[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 12-1115, 12-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,

Petitioner & Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent & Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760,

Intervenor for Respondent.

On Petition For Review And Cross-Application For Enforcement
Of An Order Of the National Labor Relations Board
NLRB-19-CA-32872

BRIEF FOR AMICI CURIAE SENATE REPUBLICAN LEADER MITCH MCCONNELL AND 41 OTHER MEMBERS OF THE UNITED STATES SENATE IN SUPPORT OF PETITIONER/CROSS-RESPONDENT NOEL CANNING

Miguel A. Estrada
Counsel of Record
Jonathan C. Bond
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner/Cross-Respondent Noel Canning, except that this brief is filed on behalf of Senate Republican Leader Mitch McConnell and 41 other members of the United States Senate and is filed in support of Petitioner/Cross-Respondent Noel Canning. A complete list of the amici joining this brief is provided in the Addendum.

B. Rulings Under Review. The ruling under review is the Decision and Order of the National Labor Relations Board in *Noel Canning and Teamsters Local 760*, NLRB-19-CA-32872, 358 NLRB No. 4 (2012).

C. Related Cases. Other related cases of which counsel is aware are listed in the Brief for Petitioner/Cross-Respondent Noel Canning and the Brief for Amici Landmark Legal Foundation et al.

Dated: September 26, 2012

/s/ Miguel A. Estrada
Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members Of The United States Senate

CERTIFICATE AS TO NECESSITY OF SEPARATE AMICUS BRIEF

Pursuant to D.C. Circuit Rule 29(d), the undersigned counsel certifies that this separate brief is necessary because Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members Of The United States Senate possess a unique interest in ensuring that the Senate's constitutionally prescribed role in the appointments process and its prerogative to determine the rules governing its own proceedings are properly preserved. Additionally, in light of their experience serving in the Senate, amici have distinct insight regarding Senate procedure, including its longstanding practice of convening pro forma sessions, that may assist the Court in its consideration of this case.

Dated: September 26, 2012

/s/ Miguel A. Estrada

Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members Of The United States Senate

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Constitutional Provisions

Statutes

Other Authorities

STATUTES AND REGULATIONS

All pertinent statutory provisions are set forth in the Brief for Petitioner/Cross-Respondent Noel Canning.

STATEMENT OF IDENTITY OF AMICI CURIAE, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are Senate Republican Leader Mitch McConnell and 41 other members of the United States Senate. A complete list of amici is provided in the Addendum. As members of the Senate, amici have a unique interest in safeguarding the Senate's constitutional authority to govern its own proceedings and its constitutionally prescribed role in the appointments process.

Pursuant to Federal Rule of Appellate Procedure 29(a) and D.C. Circuit Rule 29(b), all parties previously consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor other person other than counsel for amici contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

The President's January 4, 2012 recess appointments to the National Labor Relations Board deprived the Senate of two powers it *does* possess to protect a purported power the President does *not*. The Framers accorded the Senate broad authority to govern its own proceedings, including when and how to hold sessions. They also gave the Senate plenary power to reject appointments, deliberately withholding from the Executive unilateral authority to fill vacancies when the Senate is not in a period of "Recess" (aside from inferior officers Congress itself exempts). Like all checks and balances, the Senate's ability to block appointments—coupled with its prerogative to remain in session and foreclose appointments altogether—means that another branch of government, here the Executive, cannot always wield power as it wishes. But that is precisely the point. As the Framers understood, the costs of requiring the Senate's consent are outweighed by its benefits of preventing Executive abuses of the appointments power and ensuring its wise exercise.

The January 4 recess appointments eviscerated both of those Senate prerogatives. By declaring the Senate not "capable" of performing its constitutional function and therefore in a *de facto* period of "Recess," even while the chamber decided to be in session repeatedly, the President usurped the Senate's control of its own procedures. And by appointing officers without the Senate's

consent, he took away its right to review and reject his nominations—claiming to himself the very unilateral appointments power the Framers withheld. The President did so, moreover, to safeguard executive authority that *does not exist*. Contrary to the Executive's claim, the Recess Appointments Clause does not confer freestanding authority to fill vacancies, which the Senate must respect; the power it creates is narrow and conditional, arising only when the Senate chooses to "Recess." The power of the President's imagining, in contrast, is effectively limitless, and blessing his exercise of it here would severely undermine the separation of powers.

Most remarkable of all, however, is that the President asserted this novel power when he did: in between pro forma Senate sessions that he and Congress alike have long accepted as valid. Only weeks before the January 4 appointments, the Senate demonstrated that it is fully "capable" of exercising its constitutional powers during pro forma sessions by *passing legislation*—at the President's own urging. That reality confirms that the Executive's true concern was not the Senate's *ability* to fulfill its constitutional function, but *how* it chose to perform that role—by withholding its consent and preventing appointments. But the President's disagreement with the Senate's exercise of its authority is no reason to let him bypass the chamber's input. Indeed, it is a reflection of the constitutional system of separated powers operating exactly as the Framers intended.

