No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING, A DIVISION OF THE NOEL CORP., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

On the day after the Senate convened in a pro-forma session to commence the Second Session of the 112th Congress, and two days before the Senate convened in another pro-forma session, the President purported to make three "recess" appointments to fill preexisting vacancies on the National Labor Relations Board. The questions presented are therefore:

1. Whether the President's recess-appointment power may be exercised during a break that occurs during the Senate's Session, or is instead limited to "the Recess" that occurs between each enumerated Session.

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

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

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INTEREST OF *AMICI CURIAE*

This is not simply a case about the separation of powers and checks and balances within the national government. It is also a case about federalism—and, ultimately, the individual freedoms States want their citizens to enjoy.

In our constitutional system, the concepts of separation of powers and checks and balances are inextricably intertwined with principles of state sovereignty and individual liberty. The Constitution, in structuring the three branches of the federal government as it does, was intentionally designed to protect "State sovereign interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). To this end, the Senate is especially important. By giving States equal representation in that chamber, the Framers intended for it to be the "instrument for preserving" States' "residuary sovereignty." THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed. 1961). And the Constitution's recognition of state sovereignty through the Senate is not just an end in and of itself. It is also a means of securing "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States,* 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

At issue here is the President's attempt to circumvent the system of checks and balances, against a backdrop that vividly underscores the Senate's role in preserving the federal balance and individual liberty. The NLRB has always had unusual capacity to trammel state prerogatives, and, in recent years, the agency has upset the federal balance in unprece-

dented ways. In particular, the agency has aggressively attacked States' attempts to grant their citizens more freedom in the labor sphere. But the Constitution provides the States an important check. In light of the advice-and-consent requirement, the States' representatives in the Senate may respond to the NLRB's improper assertions of federal authority by refusing to consent to the appointment of Board nominees without first ensuring that they respect the federal balance. That is what Senators vowed to do in the circumstances presented here. But rather than try to develop consensus around a set of nominees, the President defied his coordinate branch's exercise of its constitutional prerogative. He appointed Board members without trying to seek the Senate's approval. He purported to do so under his recess-appointment power—even though the Senate had expressly declined to go into recess at that time, and even though it had expressly done so because it wanted to review any NLRB nominees the President put forward.

The President's approach, if it is allowed to stand, would not just undermine the relations between the Executive and Legislative branches. It also would substantially undermine the protections advice-and-consent provides for federalism and individual liberties. The States have vital interests in seeing that these safeguards remain in place.

SUMMARY OF ARGUMENT

This case's factual backdrop underscores the important role advice-and-consent plays in safeguarding federalism. The Senate's concerns over the nominees at issue here arose, in substantial part, from NLRB actions that had undermined state interests.

The Senate must be able to use the advice-and-consent process to protect state prerogatives and individual liberty in these circumstances, and the President must not be able to circumvent the process through recess appointments.

A. During the timeframe at issue, the NLRB took unprecedented and unauthorized action that interfered with state law. Most notable was a complaint the NLRB filed to stop the Boeing Company from building a new plant in South Carolina, a State that grants its citizens the right to work without joining a union. States with similar laws feared that the complaint was designed to undermine their citizens' liberty, and they were concerned that similar enforcement actions by the President's appointees would negatively affect growth within their borders.

B. States' representatives in the Senate responded by exercising their advice-and-consent function. They withheld consent for the President's pending NLRB nominations, used pro-forma sessions to avert recess appointments, and urged the President to subject future nominees to the usual confirmation process. Instead of compromising, the President made two new nominations at the very end of the Session, such that confirmation before the next Session was not practicable. He then attempted to use recess appointments on these nominees after the next Session began, even though the Senate held pro-forma sessions to avoid having a recess.

C. Federalism principles underscore the incompatibility between the President's actions and the constitutional design. The Constitution gave advice-and-consent power to the Senate, the chamber that represents state interests equally, because the

Framers wanted to prevent the Executive from abusing the appointment power. Yet under the President's view, even when the States' representatives in the Senate decline to confirm a particular nominee because of substantial concerns about federalism and individual liberty, the President can, during any time he unilaterally determines the Senate to go into "recess," appoint that same nominee to a term that lasts as long as two years. That cannot be the law. At the very least, when the Senate informs the President that it is not in recess, proper respect for both the separation of powers and federalism requires the President to seek the Senate's consent for the appointments he wishes to make for important federal offices.

