No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,
Respondent.

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

BRIEF OF ORIGINALIST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* in support of Respondent is respectfully submitted by law professors with expertise in Constitutional Law, presidential power, and separation of powers considered from the perspective of the Constitution's original meaning.[1] *Amici* submit this brief because they believe that Petitioner's arguments in this case would dramatically and improperly expand presidential appointments power beyond that set forth in the original meaning of the Constitution's text and would materially undermine the advice-and-consent power the Framers vested with the Senate as a check on presidential appointments.

A list of *amici curiae* appears as Appendix A.

SUMMARY OF ARGUMENT

The Appointments Clause provides for appointment of officers of the United States by the President with the Senate's advice and consent. Art. II, § 2, cl. 2. As Alexander Hamilton explained, it is the "general mode of appointing officers of the United States," *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961), and serves as an "excellent check" upon "unfit" presidential nominations. *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961). Although the Framers understood that vesting appointments jointly in two entities would be slower

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

and potentially more contentious than granting a unilateral power, they decided the benefits outweighed the costs.

The Recess Appointments Clause, which gives the President "Power to fill up all Vacancies that may happen during the Recess of the Senate," Art. II, § 2, cl. 3, is an "auxiliary method" of appointment designed for the long breaks the Framers anticipated between legislative sessions. *Federalist 67*, at 409. It contains two important textual limitations that prevent it from displacing the Appointments Clause as the "general mode" of appointment: (1) the vacancy must *arise* ("happen") when the Senate is in recess; and (2) "the Recess" refers only to the break between legislative sessions. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

Petitioner would read the Recess Appointments Clause to allow almost complete circumvention of the Appointments Clause by defining "happen" to mean "exist" (rather than "arise") and by labeling every legislative break a "Recess" (perhaps subject to some minimum duration of unclear length and derivation). Combining these arguments, Petitioner would allow the President to fill *any* vacancy that exists simply by waiting for the Senate to take a break of brief duration.

Under the Constitution's original meaning, Petitioner is wrong on both counts. The original meaning of "happen" in the Recess Appointments Clause is "arise." That is consistent with the prevailing eighteenth-century dictionary definition. See, *e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "happen" only as "to fall

out; to chance; to come to pass"). Reading "happen" to mean "arise" avoids making the phrase "that may happen" in the Recess Appointments Clause superfluous (as it would be under Petitioner's definition). The Constitution's other uses of the word "happen"—in the Senate Vacancies Clause, Art. I, § 3, cl. 2, and the House Vacancies Clause, Art. I, § 2, cl. 4—both evidently use "happen" to mean "arise." This reading is also consistent with the purpose of the Recess Appointments Clause, which was to provide for appointments during the anticipated long intersession breaks without undermining the advice-and-consent procedure as the general mode of appointment. See Rappaport, 52 UCLA L. Rev. at 1500-01.

Key figures from the founding generation, including Hamilton, Attorney General Edmund Randolph, and commentator St. George Tucker, read the Recess Appointments Clause to cover only vacancies that arose in the recess. The practice of the Washington administration and the pattern of legislation in the early post-ratification era confirm this reading. See *id.* at 1522-25. Other founding-era sources, including eighteenth-century state constitutions, also used "happen" to mean "arise" in the context of vacancies. *E.g.*, Mass. Const., Pt. 2, Ch. I, § II, Art. IV (1780); N.H. Const., Pt. 2, Art. 34 (1784).

Petitioner argues that the President must be able to fill vacancies that exist during the recess, even if they arose earlier, or offices may remain vacant. But these concerns are overstated. If vacancies arise near the end of the session, the President can urge the Senate to act quickly or extend its session (or may even call the Senate back into session). Moreover, Congress can redress the matter by legislation. For inferior officers,

Congress can give the President sole power of appointment. Art. II, § 2, cl. 2. And Congress can provide for what are now known as acting appointments, whereby an existing officer can perform the duties of a second office when the latter becomes vacant. See Rappaport, 52 UCLA L. Rev. at 1514. Congress has routinely employed both strategies to address late-session vacancies. See *Noel Canning*, 705 F.3d at 511.

Second, the original meaning of "the Recess" in the Recess Appointments Clause is the break between legislative sessions. Eighteenth-century language provides two possible semantic meanings of "recess": it could mean either generically any break in the legislature's conduct of business or specifically the break between sessions. The Constitution's text, structure, and purpose show that it has the latter meaning in the Recess Appointments Clause.

Pre-ratification materials, including state constitutions, used "recess" to mean the time that the legislature was not in session. *E.g.*, Mass. Const., Pt. 2, Ch. II, § I, Art. V (1780). Hamilton in *Federalist 67* and post-ratification congressional statutes also used it this way, pairing the "recess" and the "session" as two distinct periods. Because the Framers anticipated long intersession breaks and only short breaks within sessions, it makes sense that they would establish a special appointments process only for intersession breaks. Reading "the Recess" to mean any break in legislative business, even of short duration, makes little sense in terms of the concerns of the Framers, who understood that offices would be vacant for temporary periods as a result of the ordinary advice-and-consent requirement.

Further, other aspects of the Constitution's text support the narrower meaning. The Constitution uses

another word, "Adjournment," to refer to any break in legislative business. The only way to explain the Constitution's use of both "Adjournment" and "Recess" is to read "Recess" to mean the break between sessions. Moreover, the Recess Appointments Clause itself indicates that it addresses the break between sessions by providing that recess appointments last until "the End of [the Senate's] next Session." Art. II, § 2, cl. 3. If "the Recess" is read to mean any break in legislative conduct of business, appointments would implausibly last from the date of the appointment, through the end of the existing session, through the intersession recess, and through the entire subsequent session.