STATEMENT

1. "[T]he power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (internal quotation marks omitted). The Framers thus took great care in allocating that power in the Constitution.[1] They contemplated various alternatives—including vesting certain appointments in the President or Senate alone[2]—and ultimately struck a careful balance: Except for inferior officers Congress exempts, the President alone may nominate officers, but the Senate has an absolute veto. U.S. CONST. art. II, § 2, cl. 2. Requiring the Senate's consent, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks omitted). Even the "possibility of rejection" of a nomination "would tend greatly to prevent the appointment of unfit characters" and provide "stability in the administration." THE FEDERALIST No. 76, at 456 (C.

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[1] *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 63, 67, 116, 119-21, 224, 232-33, 292, 300-01 (M. Farrand ed. 1911) ("FARRAND"); 2 FARRAND at 23, 41-44, 80-83, 121, 132, 183 185, 389, 405-06, 418-20, 495, 538-40; Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2225 (1994); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1768 & n.59 (1984).

[2] *See, e.g.*, 1 FARRAND at 119, 232; 2 FARRAND at 185.

Rossiter ed. 2003) (Hamilton). And the Senate's "public accountability" would adequately check unwise exercises of its power. *Edmond*, 520 U.S. at 660.

After adopting the Appointments Clause, the Framers added a narrow exception to address a specific exigency: vacancies arising during the Senate's "Recess," when it cannot approve nominees. As they had anticipated, *see* THE FEDERALIST No. 84, at 519 (Hamilton), Senate sessions initially were short; until the Civil War, they ordinarily lasted only three to six months, with long recesses in between. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1500-01 (2005); JOINT COMM. ON PRINTING, 112TH CONG., 2011-2012 CONGRESSIONAL DIRECTORY 522-28 (2011). And transportation and other challenges made it difficult for the Senate to return quickly once in recess. *See* Rappaport, *supra*, at 1501, 1564. Instead of requiring the Senate to remain "continually in session for the appointment of officers," which would "improper[ly]" burden it, the Framers permitted it to recess, allowing the President to fill vacancies in the interim. THE FEDERALIST No. 67, at 408 (Hamilton); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1551, at 410 (1833). The Recess Appointments Clause—"[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of

their next Session," U.S. CONST. art. II, § 2, cl. 3—was adopted unanimously without recorded debate, 2 FARRAND at 540.

2. The Recess Appointments Clause was long understood, even by the Executive itself, to confer very limited authority. One by one, however, the Executive gradually abandoned the Clause's built-in limitations in the name of political expediency. The first Attorney General, Edmund Randolph—himself a member of the Committee of Detail, 2 FARRAND at 106—concluded based on the Clause's text and purpose that it allows appointments only to fill vacancies that *occur while* the Senate is in recess. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *reprinted in* 24 THE PAPERS OF THOMAS JEFFERSON 165, 166-67 (1990). Because the Clause created an "exception to the general participation of the Senate," it should "be interpreted strictly," not as a tool to fill vacancies on which the Senate could have acted before adjourning. *Id.* at 166.

Randolph's successors later abandoned that well-reasoned view—prompting Senate protest, *see, e.g.*, S. REP. No. 37-80, at 1-8 (1863), and legislation designed to curtail improper appointments by barring compensation, *see* Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646, codified as amended at 5 U.S.C. § 5503. Yet for more than a century subsequent Administrations (with one exception) accepted that the Clause permits appointments only during adjournments *between* Senate sessions—not during adjournments *within* a session. *See* Rappaport, *supra*, at

1501, 1572.[3] As Attorney General Knox explained in explicitly rejecting 'intrasession' recess appointments, although long intrasession adjournments might "seriously curtail the President's power of making recess appointments," that "argument from inconvenience … can not be admitted to obscure the true principles" of the Constitution. *President—Appointment of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 603 (1901).

The Executive ultimately renounced even that limitation, however, claiming that at least *some* intrasession recess appointments were permissible. *See Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 21-25 (1921). Yet in asserting that new power, Attorney General Daugherty clarified that only substantial adjournments could suffice:

> 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.) … [L]ooking at the matter from a practical standpoint, no 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. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.

Id. at 24-25.

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[3] The exception, Andrew Johnson—impeached for appointments-related and other abuses—made a handful of intrasession recess appointments in 1867-1868. *See* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 408-09 (2005).

3. In the decades since, the Executive's reliance on recess appointments, particularly intrasession appointments, has increased drastically. *See* Carrier, *supra*, at 2212-13 & n.48. By January 2012, the current and previous two Presidents combined had made more than 340 recess appointments.[4] And intrasession appointments—once forsworn as unlawful—have become a mainstay, now made in ever-shorter adjournments of as few as ten days.[5] Presidents increasingly employ recess appointments, moreover, not to fill vacancies on which the Senate cannot act, but to *bypass* the Senate when it has not acted as the Executive wishes. Nearly all recess appointees in the past two Administrations to date had previously been nominated to their posts (on average six months earlier).[6]

Despite this self-serving transformation of its understanding of the Recess Appointments Clause, the Executive has—until now—continued to honor two basic limitations. First, it has disclaimed authority to make intrasession recess appointments during adjournments of three days or fewer—breaks that do not require the House's consent, U.S. CONST. art. I, § 5, cl. 4. Just two years ago, the

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[4] HENRY B. HOGUE, CONG. RESEARCH SERVICE, RS21308, FREQUENTLY ASKED QUESTIONS 1 (2012).

[5] *See* HOGUE, *supra*, at 1; HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERVICE, RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001-OCTOBER 31, 2008, at 1, 5 (2008) ("BUSH CRS REPORT").