ARGUMENT

It is telling that the words "right to work" and "Boeing" do not appear in any of the top-side briefs. These words provide critical context in this case. They demonstrate that the system of checks and balances is not an abstract legal concept that affects only a select number of federal officials in Washington, D.C. They show that this Court's resolution of the questions presented will have a significant impact on the States and citizens throughout the country. And they demonstrate that the President's invocation of the Recess Appointments Clause to put these nominees on the NLRB, if allowed to stand, will substantially undermine one of the Constitution's safeguards of federalism and the democratic liberty it secures.

Numerous judicially enforceable rules directly promote federalism by limiting the federal government's powers with respect to the States. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 610 (2000);

Printz v. United States, 521 U.S. 898, 922-23 (1997). Other judicially enforceable rules, concerning the separation of powers and checks and balances, safeguard federalism in a less direct but no less important way. These rules impose a structure on the national government that is expressly designed to "protect the States from" federal "overreaching." *Garcia*, 469 U.S. at 550-51 (citing, among other sources, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)). Chief among these safeguards is the "equal representation" States receive in the Senate. *Id.* at 551 (citing THE FEDERALIST NO. 62, at 408 (James Madison) (B. Wright ed., 1961)). Also crucial is the right of the States' representatives in the Senate to offer their advice and consent on the President's nominees to important federal positions. *See Myers v. United States*, 272 U.S. 52, 119-20 (1926); THE FEDERALIST NO. 76, at 456-58 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

It is critical, from a federalism perspective, for the courts to enforce these rules, and the Court should do so here. The President violated the advice-and-consent requirement when he made the appointments at issue in this case, and he did so against a factual backdrop that made the federalism costs all too clear. As explained below, the Senate's concerns over the President's nominees arose, in no small part, from the NLRB's actions against state policies designed to create more individual freedom in the labor sphere. These actions included, most notably, the NLRB's attempt to sanction the Boeing Company for locating a plant in a State that grants its citizens

a right to work without joining unions. To preserve federalism and the liberties it secures, the Senate must be able to use the advice-and-consent process to protect state prerogatives in circumstances like these. The recess-appointment power does not allow the President to circumvent the safeguards of federalism in this way.

A. Federal agencies like the NLRB, if left unchecked, can upset the federal balance.

The appointments at issue involved an agency that, due to its history and statutory framework, has a unique capacity to intrude on state interests. These intrusions were particularly pronounced and controversial at the times that were critical to this case.

1. The NLRB regulates in an area of paramount state concern.

The NLRB's very creation affected the federal balance. When this Court first recognized the agency's power to regulate labor in the manufacturing industry, in *NLRB v. Jones & Laughlin Steel Corp.,* it did so by only a one-vote margin. *See* 301 U.S. 1 (1937). The four dissenting justices argued that the Court had fundamentally altered constitutional law and allowed Congress to enter a field that previously had been "reserved to the states." *Id.* at 97 (McReynolds, J., dissenting). In more recent times, this Court described *Jones & Laughlin* as a "watershed case" that "greatly expanded the previously defined authority of Congress." *Lopez*, 514 U.S. at 555-56; *see also id.* at 573 (Kennedy, J., concurring) (noting that *Jones & Laughlin* marked the Court's "definitive commitment" to a new conception of the Commerce power); *id.* at 599 (Thomas, J., concurring) (calling

the decisions of the *Jones & Laughlin* era a "dramatic departure . . . from a century and a half of precedent").

The *Jones & Laughlin* Court's understanding of the Commerce Clause is now accepted law, but the NLRB's intrusion on state interests remains extraordinary. The agency's authorizing statute, the National Labor Relations Act, "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisc. Dep't. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). In breach-of-contract cases concerning collective bargaining agreements, "the application of state law . . . is pre-empted." *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 405-06 (1988). And with certain exceptions, Congress "completely displaced state power" over labor-relations disputes, giving jurisdiction instead to the NLRB. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957).