Petitioner appears to suggest an intermediate meaning of "Recess" which would include intrasession breaks of sufficient length that the Senate is "practically unavailable" to consider nominees. However, there is no basis in any eighteenth-century meaning for this definition and it is inconsistent with founding-era materials' pairing "the session" with "the recess." Further, it is hopelessly indeterminate. There would be no reliable way to determine which breaks would count as recesses and which would not. Tellingly, Petitioner does not provide any firm definition, and in the past the Executive Branch has indicated that breaks as short as ten days or even less can qualify, even though it is implausible that the Framers would have been concerned about unfilled vacancies of such short duration.

ARGUMENT

I. THE APPOINTMENTS CLAUSE IS THE PRIMARY METHOD OF APPOINTING OFFICERS OF THE UNITED STATES, WHILE THE RECESS APPOINTMENTS CLAUSE SERVES ONLY AN AUXILIARY ROLE.

The Constitution's Framers established the Appointments Clause as the principal method of appointing officers of the United States. It provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States. . . .

Art. II, § 2, cl. 2. Notably, the Framers chose to confer appointment power on two entities jointly rather than one—a deliberate departure from British practice in which the monarch alone held the appointment power. See 1 William Blackstone, *Commentaries on the Laws of England* 271-73 (1765).

The Framers surely understood that this process would be slower and potentially more contentious than appointment by the President alone, but they decided the benefits outweighed the costs. As Alexander Hamilton explained, the Senate

> would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

The Federalist No. 76, at 457 (Hamilton) (Clinton Rossiter ed., 1961).

The Framers also included two supplemental methods of appointment. First, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Second, central to the present litigation, the Recess Appointments Clause provides:

> The 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.

Art. II, § 2, cl. 3.

Both supplemental methods of appointment are sharply limited. The first gives the President unilateral appointment power only upon Congress' formal consent and only for "inferior Officers." Superior officers must still be appointed through the advice-and-consent procedure, even if Congress prefers otherwise. The second, the Recess Appointments Clause, gives the President unilateral appointment power only for vacancies that happen during the Senate's recess. As explained below, this language contains two important textual limitations: (1) the vacancy must *arise* ("happen") when the Senate is in recess; and (2) "Recess" refers only to the break between legislative sessions. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

Thus the advice-and-consent procedure constitutes Article II's principal method of appointment, with limited exceptions. As Hamilton explained:

> The relation in which [the Recess Appointments Clause] stands to the [Appointments Clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.

The Federalist No. 67, at 409 (Hamilton) (Clinton Rossiter ed., 1961).

Petitioner would read the Recess Appointments Clause to allow almost complete circumvention of the Appointments Clause as the "general mode" of appointing officers. First, Petitioner would define "happen" to mean "exist" (rather than "arise"), so that the President could fill any vacancy that continues into a recess even if it arose when the Senate was in session but the President declined to make a nomination or the Senate declined to give its consent. Second, Petitioner would label every legislative break a "Recess" (perhaps subject to some minimum duration of unclear length and derivation). By combining these arguments, Petitioner would render the advice-and-consent requirement effectively optional: the President could unilaterally fill *any* vacancy that exists simply by waiting for the Senate to take a short break.

II. THE ORIGINAL MEANING OF "HAPPEN" IN THE RECESS APPOINTMENTS CLAUSE LIMITS THE PRESIDENT'S RECESS APPOINTMENTS POWER TO VACANCIES THAT ARISE DURING THE SENATE'S RECESS.

The Recess Appointments Clause gives the President "Power to fill up all Vacancies *that may*

happen during the Recess of the Senate . . . ." Art. II, § 2, cl. 3 (emphasis added). Petitioner argues that the phrase "that may happen" refers to any vacancy that *exists* during the Senate's recess, regardless of when the office first became vacant. To the contrary, the text, structure, and history of the phrase unambiguously establish that vacancies "happen" when they arise.

A. The Constitution's Text Makes Clear that Vacancies "Happen" when They "Arise."

Defining "happen" in the Recess Appointments Clause to mean "arise" best comports with the Constitution's text. First, founding-era dictionaries consistently defined "happen" to mean "to come to pass" or something similar. See, *e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "happen" only as "to fall out; to chance; to come to pass"); see also *Evans v. Stephens*, 387 F.3d 1220, 1230 & n.4 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (collecting additional founding-era dictionary definitions); Robert G. Natelson, *The Origins and Meaning of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause*, 37 Harv. J.L. & Pub. Pol'y (manuscript at 37) (forthcoming 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2257801) (same).[2] Thus, under the prevailing

[2] Additional founding-era dictionary definitions include Francis Allen, *A Complete English Dictionary* (1765) (defining "happen" as to "fall out, to come to pass, to light upon or meet with by chance"); John Ash, *The New and Complete Dictionary of the English Language* (1775) (defining "happen" as "To fall out, to come to pass, to light upon by accident"); Nathan Bailey, *An Universal Etymological English Dictionary* (25th ed. 1783)

eighteenth-century dictionary definition, the President has unilateral power to fill only vacancies that may "fall out" or "come to pass" during the Senate's recess.

