on its head if the President could declare a "recess" whenever the Senate stated that it would take no action on a nomination for some period of time.

Nor is it meaningful that the Senate could act only through unanimous consent at its pro forma sessions. See Pet. C.A. Br. 32-33. "The Senate is fundamentally a 'unanimous consent' institution." Walter J. Oleszek, Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate* 1 (2008). The vast majority of the Senate's business, especially on nominations, is conducted by unanimous consent. Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, at 5 (2012); see generally Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* (2013). In fact, the Senate confirmed an array of presidential nominees by unanimous consent the same day that it scheduled the sessions in question. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011).

b. Pro forma sessions are universally accepted to be "real" sessions for other constitutional purposes. The most prominent of these is the Adjournments Clause. As explained above, Congress has used pro forma sessions to avoid unlawful adjournments for

nearly a century. See, *e.g.*, 71 Cong. Rec. 3045 at 3228-29 (1929); 96 Cong. Rec. 16,980 (Dec. 22, 1950); *id*. at 17,020 (Dec. 26, 1950); *id*. at 17,022 (Dec. 29, 1950); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 126 Cong. Rec. 2574 (Feb. 8, 1980); 127 Cong. Rec. 190 (Jan. 6, 1981). No administration has challenged the validity of these sessions.

Pro forma sessions are also used to satisfy the Twentieth Amendment, which requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. Congress has, on numerous occasions, convened pro forma to comply with that "assembl[y]" requirement. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This practice has likewise gone unchallenged for decades. In fact, the government has acknowledged that Congress successfully commenced a new session by convening pro forma on January 3, 2012. See OLC Opinion at 1 (arguing that a functional recess began "on January 3, 2012, [when] the Senate convened . . . to begin the second session of the 112th Congress").[11]

---

[11] Pro forma sessions are treated just like any other sessions for statutory purposes, as well. The Congressional Research Service has identified twenty-two statutes in which various time periods are computed based on days that Congress is "in session." 158 Cong. Rec. S5954-55 (Aug. 2, 2012) (CRS report). Pro forma sessions are taken into account by both the President and Congress when performing those calculations. *Ibid*.

The government has not persuasively explained why a pro forma session is sufficiently robust to satisfy some constitutional criteria but not others. There is nothing unique to the Recess Appointments Clause that commands a higher threshold of Senate availability than does the rest of the Constitution. When the Senate has convened as a legislative body – pro forma or otherwise – it is fully capable of discharging its constitutional mandate. The advice-and-consent function is no exception.

* * *

For all of these reasons, the government's understanding of the Recess Appointments Clause is flawed. This case is an ideal vehicle for the Court to reject the government's position and forestall future unlawful appointments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

May 2013