2. The NLRB's actions in 2011 marked substantial incursions against state interests.

Despite the federal government's substantial preemption of this field, Congress also has recognized that States retain vital interests in preserving citizens' liberties in the labor sphere and promoting economic growth through labor policy. Most critically for present purposes, the Taft-Hartley Act of 1947 authorizes States to adopt "right to work" laws if they so choose. *See* 29 U.S.C. §164(b). These laws prohibit closed-shop agreements that force all em-

ployees at a particular workplace to join a union. *See generally* Jeanne Mirer, *Right-to-Work Laws: History and Fightback*, 70 NAT'L LAW. GUILD REV. 30, 31-32 (2013).

Twenty-four States currently have right-to-work laws, and their proponents argue that they are crucial to preserving employees' economic liberties. *See generally* Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 892 (1999). As Justice Frankfurter has noted, even Justice Brandeis, while once "a staunch promoter of unionism," had argued that unions would benefit if the "'privilege of individualism'" among employees was "'protected by law.'" *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 550, 552 (1949) (Frankfurter, J., concurring) (quoting Louis D. Brandeis, *Peace with Liberty and Justice*, 2 NAT. CIVIC FED'N REV., 1, 16 (1905)). This was so, Justice Brandeis said, because "'the American people'" would "'not consent to the exchange of the tyranny of the employer for the tyranny of'" unions. *Id.* at 551 (quoting Letter from Louis D. Brandeis to Lincoln Steffens (Feb. 26, 1912)). Many advocates of right-to-work laws also claim that these laws promote economic development and growth. *See generally* Hogler & Shulman, *supra*, at 893.

That said, some labor advocates have criticized these laws as undermining unions' collective bargaining power. *See id.* at 926. When the President first sought to fill the NLRB vacancies at issue in this case, right-to-work States were concerned that the President's appointees had sided with those ad-

vocates and were actively working to undermine these laws. These concerns were a critical factor in the conflict that eventually arose between the President and Senate over these nominations.

a. The NLRB took unprecedented action against right-to-work States.

Of particular concern was the NLRB's response, in 2011, to the Boeing Company's announcement that it planned to build a factory in a right-to-work State. Boeing manufactures its Dreamliner 787 jet in Everett, Washington. It had negotiated with its union there to place a second assembly line in Everett, but those talks broke down in 2009. Boeing then decided to put the second line in South Carolina, a right-to-work State. South Carolina reportedly had developed a $900 million incentive package to lure the company. *See* David Slade & Katy Stech, *Boeing's Whopping Incentives*, THE POST AND COURIER (Jan. 17, 2010).[1] In public statements, Boeing officials also explained that South Carolina was attractive because of its favorable legal climate. One executive reportedly stated that he expected the new plant to have fewer work stoppages due to union strikes. *See* Complaint & Notice of Hearing at 4, *The Boeing Company and International Association of Machinists*, No. 19-32431, NLRB Region 19 (Apr. 20, 2011) (hereinafter "Boeing Complaint").[2]

The NLRB then took action that, according to one former NLRB Chairman, was unprecedented. *See*

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[1] Available at http://www.postandcourier.com/news/2010/jan/17/boeings-whopping-incentives/ (last visited Nov. 19, 2013).

[2] Available at http://www.nlrb.gov/news-outreach/fact-sheets/boeing-documents (last visited Nov. 19, 2013).

Philip Klein, *Former NLRB Chairman Says Board's Complaint Against Boeing is Unprecedented*, S.F. EXAMINER (Apr. 21, 2011) (quoting Peter Schaumber).[3] It filed a complaint alleging that Boeing, by basing its decision to relocate on South Carolina's favorable legal environment, had "'interfere[d] with, restrain[ed], or coerce[d] employees'" at its Washington plant "in the exercise of the rights guaranteed" by the NLRA. Boeing Complaint, *supra*, at 7 (quoting 29 U.S.C. §158(a)(1)). The NLRB also alleged that Boeing's plan discouraged union membership "by discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. §158(a)(3). The NLRB sought the drastic remedy of compelling Boeing to build the second assembly line in Washington. *See* Boeing Complaint, *supra*, at 7-8.