[6] *See* BUSH CRS REPORT at 4-5; HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERVICE, R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 7 (2012) ("OBAMA CRS REPORT").

Solicitor General informed the Supreme Court that "the Senate may act to foreclose [recess appointments to the Board] by declining to recess for more than two or three days at a time over a lengthy period." Respondent's Letter Brief 3, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *cf. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, slip op. at 9 n.13 (Jan. 6, 2012) ("2012 OLC Op.") (noting Executive's prior recognition of three-day limitation).[7] Second, the Executive has acknowledged the Senate's ability to avoid recessing by convening pro forma sessions—which the Senate and the House have employed for decades, without challenge, for other purposes. The Solicitor General apprised the Supreme Court that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Respondent's Letter Brief 3, *New Process Steel*, 130 S. Ct. 2635—during which it repeatedly held only pro forma sessions for weeks at a time, *see* 2011-2012 CONGRESSIONAL DIRECTORY at 537.

Consistent with past practice, in December 2011 the Senate again decided not to adjourn until the new year pursuant to a concurrent resolution, but instead to hold pro forma sessions every three days. 157 CONG. REC. S8783-84 (Dec. 17,

[7] The Office of Legal Counsel defended the January 4 appointments solely on the ground that the pro forma sessions did not interrupt the Senate's "intrasession recess," which by its count lasted 20 days, declining to address whether recess appointments would be permissible during intrasession adjournments of three days or less. 2012 OLC Op. at 9 n.13.

2011). But on January 4—the day after the pro forma session commencing the Second Session of the 112th Congress, 158 CONG. REC. S1 (Jan. 3, 2012), and only two days before the Senate would convene again, 157 CONG. REC. S8783—the President discarded settled Executive Branch policy and announced the recess appointments of three members of the Board and one other principal officer.[8]

SUMMARY OF ARGUMENT

The President's claim that he can bypass the Senate in making appointments because he deems it to be in a period of "Recess," while the chamber declares itself to be *in session* repeatedly, is a direct affront to the constitutional structure and irreconcilable with well-established congressional and Executive practice. The Constitution empowers the Senate, not the President, to prescribe and administer its own procedures. The Senate's express determination that it was in session on January 3 and 6, not in recess, fell well within that broad authority.

Allowing the Executive to override the Senate's determination would subvert, not protect, the separation of powers. The Recess Appointments Clause does not empower the President to declare the Senate incapable of performing its constitutional function simply because it declines to confirm his nominees, or fails to confirm them with alacrity. Permitting him to do so would deprive the Senate of

[8] *President Obama Announces Recess Appointments to Key Administration Posts* (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts (all Internet materials last visited September 26, 2012).

its constitutional right to reject appointments by withholding its consent. The Executive's contrary theory lacks any limiting principle and would enable the President to sidestep the Senate at his pleasure, thus wielding the very unilateral appointment power that the Framers rejected.

Even if the President could deem the Senate in a *de facto* period of recess in *some* circumstances, he had no basis to do so here while the Senate held pro forma sessions. Both the Executive and Congress have long accepted pro forma sessions as valid for other constitutional, statutory, and legislative purposes. And the Senate is perfectly capable of exercising its powers during them—as it illustrated twice in 2011 by passing legislation, once at the President's urging. The Executive's contrary position conflates the chamber's *unavailability* to act with its *unwillingness* to do so. But interbranch disagreement is not the exigency the Recess Appointments Clause exists to remedy; it is a central feature in our system of separated powers.

ARGUMENT

The Recess Appointments Clause did not authorize the President's January 4 appointments to the Board because the Senate was not in "Recess." Indeed, the Executive itself once recognized that the text, history, and purpose of the Clause show that it allows appointments only to fill vacancies that arise during adjournments *between* sessions, not during adjournments *within* a session. *See*

supra at 6-7. And there is much to be said for that view.[9] This Court need not grapple with that issue here, however, because the Senate was not in the requisite period of "Recess" on January 4.

To hold otherwise, the Court must accept the illogical premise that the Senate was in a prolonged period of recess when it not only had not adjourned pursuant to a concurrent resolution, but even *while it held sessions* on January 3 and 6, 2012. The Executive has previously disclaimed, and does not assert now, authority to make recess appointments during intrasession adjournments of three days or fewer. *See supra* at 8-9; 2012 OLC Op. at 9 n.13. And for good reason: It would make little sense to allow the President to fill offices for up to two *years* because the Senate adjourns for two or three *days*, or even overnight—breaks the Framers thought too trivial to require the House's consent. *See* U.S. CONST. art. I, § 5, cl. 4.

The January 4 appointments are therefore invalid *unless* the Constitution authorizes the Executive to disregard the January 3 and 6 sessions. It does not. The Senate's own conclusion that it was in session should foreclose further inquiry. In any event, its conclusion was plainly correct.

[9] *See, e.g.*, Rappaport, *supra*, at 1547-73; Carrier, *supra*, at 2209-46.

I. THE SENATE'S CONCLUSION THAT IT WAS IN SESSION SHOULD CONTROL.

A. The Constitution Empowers The Senate Itself To Determine That It Is In Session.

1. The Constitution accords the Senate broad authority to prescribe and administer its own procedures—including when and how to convene and adjourn its sessions. Article I's Rulemaking Clause authorizes "[e]ach House" to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. As Justice Story explained, "[i]f th[at] power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 STORY, *supra*, § 835, at 298.