Second, reading "happen" to mean "arise" avoids rendering the phrase "that may happen" in the Recess Appointments Clause superfluous. If the Framers had intended the President to have unilateral power to fill

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(defining "happen" as "to fall out"); James Barclay, *A Complete and Universal English Dictionary* (1792) (defining "happen" as "to fall out; to come to pass without being designed or foreseen; to light upon or meet with by chance, or mere accident, exclusive of any design"); Frederick Barlow, *The Complete English Dictionary* (1772-73) (defining "happen" as "to fall out. To come to pass without being designed. To light upon or meet with by chance, or meer accident"); Edward Crocker, *A New English Dictionary* (1713) (defining "happen" as "to fall out"); Alexander Donaldson, *An Universal Dictionary of the English Language* (1763) (defining "happen" as "to fall out; to chance; to come to pass. To light; to fall by chance"); William Kenrick, *A New Dictionary of the English Language* (8th ed. 1786) ("To fall out; to chance; to come to pass—To light; to fall by chance"); William Perry, *Royal Standard English Dictionary* (1st American ed. 1778) (defining "happen" as "to come to pass, to light on"); Thomas Sheridan, *A Complete Dictionary of the English Language* (1789) (defining "happen" as "to fall out by chance; to light on by accident"); see also Caleb Alexander, *Columbian Dictionary of the English Language* (1800) (defining "happen" as "to fall out, to light on"); John Entick, *New Spelling Dictionary of the English Language* (1800) (defining "happen" as "to fall out, come to pass, chance"); Samuel Johnson, Jr. & John Elliott, *Selected Pronouncing and Accented Dictionary* (1800) (defining "happen" as "to fall out, come to pass"); John Walker, *Critical Pronouncing Dictionary and Expositor of the English Language* (1803) (defining "happen" as "to fall out by chance, to come to pass; to light on by accident"); Noah Webster, *A Compendious Dictionary of the English Language* (1806) (defining "happen" as "to fall out, come to pass, chance"). But see Thomas Dyche & William Pardon, *A New General English Dictionary* (1777) (defining "happen" as "to be").

vacancies during a recess regardless of when the vacancies arose, they could simply have written: "The President shall have Power to fill up all Vacancies during the Recess of the Senate." Instead, they included the phrase "that may happen." But if "that may happen" means only "that may exist," it adds nothing. See Rappaport, 52 UCLA L. Rev. at 1504; *Noel Canning*, 705 F.3d at 507. To give the phrase meaning, it must limit the President's recess appointment power to vacancies that "come to pass" ("happen" in Johnson's definition) during the recess.

Third, the use of "happen" elsewhere in the Constitution supports this reading. Article I reads: "if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature. . . ." Art. I, § 3, cl. 2.[3] This Clause plainly uses "happen" to mean "arise." Vacancies do not *exist* "by resignation"; they *arise* "by resignation." Similarly, Article I provides: "When vacancies happen in the Representation [in the House] from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Art. I, § 2, cl. 4. Again, "happen" in this Clause refers to the point at which the office becomes vacant, thus triggering the Executive's obligation. See Rappaport, 52 UCLA L. Rev. at 1505-06.

[3] Initially, state legislatures determined the method of choosing Senators. Art. I, § 3, cl. 1 (superseded by the Seventeenth Amendment).

B. The Structure and Purpose of the Appointments Clause Confirm that the Original Meaning of the Recess Appointments Power Is Limited to Vacancies that Arise During a Recess.

The Appointments Clause mandates that the Senate give advice and consent before an appointment is complete. As Hamilton explained, this Clause provides the "general mode of appointing officers of the United States" and serves as an "excellent check" upon "unfit" presidential appointments. *Federalist 67*, at 409; *Federalist 76*, at 457. Thus, the Constitution directed that the Senate would ordinarily have a veto over presidential nominations.

Limiting the Recess Appointments Clause to vacancies that arise during a Senate recess is consistent with this purpose, providing the President a circumscribed unilateral appointment power where the Senate was likely not to meet for long periods of time. During the founding era, recesses lasted as long as six to nine months, and travel and communications were difficult. See Rappaport, 52 UCLA L. Rev. at 1500-01. If vacancies arose during a recess, the Recess Appointments Clause allowed the President to fill them without the difficulty and inconvenience of reconvening the Senate. See *Federalist 67*, at 409. But many vacancies—those that arose during a session—would continue to be governed by the preferred advice-and-consent procedure.

In contrast, reading the Recess Appointments Clause to cover any vacancy that *exists* during a recess is inconsistent with the advice-and-consent procedure serving as an effective check on presidential nominations. If the President can fill vacancies that arise during the Senate's session and continue into the

recess, the President could unilaterally fill any vacancy simply by waiting for a recess. Significantly, the President could adopt this approach for any nominee the Senate rejected, declined to approve, or appeared likely to oppose, thereby defeating the check the Framers intended to supply through the Appointments Clause. As constitutional historian David Currie observed:

> The [Recess Appointment Clause's] text appears to require that the vacancy *arise* while the Senate is out of session, and for an understandable reason. If the President could fill all vacancies that existed during a recess . . . , he could frustrate the Senate's veto power by waiting until after adjournment to fill vacancies that occurred while it was in session.

David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 188 (2001); see also Rappaport, 52 UCLA L. Rev. at 1507 ("There is little reason to require senatorial confirmation if one is simply going to allow the President to easily circumvent that requirement" by waiting until a recess to make a contested appointment).

The Constitution's treatment of appointing inferior officers provides further evidence for the narrower view of the President's recess appointments power. The Framers recognized that the advice-and-consent procedure could be cumbersome and that Congress might sometimes want the President to have unilateral appointments power. But the Framers allowed this departure from the advice-and-consent process only after Congress gave formal approval by law, and only for inferior officers. See Art. II, § 2, cl. 2. Given these restrictions, it is implausible to read the Recess Appointments Clause to give the President a broad

power to appoint officers (including superior officers) unilaterally.