The NLRB's complaint was meritless on its face. Boeing was expanding into South Carolina—not withdrawing from Washington. The company thus did not come close to violating NLRA provisions that make it illegal for employers to discriminate against their employees because of union activity. *See generally NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (statements about the employer's beliefs of the effects of unionization are lawful, so long as the employer does not make threats or promises). Even if Boeing had proposed to relocate its entire operation to South Carolina, it is well established that employers can close or relocate a union shop for economic reasons. *See First Nat'l Maint. Corp. v. NLRB,* 452

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[3] Available at http://www.sfexaminer.com/sanfrancisco/former-nlrb-chairman-says-boards-complaint-against-boeing-is-unprecedented/Content?oid=2173580 (last visited Nov. 19, 2013).

U.S. 666, 677, 686 (1981). As this Court has explained, "Congress had no expectation that the elected union representative would become an equal partner" in decisions of this sort. *Id.* at 676.

The NLRB's actions provoked a dramatic backlash from States and their representatives in Congress. South Carolina's Attorney General, joined by Attorneys General from eight other States, told the NLRB that its complaint would "undermine[] our citizens' right to work as well as their ability to compete globally." Letter from Alan Wilson, South Carolina Attorney General, to Lafe E. Solomon, Acting General Counsel, NLRB (Apr. 28, 2011).[4] The Senate convened a hearing at which Boeing's General Counsel, former Fourth Circuit Judge J. Michael Luttig, testified that the NLRB's requested relief would "effectively prevent employers with unionized workforces from expanding into Right-to-Work States." *The Endangered Middle Class: Is the American Dream Slipping Out of Reach for American Families?*: *Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 112th Cong. 24 (2011). Senators proposed bills to protect right-to-work laws and to prevent the NLRB from discouraging businesses from moving to right-to-work States. Job Protection Act, S. 964, 112th Cong. (2011); Jobs Through Growth Act, S. 1720, 112th Cong. §§3951-53 (2011); 157 CONG. REC. S2590-93 (daily ed. May 3, 2011) (statements of Sens. Alexander, DeMint, and Graham).

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[4] Available at http://www.scag.gov/wp-content/uploads/2011/05/4.28.11_NLRB_Letter_Formatted_with_Signatures.pdf (last visited Nov. 19, 2013).

Ultimately, in late 2011, the NLRB withdrew its complaint. But it did so only after the union at the Washington plant had negotiated a new, favorable labor agreement with Boeing—and only after the union had asked the NLRB to stand down. *See* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES (Dec. 9, 2011).[5] In the wake of that development, a Senator from South Carolina expressed concern that "the NLRB complaint was used as a negotiating tool against Boeing" and that the NLRB had abandoned its role as "neutral arbiter" between labor and management. *See* Press Release, Sen. Lindsey Graham, Graham Calls for Investigation into NLRB-Union Collaboration (Dec. 9, 2011).[6]

b. The NLRB took inappropriate action against state laws protecting the right to vote by secret ballot.

Although the South Carolina right-to-work incident generated the most vocal criticism of the agency, the NLRB took other action against employee freedom that was just as disconcerting to States. In late 2010, voters in Arizona, South Carolina, South Dakota, and Utah adopted amendments that protect employees' right to vote in union elections via secret ballot. *See* ARIZ. CONST. art. 2, §37; S.C. CONST. art. 2, §12; S.D. CONST., art. 6, §28; UTAH. CONST. art. 4,

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[5] Available at http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html (last visited Nov. 18, 2013).

[6] Available at http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0 (last visited Nov. 19, 2013).

§8. Like laws providing for secret ballots in normal elections, these amendments are designed to make union-representation elections less coercive. This Court has observed that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 602 (1969). Yet the NLRB wrote letters to all four of these States in January 2011, claiming that federal law preempted these amendments. *See* Letters from Eric Moskowitz, Assistant General Counsel, NLRB, to Tom Horne, Arizona Attorney General; Alan Wilson, South Carolina Attorney General; Marty Jackley, South Dakota Attorney General; and Marc Shurtleff, Utah Attorney General (Jan. 13, 2011).[7]

The NLRB's actions once again prompted controversy. Citing the agency's threats, one Senator introduced a bill "intended to 'guarantee the right of every American worker to have a secret ballot election on whether to unionize.'" Seth Borden, *Senator DeMint Introduces Secret Ballot Protection Act in Senate*, LABOR RELATIONS TODAY (Jan. 27, 2011) (discussing Secret Ballot Protection Act, S. 217, 112th Cong. (2011)). Meanwhile, the affected States informed the NLRB that its arguments were baseless. *See* Letter from Alan Wilson, South Carolina Attorney General *et al.* to Lafe E. Solomon, Acting General Counsel,

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[7] Available at http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_az.pdf; http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_sc.pdf; http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_sd.pdf; and http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_ut.pdf (last visited Nov. 19, 2013).