The Constitution also leaves almost entirely to the Senate's discretion decisions of when to convene—and, with the House's consent, when to adjourn. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Residence Bill* (July 15, 1790), *reprinted in* 17 THE PAPERS OF THOMAS JEFFERSON 194, 195 (1965). The Senate must meet once a year on January 3 (or another date Congress selects), U.S. CONST. amend. XX, § 2, and when the President calls it into special session, *id.* art. II, § 3. And once it convenes, it cannot *break* for more than three days (or to a different place) without the House's consent. *Id.* art. I, § 5, cl. 4. Beyond

those limitations, the Senate can hold sessions when and how it chooses.[10] Aside from calling special sessions and resolving "Disagreement[s] between" the House and Senate regarding "the Time of Adjournment," the President plays no role. U.S. CONST. art. II, § 3; *see id.* art. I, § 7, cl. 3 (excluding adjournment resolutions from presentment requirement).

As the Supreme Court has long held, the wide latitude the Constitution gives each House to govern its own proceedings leaves little room for outside interference. *See United States v. Ballin*, 144 U.S. 1, 5 (1892). "[T]he advantages or disadvantages" of Senate procedures are not "matters of judicial consideration." *Id.* Unless they "ignore constitutional restraints" or "violate fundamental rights," or are not rationally related to their ends, they are "beyond the challenge of any other body or tribunal." *Id.* Within those broad boundaries, the Senate's power is "absolute." *Id.*

The Senate's interpretation of its rules and orders, moreover, deserves "great weight." *United States v. Smith*, 286 U.S. 6, 33-34 (1932). At least to the same extent as an agency's reading of its own regulations, *cf. Auer v. Robbins*, 519 U.S. 452, 461-62 (1997), the Senate's interpretation should not be rejected unless it plainly contradicts a rule's text or is merely a *post hoc* rationalization, *see, e.g.*,

[10] The Constitution defines a quorum for doing business but grants the Senate alone authority to establish and enforce rules regarding that requirement. U.S. CONST. art. I, § 5, cl. 1.

Smith, 286 U.S. at 33-34. Otherwise, courts risk "effectively … *making* the Rules—a power that the Rulemaking Clause reserves to each House alone." *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995) (emphasis added). Courts likewise take Congress at its word when it reports its official actions. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-80 (1892) (chamber's attestation through its presiding officer that enrolled bill he signed was passed is controlling); *Pub. Citizen v. U.S. Dist. Ct.*, 486 F.3d 1342, 1349-50 (D.C. Cir. 2007).

2. These core principles of congressional self-governance should resolve this case. To begin with, the Senate did *not* adjourn pursuant to a concurrent resolution—which the Constitution would have required for an adjournment from December 17 (or even January 3) to January 23. That alone fatally undermines the Executive's position. The Senate hardly could be deemed in "Recess" when it was constitutionally bound to be in session.

Instead, the Senate expressly and unambiguously determined that it was in *session* on January 3 and 6, followed by adjournments of three days or fewer, and not in the midst of one continuous, weeks-long recess: Its December 17, 2011 order established that the Senate would "convene for pro forma sessions" on those days (among others), and "following" each session would "adjourn" until the next. 157 CONG. REC. S8783-84. The official record confirms that those sessions and

adjournments actually occurred. 158 CONG. REC. S1; 158 CONG. REC. S3 (Jan. 6, 2012). Whatever breaks the term "Recess" in the Recess Appointments Clause encompasses, it assuredly excludes formal Senate sessions.

The Senate's explicit determination that it was holding sessions—not in a period of "Recess" (requiring the House's consent)—should control unless it exceeded the chamber's authority. *Ballin*, 144 U.S. at 5. It did not. The Constitution does not dictate how long Senate sessions may or must last or how much business must be conducted. The Executive itself has not questioned the Senate's power to convene pro forma sessions, and indeed has long accepted them. *See infra* at 22-25. The Senate's conclusion that it was in session is thus dispositive.[11]

B. Allowing The Executive To Override The Senate's Conclusion Would Subvert, Not Safeguard, The Separation Of Powers.

The Executive's claim that the President can override the Senate's conclusion that it was in session has no foothold in the Constitution, and if accepted would severely undermine the separation of powers. The President

[11] The Executive's contention that the Senate has acquiesced in a purely functional definition of "recess" is based on a misreading of a 1905 Senate Judiciary Committee report taken out of context. *See* 2012 OLC Op. at 12; 33 Op. Att'y Gen. at 25; S. REP. No. 58-4389 (1905), *reprinted in* 39 CONG. REC. 3823 (1905). The report protested recess appointments President Roosevelt made during the *intersession* recess that supposedly occurred when one Senate session ended automatically with the start of the next regular session. *See* 39 CONG. REC. 3823-24. The report's central point, moreover, was that the Senate's practical unavailability was a *necessary* condition for a recess—not a *sufficient* one. *See id*.

claims power to deem the Senate not "genuinely 'capable of exercising its constitutional function'" during pro forma sessions and thus in a *de facto* recess. 2012 OLC Op. at 14 (citation omitted). But the Constitution confers no such power, and allowing the President to wield it would oust the Senate from its own constitutional role.