In sum, reading "happen" to mean "exist" is inconsistent with the Constitution's structure and purpose because it would give the President a way largely to avoid the check of the advice-and-consent process for controversial appointments. Reading "happen" to mean "arise," by contrast, preserves the intended purpose of the Appointments Clause and the Senate's ability to reject a President's nominee.

C. Early Congresses and Key Figures from the Founding Generation Read the Recess Appointments Clause to Apply Only to Vacancies that Arose During a Recess.

How a text was interpreted close in time to its enactment is evidence of its original meaning. Leading members of the founding generation understood vacancies to "happen" when the office first became vacant and thus read the Recess Appointments Clause to apply only to vacancies that arose during a recess. Edmund Randolph, Washington's first Attorney General—who had been a Virginia delegate to the Philadelphia convention and a leading figure in the Virginia ratifying convention—opined that the President could not recess-appoint a Chief Coiner of the U.S. Mint when the vacancy arose while the Senate was in session and remained unfilled after the Senate recessed. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *Papers of Thomas Jefferson* 165-67 (John Catanzariti et al. eds., 1990).

As Randolph recounted, the Act establishing the office of Chief Coiner passed on April 2, 1792, and the Senate ended its session on May 8 without any person

having been nominated to the office. Writing to Secretary of State Thomas Jefferson on July 7 (with the Senate still in recess), Randolph concluded that this was a "vacancy" and continued:

> But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.

Id. at 166.

Because Randolph concluded that a vacancy "happen[s]" on the day it "commence[s]," he advised Jefferson that the President could not make the appointment. *Id*. at 166-67. Randolph added that the Appointments Clause was the primary means of making appointments and that the Recess Appointments Clause should only be used when absolutely necessary, such as "where the Officer has died, or resigned during the recess . . . ." *Id*. at 166.

Randolph noted a distinct situation in which the Senate approved a nomination but, after the Senate went into recess, the appointed person refused the office. The two circumstances, he said,

> are different in their relation to the constitution. . . . In the one the vacancy was filled up, as far as the President and Senate could go; and the Vacancy may be said to have happened during the Recess in consequence of the Refusal. In the other, not.

Id. at 167.

Hamilton, though generally a strong supporter of executive power in the post-ratification period, expressed a similar view of the recess appointment power. In 1799, the issue arose under President

Adams regarding appointment of army officers. Adams initially thought he might have recess appointment power as to military offices created but not filled during the session. Secretary of War James McHenry wrote to Hamilton, then serving as major general in the army, for advice, expressing his view that "the President alone cannot make certain appointments or fill up vacancies that may happen during a session of the Senate, without an express power derived from an act of Congress." Letter from James McHenry to Alexander Hamilton (April 26, 1799), in 23 *The Papers of Alexander Hamilton* 69 (Harold C. Syrett ed., 1976). Although he presumably wanted the offices filled, Hamilton agreed, responding: "It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 *Papers of Alexander Hamilton* at 94.[4]

Constitutional commenter St. George Tucker, writing in 1803, echoed Randolph's and Hamilton's conclusion. Tucker observed that ordinarily when the President and Senate disagreed on a nominee, the office would remain vacant; however, he added, "if it should have happened that the office became vacant during the recess of the senate," then the President could make a unilateral appointment. St. George

[4] In his 1787 written plan for the Constitution, Hamilton used "happen" to mean "arise" in connection with the death or resignation of his life-tenure president: "The Judges of the Supreme Court shall within sixty days after a vacancy shall happen, cause public notice to be given in each State of such vacancy. . . ." 3 *The Records of the Federal Convention of 1787*, at 622 (Max Farrand ed., 1911).

Tucker, *View of the Constitution of the United States* 279-80 (1803) (Clyde N. Wilson ed., 1999).

President Washington also appeared to share a narrow view of the recess appointments power. First, he followed Randolph's advice regarding the Chief Coiner. Washington apparently wanted the position filled promptly but waited until the Senate reconvened that winter to make a nomination. See S. Exec. Journal, 2d Cong., 2d Sess. 127 (1793) (nominating Henry Voigt as Chief Coiner); Timeline of the United States Mint, http://www.usmint.gov/education /historian scorner/?action=timeline (reflecting initial appointment of Chief Coiner as Jan. 28, 1793). Additionally, Washington filled vacancies that remained late in the Senate's session by submitting a long list of nominees sometimes without knowing if the nominees would accept the nomination. If a person then turned down the appointment after the session ended, Washington treated this as a new vacancy and made a recess appointment. See Rappaport, 52 UCLA L. Rev. at 1522; see also S. Exec. Journal, 1st Cong., 1st Sess. 29-35 (1789) (reflecting nomination of 95 officers and judges in the last days of the session). If Washington thought the President could make recess appointments to fill vacancies that arose during the session, this practice would have been unnecessary.