NLRB (Jan. 27, 2011).[8] The States' Attorneys General told the agency it was misinterpreting their amendments as requiring "elections when federal law does not." *Id.* They pointed out that "[s]ecret elections promote freedom of association, here the freedom to decide for oneself, without interference, whether to join a union." *Id.* at 2. They reminded the NLRB that it previously had conceded that "both the Board and courts have long recognized that the freedom of choice guaranteed employees by [the NLRA] is better realized by a secret election than a card check." *Id.* at 1 (quoting *In re Dana Corp.*, 351 NLRB 434, 438 (2007)). And they called it "extraordinary" for the NLRB to "use its resources to sue our States for constitutionally guaranteeing the right to vote by a secret ballot." *Id.*

The NLRB nevertheless chose to pursue its challenge. When the NLRB sued Arizona in a test case, the district court granted summary judgment in Arizona's favor. *See NLRB v. Arizona*, No. CV 11-913, 2012 WL 3848400 (D. Ariz. Sept. 5, 2012).

B. The Senate safeguards state interests in these matters through advice-and-consent.

The Senate's lack of consent to the President's nominations in 2011 resulted in part from concerns about the NLRB's record on right-to-work and ballot-secrecy laws. The President's resort to the recess-appointments power, in turn, resulted from his failure to meaningfully address those concerns with his coordinate branch during the 2011 session.

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[8] Available at http://amlawdaily.typepad.com/states%20respond.pdf (last visited Nov. 20, 2013).

1. Senators withheld consent for pending NLRB nominations and insisted on advice-and-consent for future ones.

When the NLRB took these actions, the President had not yet nominated either Sharon Block or Richard Griffin, whose appointments are at issue here, to the Board.[9] But two other crucial nominations were pending—Lafe Solomon as NLRB General Counsel, and Craig Becker as a Member of the Board. The NLRB's stance on right-to-work laws and ballot-secrecy issues became an issue for both nominations because both nominees already were serving the NLRB at the time. Solomon was Acting General Counsel, and Becker was a purported recess appointee to the Board.

Becker's nomination was controversial from the start. The President had nominated him to a full term the year before. *See* 156 CONG. REC. S59 (daily ed. Jan. 20, 2010). The Senate had not confirmed him, and his detractors cited, among other things, concerns that he was hostile to secret-ballot elec-

[9] The President had nominated Terence Flynn, the third recess appointment at issue, in January 2011. 157 CONG. REC. S69 (daily ed. Jan. 5, 2011). Traditionally, the Board is composed of three members from the same political party as the president and two members from the minority party. *See* Melanie Trottman, "NLRB Nominees Are Confirmed," WALL STREET JOURNAL (Jul. 30, 2013), available at http://online.wsj.com/news/articles/SB10001424127887323854904578637872875060486 (last visited Nov. 18, 2013). Flynn was a nominee from the minority party. The Senate apparently did not "push[] for a vote on Flynn's nomination" in 2011. Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?* WALL STREET JOURNAL WASHINGTON WIRE (Jan. 6, 2012), available at http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/ (last visited Nov. 19, 2013).

tions. *See, e.g.*, Carl Hulse, *Republicans Block Confirmation of Labor Lawyer*, THE CAUCUS (Feb. 9, 2010);[10] *Full Committee Hearing—Nomination of Harold Craig Becker to be a Member of the National Relations Board: S. Comm. On Health, Education, Labor, & Pensions*, 111th Cong. (2010) (statements of Sens. Isakson and Hatch). Once it was clear Becker would not make it through the Senate, the President purported to give him a 20-month recess appointment in March 2010. *See* Press Release, The White House, "President Obama Announces Recess Appointments to Key Administration Positions" (Mar. 27, 2010).[11] That move prompted outcry from the Senate. One member argued that the President had "ignored the Senate's bipartisan rejection" of Becker and should have opted for a "consensus nominee" instead. Orrin Hatch, Press Release, Hatch Blasts Obama Administration Recess Appointment of Craig Becker to NLRB (Mar. 27, 2010).[12]