1. No constitutional provision empowers the President to deem the Senate "unavailable" to perform its advice-and-consent function when the chamber chooses not to recess. The few relevant powers the Constitution *does* give the President only underscore the narrow limits of his authority. He can call the Senate into special sessions on "extraordinary Occasions," U.S. CONST. art. II, § 3—as Presidents historically did to seek approval of appointments and treaties, *see* 2011-2012 CONGRESSIONAL DIRECTORY at 522-28. And if (but only if) the House and Senate disagree regarding "the Time of Adjournment," he can "adjourn them to such Time as he shall think proper." U.S. CONST. art. II, § 3. The President thus can require the Senate to convene—and, in one limited instance, decide the time of adjournments. But he *cannot* command the Senate to act when it does convene—or deem a duly convened session a nullity because the Senate fails or declines to act. He cannot even "compel the Attendance" of a quorum, which the Senate alone can do. *See id.* art. I, § 5, cl. 1.

Because no provision expressly authorizes disregarding otherwise-valid Senate sessions, the Executive is forced to argue that such power must be *inferred* to protect the President's recess-appointments authority. *See* 2012 OLC Op. at 13-18. But that contention turns the Recess Appointments Clause on its head. The Clause does not confer a freestanding power on the President with which the Senate may not interfere; it instead "establish[es] an auxiliary method of appointment" that arises only when the Senate chooses not to be in session. THE FEDERALIST No. 67, at 408. Indeed, the Clause was designed not for the *Executive's* benefit, but the *Senate's*; the alternative was to require the Senate to remain in perpetual session, which the Framers recognized was "improper." *Id.*; *see supra* at 5. They therefore allowed the Senate to recess at its discretion (with the House's concurrence), and permitted the President, *when the Senate chooses to do so*, to make temporary appointments.[12] The Senate thus cannot possibly intrude on the President's power under the Clause by electing *not* to be in a period of recess. If it holds sessions, the President's "auxiliary" authority is simply never

[12] Indeed, under the Clause's plain language ("Vacancies that may *happen* during the Recess" (emphasis added)), and the Executive's own understanding at the Framing, *see supra* at 6, even this power is not triggered unless the vacancy *itself* arose during the recess. *See* Rappaport, *supra*, at 1501-46. While this Court need not consider or decide whether that reading of the Clause is controlling in all circumstances, the fact that such a view prevailed at the Framing at minimum highlights the implausibility of the Executive's reading of the Clause as establishing a robust, independent power that must be protected.

triggered, and the ordinary appointments protocol—requiring the Senate's consent—must be obeyed.

The Executive's contrary position boils down to the claim that the Clause's purpose is to avoid vacancies, and that that purpose requires permitting recess appointments whenever the President pronounces the Senate practically unable to approve nominees. *See* 2012 OLC Op. at 10-13, 15. But even taking that purpose at face value, the Constitution does not pursue it at all costs. The Constitution undisputedly allows some vacancies to exist that the President is powerless to fill; the Senate can foreclose *any* appointments by remaining in continuous session but declining to approve nominees. *See id.* at 1, 4, 17, 20. The "argument from inconvenience" based on the general aim of avoiding vacancies cannot justify novel, unbounded exceptions to the shared responsibility for appointments not remotely tethered to the Constitution's text. 23 Op. Att'y Gen. at 603.

2. The President's claimed power to disregard Senate sessions not only has no basis in the Constitution, but would eviscerate two powers the Constitution *does* confer on the Senate. In addition to infringing the Senate's control over its procedures, the Executive's theory deprives the chamber of its role in the appointments process. The Framers purposefully foreclosed unilateral appointments by the President (excluding certain inferior officers exempted by Congress). *See* Curtis, *supra*, at 1768 & n.59; Carrier, *supra*, at 2225; THE

FEDERALIST No. 76, at 455-56; *supra* at 4-5. The Senate's absolute veto, they recognized, would yield significant benefits, and its exercise should and would be checked by the political process, not Executive override. *See Edmond*, 520 U.S. at 659-60. The Executive's theory subverts that structure by allowing the President to sidestep the Senate at his pleasure.

Indeed, the Executive's theory lacks any limiting principle. If the President can deem the Senate not "genuinely 'capable of exercising its constitutional function'" because it announces its intention, subject to change at any time, not to conduct business, 2012 OLC Op. at 14 (citation omitted), he could do the same *whenever* the chamber does not swiftly rubber-stamp his nominees. He might declare the Senate "unavailable" to approve appointments because it is preoccupied with other business, or not "capable" of doing so due to partisan divisions that make prompt confirmation unlikely. *Id.* at 9, 14. And on such grounds, he could fill any federal office for up to two years at a time—to the end of the *next* Senate session. Subject to statutory restrictions, *see, e.g.*, 5 U.S.C. § 5503,

he could even attempt to string such appointments together to last his entire tenure or beyond.[13]