Early Congresses also apparently thought the President could not unilaterally make recess appointments to fill vacancies that arose during a session, and thus provided statutory authority for him to do so for certain inferior officers. For example, a 1791 statute provided for inspectors of surveys to be appointed by the President with the Senate's advice and consent, but if appointments were not made "during the present session of Congress" the President was

empowered to "make such appointments during the recess of the Senate." Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. See also Act of Mar. 2, 1799, ch. 31, § 2, 1 Stat. 725 (giving power to appoint army officers during the Senate's recess); Act of July 16, 1798, ch. 79, § 8, 1 Stat. 604, 605 ("And in recess of [the] Senate, the President of the United States is hereby authorized to appoint all the regimental officers proper to be appointed under this act, and likewise to make appointments to fill any vacancies in the army, which may have happened during the present session of the Senate."); Act of Mar. 3, 1799, ch. 47, 1 Stat. 749 (similarly authorizing the President "to make appointments to fill any vacancies in the army and navy which may have happened during the present session of the Senate"); Rappaport, 52 UCLA L. Rev. at 1524-25 & n.103.

D. Other Founding-Era Sources Used "Happen" to Mean "Arise."

In addition to founding-era dictionaries, eighteenth-century state constitutions used "happen" to mean "arise" rather than "exist." The Massachusetts Constitution of 1780 outlined how "vacancies in the senate, arising by death, removal out of the state, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen." Mass. Const., Pt. 2, Ch. I, § II, Art. IV (1780). See also N.H. Const., Pt. 2, Art. 34 (1784) (using almost identical language).

Many state legislative records are to the same effect. For example, a 1782 resolution of the Rhode Island legislature stated that a battalion captain vacancy "happened" on the day the captain resigned. Natelson, 37 Harv. J.L. & Pub. Pol'y at 45. Similarly, a Connecticut legislative resolution provided that a lieutenant

colonel's office "became vacant" when the officer was promoted and observed that another officer claimed a right to be promoted into that vacancy "when it happened." *Id*. at 46. See also *id*. at 39-47 (providing additional examples).

E. Petitioner Provides No Reason to Doubt the Limited Reading of the President's Recess Appointments Power.

Petitioner principally argues that limiting the recess appointments power to vacancies that arise during a recess would prevent the President from making necessary appointments. In particular, Petitioner points to problems that might result if vacancies arise by death or resignation—or if offices are created—too near the end of a session to allow the Senate to act on a nomination. Pet. Br. 31-33.

These concerns are overstated. The President has several constitutional options if filling a vacancy appears crucial. The President could urge the Senate to extend its session or act quickly prior to recess, or in an extreme case, the President could call the Senate back into session. See Art. II, § 3 (providing this power). Further, Congress can address such potential vacancies by providing (for inferior officers) that the President alone has the power to fill them, see Art. II, § 2, cl. 2, and by providing for what are now called acting appointments.

The acting appointments approach allows an existing officer to perform the duties of a second office when the latter becomes vacant. See Rappaport, 52 UCLA L. Rev. at 1514 (explaining that "[f]or example, Congress could provide that when the office of the Attorney General becomes vacant, the Deputy

Attorney General, who has been appointed with the consent of the Senate, should serve as Acting Attorney General and perform the duties of that office").[5] Congress implemented this approach very broadly from the outset, providing in a 1792 statute that "in the case of death, absence from the seat of Government or sickness" of the Secretaries of War, State, or Treasury "or of any officer of either of the said departments" the President may "authorize any person or persons at his discretion to perform the duties of the said respective offices." Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. In this way, Congress can assure that vital duties will be performed, and provisions for acting appointments are commonplace today. See *Noel Canning*, 705 F.3d at 511 (listing statutes).

Petitioner's reading of "happen" would allow the President to fill not only vacancies that arise near the end of the session, but all vacancies for which the President and the Senate have not agreed on an appointment prior to a recess. This outcome fundamentally conflicts with the purpose of the Appointments Clause, which was to provide a check on presidential appointments. See *Federalist 76*, at 457. As discussed above, the advise-and-consent requirement of the Appointments Clause and the prohibition against presidential appointment of even inferior officers without a grant of authority from Congress show that the Framers intended, as a general matter, to give the

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[5] Speaking precisely, "acting appointments" statutes do not allow unilateral presidential "appointments" of superior officers (which would be unconstitutional); rather, by Congress' power to define the powers and duties of statutorily created offices, they allow the President to reallocate a vacant office's duties to a different officer (at the very least, where the acting duties are within the contemplated scope of the initial appointment). See Rappaport, 52 UCLA L. Rev. at 1514-15 & n.78.

Senate veto power over presidential appointments even at the cost of some offices remaining vacant. Because Petitioner's interpretation would allow the President to circumvent Senate opposition to controversial nominees and thereby thwart rather than facilitate the Framers' design, it is unlikely to be the original meaning of "happen."

Petitioner also contends, Pet. Br. 39-40, that President Washington made recess appointments of Robert Scot and William Clarke to positions that became vacant during a session. However, Washington himself described these positions as having become vacant during a recess. S. Exec. Journal, 3d Cong., 1st Sess. 142-43 (1793) (Washington, when nominating Scot as Engraver of the Mint, stating, "I nominate the following persons to fill the offices annexed to their names respectively; to which, having fallen vacant during the recess of the Senate, they have been appointed."); S. Exec. Journal, 4th Cong., 2d Sess. 216-17 (1796) (Washington nominating Clark[e] to an office "which became vacant during the recess of the Senate"). Even if the actual facts of the vacancies are ambiguous,[6] Washington apparently believed the vacancies arose during the recess and thought this point was worth reciting to the Senate.

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[6] As to Clarke, Petitioner concedes that the office may have become vacant in October 1794, see Pet. Br. 40 n.31, which was during a previous recess. As to Scot, the office of Engraver may not have become vacant until the recess because the Chief Coiner may not have ceased exercising the duties of Engraver pursuant to the President's direction until after the recess began. See The Originalism Blog, May 20, 2013, http://originalismblog.typepad.com/the-originalism-blog/2013/05/originalism-recess-appointments-and-the-sgs-noel-canning-cert-petitionmike-rappaport.html.