Things got worse with the advent of the Boeing complaint, filed under Solomon's name in April 2011. It prompted a group of 19 Senators to call on the President to withdraw both the Solomon and Becker

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[10] Available at http://thecaucus.blogs.nytimes.com/2010/02/09/senates-vote-on-labor-nominee/ (last visited Nov. 19, 2013).

[11] Available at http://www.whitehouse.gov/the-press-office/ president-obama-announces-recess-appointments-key-admin istration-positions (last visited Nov. 19, 2013).

[12] Available at http://votesmart.org/public-statement/495479/ hatch-blasts-obama-administration-recess-appointment-of-craig -becker-to-nlrb#.Uo1AXdJwrPw (last visited Nov. 19, 2013). The Third Circuit eventually would hold that Becker's recess appointment was invalid on reasoning similar to the D.C. Circuit's. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 244 (CA3 2013).

nominations. *See* Letter from Senator Jim DeMint to President Barack Obama (May 4, 2011).[13] These Senators informed the President that they believed that "recent actions by your handpicked political appointees at the National Labor Relations Board are making it more difficult for America to win the future." *Id.* at 1. They contended that "[t]he NLRB, at the behest of Acting General Counsel Lafe Solomon, has taken unprecedented action against The Boeing Company to prevent it from expanding productions into South Carolina, a state that assures workers the freedom not to join a union as a condition of employment." *Id.* They stated that they "consider[ed] this an attack on millions of workers in 22 right-to-work States, as well as a government-led act of intimidation against American companies that should have the freedom to choose to build plants in right-to-work states." *Id.* They claimed that their chamber "ha[d] been unacceptably denied the ability to exercise its constitutional duty of advise and consent" on Becker. *Id.* at 2. These Senators pledged to "vigorously oppose both nominations, vote against cloture and use all procedural tools available to defeat their confirmation." *Id.*

Legislators simultaneously called for the use of pro-forma sessions to prevent another recess appointment to the Board. Twenty Senators wrote the Speaker of the House in May 2011, arguing that the President's recess appointees were "using their positions to implement policies that destroy jobs, and infringe upon the freedom on the American people."

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[13] Available at http://www.foxnews.com/projects/pdf/2011_05_04_Letter_to_President_Obama_on_NLRB1.pdf (last visited Nov. 19, 2013).

Letter from Senator David Vitter to Speaker John Boehner (May 25, 2011) (hereinafter "May 25 Letter").[14] They noted that "Article I, Section 5 of the United States Constitution states, 'Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days[.]'" *Id.* They asked the Speaker "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term." During the same timeframe, 80 members of the House of Representatives, citing concerns about the Boeing case, asked House majority leadership to take the same measures. *See* Letter from Representative Jeff Landry to Speaker John Boehner (Jun. 15, 2011).[15]

As the First Session of the 112th Congress wound down, the President had not withdrawn either nomination, and the Senate's concern about the NRLB's approach to these issues continued to loom large. When the NLRB withdrew the Boeing complaint, Senator Graham from South Carolina called for a "congressional investigation to answer questions about the NLRB's role, attitude, and relationship with the parties" in the Boeing matter. Press Release, Senator Lindsey Graham, Graham Calls for Investigation into NLRB-Union Collaboration (Dec.

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[14] Available at http://www.vitter.senate.gov/newsroom/press/vitter-demint-urge-house-to-block-controversial-recess-appointments (last visited Nov. 19, 2013).

[15] Available at http://woodall.house.gov/sites/woodall.house.gov/files/Freshmen%20Recess%20Appointment%20Letter.pdf (last visited Nov. 19, 2013).