The Executive's reading of the Recess Appointments Clause thus would render the careful balance the Framers struck in allocating the appointments power a dead letter. That interpretation is utterly implausible. It would be strange indeed for the Framers to adopt without discussion or dissent, immediately after months-long debate over the general appointments power ended, an exception that swallows the rule requiring the Senate's consent, *see* Carrier, *supra*, at 2225, and that undercuts the chamber's plenary control over its own procedures. One should not assume, in other words, that those who wrote and ratified the Constitution "hi[d] elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Even if the President does not immediately exploit this purported power to its limit, moreover, it still poses a grave threat to the Senate. If he can declare that Senate sessions he deemed valid *yesterday* are not good enough *today*, he can

[13] The Executive's malleable, multifactor "framework" for distinguishing sessions from *de facto* recesses, 2012 OLC Op. at 5, does nothing to prevent such abuses. The factors it identifies—*e.g.*, the number of Senators present, the session's duration, and legislative achievements, *id.* at 13-14—are poor proxies for the Senate's ability to perform its constitutional role. Its touchstone, moreover, is the President's "large … discretion" and "judgment," to which the Executive would have other branches blindly defer. *Id*. at 5 ("'Every presumption is to be indulged in favor of the validity of whatever action [he] may take.'" (citation omitted)). And nothing prevents the Executive from abandoning that approach for another, as Attorney General Daugherty did in adopting it. *See* 33 Op. Att'y Gen. at 21-25.

catch the chamber by surprise, making appointments even while the Senate is holding sessions that satisfy the existing standard. Indeed, he did exactly that here—deeming pro forma sessions invalid that only two years earlier his Administration acknowledged as legitimate. *See supra* at 8-10. And while the Senate theoretically could prevent recess appointments by remaining in round-the-clock session (until the Executive refuses to honor even that limitation), that is the very eventuality the Recess Appointments Clause was added to *avoid*.

II. LONGSTANDING PRACTICE CONFIRMS THAT THE SENATE'S PRO FORMA SESSIONS ARE VALID.

Even if the President *could* override the Senate's determination that it was in session, he had no basis to reject the Senate's conclusion here because its pro forma sessions were not *de facto* recesses by any measure. Pro forma sessions are nothing new, but have been employed for decades, and the Executive itself has accepted their validity for other purposes—including to pass legislation at the President's request. The Senate thus is *available* to act on nominations during such sessions. Its *unwillingness* to do so does not justify the President in pretending the chamber is absent and circumventing its constitutional role.

A. Congress And The Executive Have Long Accepted Pro Forma Sessions As Valid.

The Senate (like the House) has long employed pro forma sessions for a variety of purposes, and their validity has gone unchallenged. Most notably, the

Senate has held pro forma sessions to satisfy two constitutional provisions that do limit the Senate's control of its own schedule. The Adjournments Clause, U.S. CONST. art. I, § 5, cl. 4, as noted, forbids the Senate from "adjourn[ing] for more than three days" unless it obtains the House's consent. *Id.* As the Executive admits, for decades the Senate has used pro forma sessions to satisfy that requirement where no agreement with the House was reached. *See* 2012 OLC Op. at 18-19 & n.25; *see, e.g.*, 98 CONG. REC. 3999 (Apr. 14, 1952) (Sen. Stennis explaining that pro forma session was held to comply with Adjournments Clause). Likewise, the Senate has repeatedly held pro forma sessions to satisfy the Twentieth Amendment's mandate that Congress convene on January 3.[14] The January 3 and 6 sessions served *both* functions: The January 3 session satisfied the Twentieth Amendment, and both ensured compliance with the Adjournments Clause.[15]

The Executive does not dispute the existence or validity of that practice of holding pro forma sessions for these other purposes. It claims instead that it is irrelevant to the Recess Appointments Clause. *See* 2012 OLC Op. at 19-20. But that piecemeal approach makes little sense; any theory that treats a chamber as in

[14] *See* Christopher M. Davis, Cong. Research Service, Memorandum: Certain Questions Related to Pro Forma Sessions of the Senate (2012), *reprinted in* 158 CONG. REC. S5954, S5955 (Aug. 2, 2012) (noting six such sessions since 1980).

[15] The Senate's previous session was on December 30, 2011, 157 CONG. REC. S8793 (Dec. 30, 2011), and its next session was on January 10, 2012, 158 CONG. REC. S5 (Jan. 10, 2012).

session for purposes of one provision, yet simultaneously in *recess* for purposes of another, requires a compelling explanation. The Executive has offered none. Its claim that the Adjournments Clause and the Twentieth Amendment "affect the Legislative Branch *alone*," *id.* at 19, is beside the point. Courts routinely consider parallel provisions in interpreting legal texts because they shed light on the text's intended meaning. *See, e.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011). A litigant affected by one provision cannot claim that a second, parallel provision has no bearing in his case simply because it does not directly apply to him.

In any event, the Executive has accepted pro forma sessions' validity in contexts where they *do* affect others outside Congress—including the Executive itself. Various federal statutes that provide for expedited congressional review of Executive actions measure the time Congress has to act before the action takes effect based on the number of days that the Senate, House, or both are in session. *See* 158 CONG. REC. S5955-56. These provisions directly affect both the Executive and the private persons and entities it regulates. Yet in implementing these provisions, both Congress and the Executive count pro forma sessions no differently than any others. *See id*. at 5955. The President thus has no difficulty accepting pro forma sessions as valid when doing so serves his interests. *See also*

id. (noting Executive's acceptance of Senate's treatment of pro forma sessions as valid for purposes of Senate rule regarding return of nominations).