Petitioner's claim that Presidents Adams, Jefferson, and Madison thought they could make recess appointments to offices that became vacant during the session is similarly weak. As to Adams, Petitioner relies on an ambiguous statement that does not clearly assert such a power. Pet. Br. 41; see Rappaport, 52 UCLA L. Rev. at 1535. As noted above, Part II.C., Hamilton and McHenry advised that Adams could not make such appointments, and Petitioner cites no direct evidence that Adams did so.[7]

Regarding the Jefferson and Madison presidencies, Petitioner cites only scattered practice that may be subject to historical ambiguities or explained on other grounds. In any event, occasional executive branch practice, unsupported by a well-considered reading of the Constitution's text and occurring in some cases twenty years or more after ratification is not sufficient to unsettle the strong textual and structural evidence set forth above. See Rappaport, 52 UCLA L. Rev. at 1537-38 (noting that subsequent evidence is a poor indicator of the text's meaning where "motivated by the interpreter's self-interest" or "taken without significant attention to the constitutional question").

Petitioner also relies, Pet. Br. 30, on the 1823 opinion of Attorney General Wirt, who concluded

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[7] Petitioner acknowledges that Adams agreed "to suspend [the appointment in question] for the present, perhaps till the meeting of the Senate[.]" Pet. Br. 41. Petitioner points to Jefferson's recollection that Adams' attorney general, Charles Lee, told Jefferson that "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of inquiring for a proper character, [the Adams administration] let it lie always till recess[.]" *Id*. Even if this account is correct, Lee may have been talking about offices the President had statutory authority to fill during a recess, a power commonly provided at the time.

(contrary to Randolph's 1792 opinion) that the President could make recess appointments to offices that became vacant during a session. 1 Op. Att'y Gen. 631-32 (1823). Wirt's opinion is unpersuasive evidence of the Clause's meaning for multiple reasons. Wirt was not a member of the founding generation, and so his reading, some thirty-five years after the Convention, is much less probative than the contrary readings of Convention delegates Randolph and Hamilton. Wirt was also serving in the Executive Branch at the time and so had an institutional incentive to favor a broad interpretation of presidential power. Further, even Wirt conceded that the better reading of the "letter" of the Constitution was to limit the power to vacancies that arose during the recess. *Id*. at 633-34. Wirt settled on a broader reading, despite the text, because he was concerned about vacancies that arose at the end of a session or where the Senate might be unable to act for reasons such as invasion or natural disaster. But as discussed above, these potential problems had several ready solutions, including statutes providing for acting appointments.

In sum, Petitioner provides no reason to doubt the evident original meaning of the word "happen." As Randolph concluded in 1792, a vacancy happens when it commences. If it does not commence during a recess of the Senate, the President may not bypass the ordinary method of making appointments.

III. THE ORIGINAL MEANING OF "THE RECESS" IN THE RECESS APPOINTMENTS CLAUSE IS THE BREAK BETWEEN LEGISLATIVE SESSIONS.

The Recess Appointments Clause permits the President to bypass the Appointments Clause's advice-and-consent procedure only for vacancies that happen

"during the Recess of the Senate." Art. II, § 2, cl. 3. Eighteenth-century language provides two possible semantic meanings of "recess." First, "recess" was used specifically to mean the break between legislative sessions; that is, a legislative body was either "in session" or "in recess." Second, "recess" could be used more generically to refer to any break in a legislature's conduct of business, including short breaks during a session. See Johnson, *Dictionary of the English Language* (defining "recess" as "remission or suspension of any procedure"). As set forth below, the first meaning—that "recess" indicates the time between legislative sessions—best comports with the Constitution's text, structure, and purpose.

A. Pre- and Post-Ratification Materials Show that "Recess" Was Used to Refer Specifically to the Time Between Legislative Sessions.

Eighteenth-century state constitutions used "recess" to refer to the time that the legislature was not in session. The Massachusetts Constitution of 1780, which was a source for many provisions of the U.S. Constitution, provided:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [*i.e.*, the Massachusetts legislature], to adjourn or prorogue the same to any time the two Houses shall desire . . . and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess; . . . .

Mass. Const., Pt. 2, Ch. II, § I, Art. V (1780). See also N.H. Const., Pt. 2, Art. 50 (1784) (using nearly identical language).

These provisions contemplated two distinct periods—"during the session" and "in the recess"—in which the Executive had different powers. See Rappaport, 52 UCLA L. Rev. at 1552. During the session, the Executive could both adjourn and prorogue the legislature. In the recess, the Executive could only prorogue the legislature. The lack of authority to adjourn the legislature during its recess makes sense if the legislative session has ended; by definition, a legislature cannot be adjourned when it is not in session. In contrast, if "the recess" included times when the legislature was in session, there would be no reason not to give the Executive a power of adjournment. *Id*. at 1552-53.

Using "recess" specifically to mean an intersession break has antecedents in English terminology. Blackstone used the term "recess" to refer to the period between parliamentary sessions. See 4 William Blackstone, *Commentaries on the Laws of England* 260 (1769) ("During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the [high court of parliament]. . . . But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law. . . ."); 3 William Blackstone, *Commentaries on the Laws of England* 57 (1768) ("This committee seems to have been established, lest there should be a defect of justice, for want of a supreme court of appeal, during the intermission or recess of parliament; for the statute further directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said [committee] unto the *next* parliament, who shall finally determine the same.").