9, 2011).[16] He also announced that he would "continue to block all nominations to the NLRB until we get satisfactory answers regarding their role in this entire saga." *Id.*

2. The President gave the Senate no meaningful opportunity to advise and consent on the nominations at issue here.

The President did not withdraw Solomon's nomination as general counsel in 2011, but he did eventually withdraw Becker's nomination, offering Block and Griffin as new nominees to the Board. Yet the President did so in a way that precluded the Senate from exercising its advice-and-consent function. He sent Block's and Griffin's nominations to the Senate on December 15, 2011, a date that gave the Senate insufficient time to hold confirmation hearings during the 2011 session. *See* 157 CONG. REC. S8691 (daily ed. Dec. 15, 2011); Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?* WALL STREET JOURNAL WASHINGTON WIRE (Jan. 6, 2012).[17] The Senate did not receive the nominees' committee questionnaires and background checks at that time. *See* Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions,

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[16] Available at http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0 (last visited Nov. 19, 2013).

[17] Available at http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/ (last visited Nov. 19, 2013).

NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012).[18]

Forty-seven Senators thus sent the President a letter on December 19, urging him not to try to use recess appointments on Block and Griffin. The Senators asked the President to instead "allow for a full and thorough review of their qualifications through regular order in the Senate." Letter from Senator Orrin Hatch to President Barack Obama (Dec. 19, 2011) (hereinafter "Dec. 19 Letter").[19] They noted that "[a]ppointments to the NLRB have traditionally been made through prior agreement of both parties to ensure that any group of nominees placed on the board represents an appropriate political and philosophical balance." *Id.* They also argued that the President's "recess appointment of NLRB Member Craig Becker is an example of an NLRB nominee having been appointed over the objection of the Senate," resulting in "controversy throughout Member Becker's entire term." *Id.* They warned that attempted recess appointments of Block and Griffin would "set a dangerous precedent" that "could needlessly provoke a constitutional conflict between the Senate and the White House." *Id.* They concluded that the Senate should be "given an opportunity to fully explore their qualifications and suitability to be Members of the NLRB through a careful and deliberative hearings and confirmation process." *Id.*

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[18] Available at http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb (last visited Nov. 19, 2013).

[19] Available at http://www.nationalreview.com/corner/286200/new-nlrb-controversy-robert-verbruggen (last visited Nov. 19, 2013).

The President nevertheless announced Block's and Griffin's recess appointments on January 4. That announcement came a little more than two weeks after the Senate had entered an order scheduling pro-forma sessions every three business days to avoid an end-of-year recess. *See* 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011). The President's announcement also came only one day after the Senate convened one of those pro-forma sessions, on January 3, 2012, marking the beginning of the next Session of Congress. *See* 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

Although Block and Griffin sat on the board as recess appointees for 18 months, the President and Senate eventually reached a deal that allowed the Senate to exercise its advice-and-consent function in an effective way—and to inquire into the right-to-work and ballot secrecy issues. *See* NLRB Br. 7 n.3, 58. In July 2013, the President withdrew Block's and Griffin's nominations and named Kent Hirozawa and Nancy Schiffer in their stead. *See* 159 CONG. REC. S5715 (daily ed. Jul. 16, 2013). During the confirmation hearing that followed, both nominees testified that they believed that the Board could not abrogate right-to-work laws. *See Full Committee Hearing – Hearing on National Labor Relations Board Nominees Before the S. Comm. On Health, Education, Labor, and Pensions*, 113th Cong. at 53:27-58 (Jul. 23, 2013).[20] They added that they did not understand it to be an unfair labor practice, standing alone, for an employer in a non-right-to-work State to expand its

[20] Available at http://www.help.senate.gov/hearings/hearing/?id=169b019b-5056-a032-529b-881d2a8a9b11 at 54:08 (last visited Nov. 18, 2013).

operations in a right-to-work State. *Id.* at 55:10-25 (questions from Sen. Alexander). Senators also discussed the nominees' positions on ballot secrecy. *See id.* at 1:39:27-43:56 (questions from Sen. Scott). After this process was complete, the Senate confirmed both nominees. More recently, the Senate confirmed the President's nomination of Griffin to replace Solomon as General Counsel. *See* 159 CONG. REC. S7608 (daily ed. Oct. 29, 2013).