Indeed, until now the Executive accepted pro forma sessions even for purposes of the Recess Appointments Clause *itself*. It informed the Supreme Court in 2010 that by holding pro forma sessions, the Senate previously had avoided recessing for more than three days at a time. *See supra* at 8-9. And until 2012, both this President and his predecessor honored that policy in practice, making no recess appointments while the Senate held such sessions,[16] and had not adjourned under a concurrent resolution making clear that the Senate was *not* in session. Having acquiesced in word and deed in the Senate's well-established practice, the Executive should not be heard to challenge it now.

B. The Senate Is Fully Capable Of Performing Its Constitutional Functions During Pro Forma Sessions.

The Executive's claim that the Senate was not "genuinely 'capable of exercising its constitutional function,'" 2012 OLC Op. at 14 (citation omitted), fails even on its own terms. One need look no further than the fact that *twice* in 2011, the Senate *passed legislation* in such sessions. On August 5, 2011, the Senate passed (and the President signed) the Airport and Airway Extension Act of 2011, Part IV. *See* 157 CONG. REC. S5297 (Aug. 5, 2011); Pub. L. No. 112-27,

[16] *Compare* OBAMA CRS REPORT at 3, 14-15 *and* BUSH CRS REPORT at 11-19 *with* 2011-2012 CONGRESSIONAL DIRECTORY at 535-38.

125 Stat. 270 (2011). And in December 2011—during a pro forma session established by the same Senate order that scheduled the January 3 and 6 sessions—the Senate passed another bill at the President's *own urging*. After the Senate had already commenced its series of pro forma sessions, the President pressed Congress to pass a bill extending payroll-tax and other provisions set to expire in days.[17] The House accordingly passed the Temporary Payroll Tax Cut Continuation Act of 2011, which the Senate then passed by unanimous consent during its December 23 pro forma session, *see* 157 CONG. REC. S8789 (Dec. 23, 2011); the President signed it the same day, *see* Pub. L. No. 112-78, 125 Stat. 1280 (2011).

Having signed into law bills the Senate passed in those pro forma sessions, the President cannot dispute its ability to take legislative action during them. Yet he cannot explain how the Senate could not be "capable" of approving nominees during *identical* sessions in January 2012. The Executive insists that "the President may properly rely on the public pronouncements of the Senate that it will not conduct business." 2012 OLC Op. at 21. But that theory proves far too much; it could permit the President to bypass the Senate if the chamber announces it will not conduct the *particular* business of reviewing nominations for a given period—for example, when the Senate, in presidential election years, postpones action on

[17] *See, e.g.*, 2011 DAILY COMP. PRES. DOCS. No. 00962, at 1-2 (Dec. 22, 2011).

judicial appointments until after the election. In any event, the Senate's subsequent *actions* here had already demonstrated that it could change its mind and conduct business if it chose—as is true under every unanimous-consent agreement. The President, indeed, *did not* assume that the Senate could not or would not act during pro forma sessions: Only weeks before the January 4 appointments, he had successfully *urged* it to do so.

The Executive's reliance theory, moreover, contradicts its own view that *one* of the January pro forma sessions *was* valid: It has described the relevant recess as beginning January 3—not on December 17, 2011.[18] But that is accurate only if the January 3 session interrupted the Senate's adjournment. There is no relevant difference, however, between that session and those that followed. The motivation for this cherry-picking approach is no mystery: By accepting *only* the January 3 session as valid, the Executive could stretch the January 4 recess appointments to last twice as long—not until the end of the Senate's current session, but the end of the next one. *See* U.S. CONST. art. II, § 2, cl. 3. Regardless of the reasons for that selective approach, it refutes the Executive's claim that it simply took the Senate's order at face value.

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[18] *See* 2012 OLC Op. at 15 ("'the Senate will have been absent from January 3, 2012 until January 23, 2012, a period of twenty days'" (brackets and citation omitted)); *id*. at 1, 5, 9, 15; Petr.'s Opp. to Resp.'s Mot. Dismiss 1, *Paulsen v. Renaissance Equity Holdings, LLC*, No. 12-cv-350 (E.D.N.Y. Feb. 22, 2012) (Doc. 59) (describing Senate's "break from January 3 to 23, 2012").

The Executive's theory, in short, has nothing to do with the Senate's actual or perceived *availability* to perform its advice-and-consent function. The President's real concern is with the chamber's *willingness* to exercise its power—or indeed, to exercise it in the *way he prefers*: When the Senate withholds its consent by declining to act on nominations, it *is* performing its constitutional function—but simply in a way the President does not like. The circumstances here, in fact, leave no doubt that his true aim was to sidestep Senate opposition. All four January 4 recess appointees had received ordinary nominations before the pro forma sessions began. Terrence Flynn, for example, was nominated in January 2011, and Richard Cordray was nominated to head the Consumer Financial Protection Bureau in July 2011.[19] The problem the President faced thus was not that the Senate *could not* act on his nominations, but that he believed it *would not*,

[19] *See* 157 CONG. REC. S69 (Jan. 5, 2011); 157 CONG. REC. S4646 (July 18, 2011).

so he sought to circumvent it through recess appointments. As the President himself put it, he simply "refuse[d] to take no for an answer."[20]

As discussed above, however, *see supra* at 19-22, the Constitution does not permit the President to bypass the Senate whenever he deems it uncooperative. Disagreement between the Senate and the President about appointments is not the problem the Framers designed the Recess Appointments Clause to avoid; rather, it is an integral feature of the structure they established. The Senate's veto over appointments provides a vital check on "Executive abuses of the appointment power." *Edmond*, 520 U.S. at 659. Allowing the President to invoke the Clause to end-run Senate opposition to his nominees eliminates that check, severely undermining the separation of powers.