Founding-era state legislatures also used the term "recess" to differentiate between the legislative session and the intersession period. For example, a 1778 order of the Virginia House of Delegates stated:

> *Ordered*, That the delegates for the several counties consult with their constituents, during the recess of Assembly, on the justice and expediency of passing [a bill] . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates at their next session.

Journal of the House of Delegates of the Commonwealth of Virginia (1777-81), at 123 (Thomas W. White ed., 1827). If a recess occurred during the legislative session, there would be no reason to require the delegates to wait until the next session to bring those concerns to the House. See Natelson, 37 Harv. J.L. & Pub. Pol'y at 19-36 (collecting similar usage from multiple states).

Similarly, statutes passed in the early post-ratification period distinguish between "the recess" and "the session." See, *e.g.*, Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71 (providing the Senate's engrossing clerk compensation of "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess"); Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200 (permitting presidential appointments "during the recess" for vacancies that occurred "during the present session"); Act of July 16, 1798, ch. 79, § 8, 1 Stat. 604, 605 (similar).

B. The Recess Appointments Clause Addressed the Inadequacies of Advice-and-Consent Appointments During the Lengthy Intersession Recesses Anticipated by the Framers.

At the time of drafting, the Framers anticipated that Congress would conduct short sessions with long intersession breaks for much of the year. See 2 *Records of the Federal Convention,* at 199-200 (debating whether Congress' session should be held in the winter or spring). State legislatures at the time followed such a pattern. Robert Luce, *Legislative Assemblies* 154 (1924). Republican political beliefs held that representatives should spend more time as ordinary citizens than as representatives, see Rappaport, 52 UCLA L. Rev. at 1498, 1564, and "[i]n colonial times and indeed up to the development of our railroad systems, the slowness of travel made any but periodical gatherings out of the question." Luce, *Legislative Assemblies*, at 154. Hamilton observed, "[I]t is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps half, for the former." *The Federalist No. 84*, at 519 (Hamilton) (Clinton Rossiter ed., 1961). As the Framers anticipated, in the immediate post-ratification period Congress typically recessed for long intersession breaks ranging from two months to as long as six or nine months.[8] By contrast, as Petitioner acknowledges, Pet. Br. 14, intrasession breaks in the post-ratification period were typically three days or less.

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[8] See Dates of Sessions of the Congress, 1789-present, http://www.senate.gov/reference/Sessions/reverseDates.htm.

As Hamilton explained, the purpose of the Recess Appointments Clause was to provide a limited mechanism for addressing the inadequacy of the advice-and-consent process during intersession breaks:

> The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in *their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorise the President *singly*, to make temporary appointments. . . ."

Federalist 67, at 409-10.

Hamilton clearly uses "their recess" here to mean the time between legislative sessions. He adopts the linguistic convention noted above of identifying two distinct periods: when the Senate is "in session" and when it is "in . . . recess." Accordingly, he indicates that the need for presidential appointments "in their recess" arises when the Senate is not "in session" because when the Senate is "in session," the joint appointment power can be exercised. Because the Framers expected the "recess" (meaning the inter-session break) to be a long period, it makes sense that they would establish a special appointments process for such a period. Even though the Framers were, as Hamilton said, committed to the advice-and-consent procedure for most appointments as a "check" on the President, see *Federalist 76*, at 457, they thought the special problem of the likely long intersession breaks called for an alternative approach.

Petitioner offers no reason why the Framers would have used "the Recess" to mean any break in legislative business. Intrasession breaks were not expected to be of great duration, so there would be no need to establish a special rule for appointments. That offices might be vacant for temporary periods was a necessary consequence of the Appointments Clause, which might leave vacancies unfilled even when the Senate was conducting business because the President and Senate could not agree on a nominee or the Senate had more pressing matters to attend. See Rappaport, 52 UCLA L. Rev. at 1562 ("While it is understandable that the Framers would have allowed the President to bypass the Senate to prevent a position from being vacant during a six- or nine-month recess, it seems absurd to imagine that the Framers would have allowed recess appointments to prevent an office from being vacant for only a week or two.").

C. Other Provisions of the Constitution's Text Show that "the Recess" Means Only Intersession Breaks.

Other provisions of the Constitution indicate that "the Recess" refers only to the period between sessions. First, the Constitution uses another word, "Adjournment," to refer to all breaks in legislative business. The terms "Adjournment" or "adjourn" appear in five constitutional clauses: the Presentment Clause, Art. I, § 7, cl. 2; the Three-Day Adjournment Clause, Art. I, § 5, cl. 4; the Presidential Adjournment Clause, Art. II, § 3; the Orders Presentment Clause, Art. I, § 7, cl. 3; and the Day-to-Day Adjournment Clause, Art. I, § 5, cl. 1. Each clause uses "adjourn" or "Adjournment" to mean both intrasession and intersession breaks in legislative business. See Rappaport, 52 UCLA L. Rev. at 1557-61. Had the Framers meant the Recess

Appointments Clause to include both intersession and intrasession breaks, they could have expressed this by giving the President power to make unilateral appointments "during an Adjournment of the Senate."

In contrast, the Constitution uses "the Recess" twice—in the Recess Appointments Clause and in the Senate Vacancies Clause, which, as discussed above, allowed a state's executive to fill a Senate vacancy "during the Recess of the Legislature of [the] State." Art. I, § 3, cl. 2. The choice to use different language ("the Recess" rather than "Adjournment") indicates a different meaning. The most obvious explanation is that "the Recess" had a narrower meaning encompassing only the expected longer (and, from an appointments standpoint, more problematic) break between sessions.