C. The President cannot use recess appointments to circumvent the Senate's role in safeguarding federalism.

The facts surrounding these nominations demonstrate that advice-and-consent plays a crucial role in safeguarding state sovereignty and the liberty that flows from it. Noel Canning has convincingly explained why the text, history, and purposes of the Recess Appointments Clause precluded the President from making the recess appointments at issue here. *See* Noel Canning Br. 8-70. Federalism principles bolster that conclusion. A rule that would allow the President to override this safeguard in this way would be inconsistent with the Senate's federalism-promoting structure.

The President's view of the Recess Appointments Clause is incompatible with the Framers' decision to entrust the advice-and-consent role to the Senate. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation

marks omitted). It thus makes sense that the Framers assigned review of Executive appointments to the chamber they called the "instrument" for retaining state "sovereignty." THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed. 1961). Yet under the President's view, even when the States' representatives fail to develop consensus about a particular nominee, the President can, during any time he unilaterally determines the Senate to go into "recess," unilaterally appoint that same nominee to a term that lasts as long as two years. He can do so even when, as was the case here, the Senators' failure to develop consensus arose from concerns about the nominees' positions on laws that govern in a substantial number of States. And he can do so even when, as was the case here, a substantial number of Senators ask the President to defer the nominee to "a careful and deliberative hearings and confirmation process" in the Session that is to follow. *See* Dec. 19 Letter, *supra*.

That result is particularly unpalatable in the circumstances of this case. The issues surrounding these nominations were sufficiently important to the States that both Houses of Congress convened in proforma sessions every three days, specifically to ensure that they could "scrutinize" the President's "appointees through regular order of advise and consent." May 25 Letter, *supra*. So in going forward with the purported appointments, the President not only ignored the Senate's substantive concerns about his nominees' approach to state law and individual liberty, but also declared that the Senate was conducting a procedural sham. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwith-*

standing Periodic Pro Forma Sessions, 36 Op. O.L.C. __, slip op. at 13-18 (Jan. 6, 2012). No workable understanding of the separation of powers would allow the President to act based on those sorts of judgments about a coordinate branch.

It also gets things precisely backwards for the Administration to claim that these pro-forma sessions were illegitimate because their "explicit purpose" was "a desire to deny the President the authority to make recess appointments." NLRB Br. 56. The Senate's purpose was not to deny the President's authority to make recess appointments. It was to preserve *the Senate's* authority to advise and consent. That Congress thought its authority sufficiently important as to warrant these drastic measures should have given the President more cause, not less, to iron out the concerns his coordinate branch had expressed.

The sequence of events also belies the NLRB's assertion that the States' representatives in the Senate cannot be trusted to work with the President in matters of this sort. The NLRB suggests that these appointments were necessary because the Senate effectively had "prevent[ed]" the President "from filling vacancies," thereby putting the Board in danger "of losing its quorum" in January 2012. NLRB Br. 63. But the President could have headed off that circumstance without resorting to this measure. A large number of Senators announced that they would oppose the President's original nominee, Craig Becker, no later than May 2011. Indeed, Becker had failed to secure confirmation the previous year. *See supra* at 16-18. Yet the President did not withdraw Becker's nomination until December 15, when he nominated

Block and Griffin. It is unclear why the President did not make that move earlier, at a time when the Senate still could have conducted a meaningful confirmation process. The Senate's eventual confirmation of the President's two other nominees in 2013—during which Senators were able to inquire about the right-to-work and ballot-secrecy issues that previously had caused concern—shows that the President and Senate can reach compromises in this area.

In any event, neither federalism nor separation-of-powers jurisprudence proceeds on the assumption that the various branches of government act in bad faith. Precisely the opposite is true. Just as the Constitution presupposes that the States discharge their constitutional responsibilities in good faith, *see Alden v. Maine*, 527 U.S. 706, 755 (1999), the Constitution presupposes that the States' representatives in the Senate do the same.

These considerations confirm the conclusion to which Noel Canning has pointed. No sensible system of checks and balances—or federalism—would allow the President to unilaterally make the appointments at issue in this case. At the very least, when the States' representatives in the Senate announce that they are not in recess and that they are therefore available to consider the President's nominations, proper respect for both separation of powers and state sovereignty requires the President to seek those representatives' consent before he appoints someone to an office as important as the ones at issue here.

CONCLUSION

This Court should affirm the judgment of the D.C. Circuit.

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