[20] 2012 DAILY COMP. PRES. DOCS. No. 00003, at 3 (Jan. 4, 2012). Although the President nominated Richard Griffin and Sharon Block to the Board only two days before the Senate's final non-pro forma session, 157 CONG. REC. S8691 (Dec. 15, 2011), their appointments also illustrate the same basic strategy of sidestepping the Senate's role. Griffin was nominated to a seat that had been vacant since August 2011 (when the incumbent's term expired); the President had ample time to propose a successor. And Block was nominated to fill a soon-to-be-vacant seat then held by another recess appointee whose own nomination had long been pending but which the President withdrew. *See id.*; NLRB, Members of the NLRB Since 1935, http://www.nlrb.gov/members-nlrb-1935; NLRB, Board Members Since 1935, http://www.nlrb.gov/who-we-are/board/board-members-1935.

CONCLUSION

For the foregoing reasons, Petitioner Noel Canning's petition for review should be granted and the Board's cross-application for enforcement denied.

Dated: September 26, 2012

Respectfully submitted,

/s/ Miguel A. Estrada

Miguel A. Estrada
Counsel of Record
Jonathan C. Bond
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members Of The United States Senate

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 29(d) because this brief contains 6,997 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C Circuit Rule 32(a)(1); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: September 26, 2012

Respectfully submitted,

/s/ Miguel A. Estrada

Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members Of The United States Senate

ADDENDUM

The following members of the United States Senate respectfully join the foregoing brief as amici curiae in support of Petitioner/Cross-Respondent Noel Canning:

Senate Republican Leader
Mitch McConnell
Senator Lamar Alexander
Senator Kelly Ayotte
Senator John Barrasso
Senator Roy Blunt
Senator John Boozman
Senator Richard Burr
Senator Saxby Chambliss
Senator Daniel Coats
Senator Tom Coburn
Senator Thad Cochran
Senator Susan M. Collins
Senator Bob Corker
Senator John Cornyn
Senator Mike Crapo
Senator Jim DeMint
Senator Michael B. Enzi
Senator Lindsey Graham
Senator Chuck Grassley
Senator Orrin G. Hatch
Senator John Hoeven
Senator Kay Bailey Hutchison
Senator James M. Inhofe
Senator Johnny Isakson
Senator Mike Johanns
Senator Ron Johnson
Senator Jon Kyl
Senator Mike Lee
Senator Richard G. Lugar
Senator John McCain
Senator Jerry Moran
Senator Rand Paul
Senator Rob Portman
Senator James E. Risch
Senator Pat Roberts
Senator Marco Rubio
Senator Jeff Sessions
Senator Richard C. Shelby
Senator John Thune
Senator Patrick J. Toomey
Senator David Vitter
Senator Roger F. Wicker

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2012, I electronically filed the foregoing Brief for Appellant with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system, which accomplished service on the following counsel this same day:

Gary E. Lofland
Lofland & Associates
9 North 11th Avenue
Yakima, WA 98902

Counsel for Petitioner & Cross-Respondent Noel Canning

Linda Dreeben
Jill A. Griffin
Elizabeth Ann Heaney
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960
appellatecourt@nlrb.gov
Jill.Griffin@nlrb.gov
Elizabeth.Heaney@nlrb.gov

Counsel for Respondent & Cross-Petitioner National Labor Relations Board

Noel Francisco
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939
njfrancisco@jonesday.com

James M. Burnham
Jones Day
77 West Wacker Drive
Suite 3500
Chicago, IL 60601
jmburnham@jonesday.com

George Roger King
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
(614) 469-3939
gking@jonesday.com

Counsel for Movant-Intervenors Chamber of Commerce of the United States of America and The Coalition for a Democratic Workplace

James B. Coppess
AFL-CIO Office of General Counsel
815 Sixteenth Street, N.W.
6th Floor
Washington, D.C. 20006
202-637-5000
jcoppess@aflcio.org

Counsel for Intervenor International Brotherhood of Teamsters Local 760

Jay Alan Sekulow
American Center for Law and Justice
201 Maryland Avenue, N.E.
Washington, D.C. 20002-5703
(202) 546-8890
sekulow@aclj.org

Counsel for Amicus Curiae Speaker of the House of Representatives John Boehner

Richard P. Hutchison
Landmark Legal Foundation
3100 Broadway, Suite 515
Kansas City, MO 64111

Counsel for Amicus Curiae Landmark Legal Foundation

William L. Messenger
John N. Radabaugh
National Right to Work Legal Defense Foundation
Suite 600
Springfield, VA 22160-8001
wlm@nrtw.org
jnr@nrtw.org

Counsel for Amici Curiae Jose Antonio Lugo, Douglas Richards, David Yost, Connie Gray, Karen Medley, Janette Fuentes, and Tommy Fuentes

/s/ Miguel A. Estrada
Miguel A. Estrada