A second textual indication of the meaning of "the Recess" is the length of recess appointments. Recess appointments last until "the End of [the Senate's] next Session." Art. II, § 2, cl. 3. Interpreting "the Recess" to mean the break between sessions fits perfectly with this provision and with the primacy of the Appointments Clause's advice-and-consent method. By limiting a recess appointment's duration to "the End of [the Senate's] next Session," the Framers addressed the problem of unfilled vacancies during anticipated long intersession breaks while providing an opportunity for the advice-and-consent method to proceed once the Senate's new session began. Moreover, pairing "the Recess" and "their next Session" further implies that the Framers understood the Senate would be either "in recess" or "in session."

If "Recess" instead meant any break in legislative business, a recess appointment would last from the date of the appointment, through the end of the

current session, through the intersession recess, and through the entire subsequent session. This arrangement is implausible. There would be no reason to have the appointment last until the end of the *next* session, rather than until the end of the existing session.[9]

D. Alternate Definitions of "the Recess" for Constitutional Purposes are Untenable.

As noted, eighteenth-century language also used the word "recess" generically to refer to any break, no matter how short, in legislative business. See Johnson, *Dictionary of the English Language* (defining "recess" as "remission of suspension of any procedure"); Pet. Br. 13-16 (giving further examples). This broader meaning, however, is untenable in the context of the Recess Appointments Clause because it would give the President power to make recess appointments even during Senate breaks as short as a day. See *Noel Canning*, 705 F.3d at 503. There was no reason to provide the President with unilateral appointments power if an office becomes vacant during a very brief break in legislative business. Indeed, coupled with Petitioner's reading of "happen" to mean "exist," this interpretation of "the Recess" would allow the President effectively to bypass Senate approval altogether: the President could unilaterally fill every vacancy that existed during any such short break.

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[9] As noted, intrasession breaks were typically much shorter than intersession breaks, so it is especially implausible to provide for intrasession appointments lasting so much longer than intersession appointments.

Petitioner appears to argue that because *sometimes* an intrasession break could be long enough to make unilateral presidential appointments plausible, all intrasession breaks should be sufficient to potentially trigger the recess appointments power. See Pet. Br. 14-19. However, had the Framers wanted to provide for the case of *long* intrasession breaks, it is unlikely that they would have used a phrase that referred to any break.

Apparently recognizing the absurdity of defining "Recess" to include *any* break in legislative business, in the past the Executive Branch has suggested that the Recess Appointments Clause is triggered only when "in a *practical* sense" the Senate is unavailable to provide advice and consent, without settling on how long a break that might be. See 33 Op. Att'y Gen. 20, 24-25 (1921) (opinion of Attorney General Harry Daugherty) (suggesting that breaks of more than ten days might trigger the recess appointments power but ten days or less would not); see also Pet. Br. 18 (indicating that "the Executive has long understood that [intrasession breaks of three days or less]—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively de minimus and do not trigger the President's recess-appointment authority"). This suggestion, however, has no support in constitutional text, structure, or purpose.

First, there is no eighteenth-century evidence of "recess" having the intermediate meaning the Executive Branch has proposed, and Petitioner does not provide any here. As indicated above, "recess" meant either (generically) any suspension of business or (specifically) the break between legislative sessions; it did not have a meaning directly linked to the length of the break.

Further, the standard of "practical unavailability" is hopelessly indeterminate and is not judicially administrable. Under this approach, there is no clear way to distinguish between legislative breaks that are long enough to count as recesses and those that are not. Petitioner advances no way to make such a distinction, nor does Executive Branch practice reflect one.[10] Although some Executive Branch interpretations have suggested that breaks of longer than ten (or perhaps only three) days may trigger the President's recess appointments power, it is hard to believe that such vacancies would have been considered so intolerable as to justify an exception to the Senate's advice-and-consent function. Vacancies of this duration, or even much longer, might well exist when the Senate was conducting other business, or while the President and the Senate came to an agreement on a nominee.

The extreme vagueness of the "practical unavailability" interpretation makes it unlikely that the Framers would have employed it. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 306-09 (1989) (noting the Framers' desire "to avoid vagueness and imprecision in the Constitution"); *Noel Canning*, 705 F.3d at 504. In particular, uncertainty over whether a recess had occurred—and therefore whether a valid recess appointment could be made—could cast doubt on the validity of a recess appointee's acts. This uncertainty

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[10] Doughtery's opinion observes (contrary to existing Executive practice) "[n]or do I think an adjournment for 5 or even 10 [days] can be said to constitute the recess intended by the Constitution," while ultimately concluding that "[i]n the very nature of things the line of demarcation cannot be accurately drawn." 33 Op. Att'y Gen. 20, 24-25.

is exemplified by Petitioner's inability to identify fixed time limits in an alternate definition of "the Recess." It is much more plausible that "the Recess" was understood, in accordance with its eighteenth-century meaning, as the readily identifiable intersession break. That meaning provided certainty as to when recess appointments would be proper through a clear, judicially administrable line, thus assuring that the recess appointments power would not displace the ordinary requirement of Senate consent while covering the most likely periods of long Senate unavailability. See Rappaport, 52 UCLA L. Rev. at 1552-56, 1563-64.

CONCLUSION

In sum, the original meaning of the Recess Appointments Clause is that the President may make recess appointments only when a vacancy arises between sessions of the Senate. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

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