No. 12-1281

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, *et al.*,

Respondents.

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

BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 350,000 member businesses in Washington, D.C., and all fifty state capitals. Founded in 1943, as a nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses.

NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. The

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[1] All parties to this matter have granted blanket consent for *amicus curiae* briefs in support of either or neither party. The respondent/intervenor below, National Brotherhood of Teamsters Local 760, filed such consent on September 3, 2013. The petitioner, National Labor Relations Board, filed such consent on September 12, 2013, and the respondent, Noel Canning, filed such consent on November 12, 2013. The requirements of Rule 37.2(a) of the rules of this court are satisfied by these filings.

In accordance with Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

This case presents questions to this Court that are of critical importance to the small business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The NFIB Legal Center urges this Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. This *amicus* further urges this Court to hold that the President lacks constitutional authority to exercise the recess appointment power set forth in U.S. Const. art. II, § 2, cl. 3 while the Senate is convening for three days at a time in *pro forma* sessions.

This brief *amicus curiae* addresses the matters that are of paramount concern to the small business community. Three inquiries in particular raise special concerns for this community and the views of this *amicus* are presented here to assist the Court in addressing these matters.

First, there is today almost universal recognition of the fact that the small business community is the principal engine of job creation in the United States and the place where innovation and invention are

most robust. We believe there is no parallel anywhere matching the vitality, productivity and potential of U.S. small business.

We believe also that our Constitutional system of governing, and in particular, our separation of powers doctrine, plays a large role in empowering the vitality of small businesses in the United States. When this system erodes or functions less perfectly, there is an adverse impact on the ability of small businesses to have the significant impact they should have on the national marketplace and the economy as a whole.

Empirical studies in recent years conducted by NFIB affiliates and others document this effect and caution that there may be a heavy price to pay not only for owners and supporters of small business, but the nation as a whole when institutional values deteriorate.

This *amicus* believes that the values reflected in our Constitution are the same values that empower our small business community. NFIB Legal Center asks the Court to consider these factors as a guide in the disposition of this case.

Second, the opinion of the D.C. Circuit in the decision below, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), reflects a meticulous analysis of the text and historical context of the recess appointment clause, U.S. Const. art. II, § 2, cl. 3, and related constitutional provisions. There is no need for this *amicus* to cover the same ground that has been explored by so many others.

A point of greater significance to the NFIB Legal Center is that while the plain language may stimulate controversy, although we do not believe it should, our core principles of separation of powers doctrine and their enforcement through constitutional checks and balances should end the debate. It should also resolve any perceived ambiguity over the intentions of the Framers in selecting the words that comprise the Recess Appointments Clause, and the provisions of the Constitution that interact with it.

This system is the "foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). The system also is designed to establish and preserve a stable society that is assisted in its individual and collective pursuit of liberty by a balanced and stable government. In a practical sense, the allocation of co-equal power to the branches of government enables society to thrive and that benefit inures to the small business community as well as society as a whole.

The unprecedented actions of the President on January 4, 2012, during the *pro forma* sessions of the Senate making executive appointments to important positions in the government was not what the Framers had in mind for the government they envisioned. Whatever frustrations may be a part of political life today, the Framers did not create a network of loopholes for the expedient elimination of the Constitutional role of the Senate in the appointments process.

Where political disputes are not resolved within the constitutional framework, the stability and certainty of our society is damaged and that in turn has had significant adverse consequences for the health of the small business community. The empirical data collected in recent years leave little doubt that this effect is occurring and that this Court should step in to restore constitutional order.

The third and final question addressed here arises from a concern that the failure of Noel Canning to challenge the authority of the recess appointees while the case was before the National Labor Relations Board ("NLRB") may cast doubt on this Court's willingness to resolve the case on its merits. *See* 29 U.S.C. § 160(e); *NLRB v. RELCO Locomotives, Inc.*, Nos. 12-2111, 12-2203, 12-2447, 12-2503 (8th Cir. Aug. 20, 2013). The waiver provision merits brief mention here because it raises concerns that are common among small business litigants who may be less familiar with the complexities of federal agency proceedings.

In this case, the waiver argument is itself waived, not having been raised by any party in this Court. Neither does the point have any sensible application in a case like this where clairvoyance would have been a necessity on the part of Noel Canning. Objections were initially filed nine months before the January 4, 2012 recess appointments were made. Under well-established law, the futility rule also should have taken the waiver issue out of the case.

ARGUMENT

I. A Rule of Constitutional Doctrine that Sacrifices Core Principles for Expedience Damages the Vitality of Small Business

The relationships between government, especially the Federal government, and the business community are increasingly important factors in the success or failure of business enterprises. These relationships often present special challenges to the small business community which is often most sensitive to change and vulnerable to the effects of disruption and instability in the government sector. *See* Mark E. Schwertzer and Scott Shane, "Economic Policy Uncertainty and Small Business Exposure," Federal Reserve Bank of Cleveland, available at http://www.clevelandfed.org/research/commentary/2011/2011-24.cfm; Majar L. Clark III, *et al*., "The Role of Small Business in Economic Development of the United States: From the End of the Korean War (1953) to the Present," Office of Advocacy, Small Business Administration (September 2010), available at http://www.sba.gov/advocacy/7540/12143.

Neither is the small business sector small. In May 2012, Forbes Magazine reported that at any given time, there are from 25-27 million small businesses that account for 60-80% of all private sector jobs in the United States. The same report noted that small businesses produce 13 times more patents than big businesses. *See* Rebecca O. Bagley, "Small Business = Big Impact," Forbes Magazine (May 2012), available

at http://www.forbes.com/sites/rebeccabagley/2012/05/15/small-businesses-big-impact/.

There are, of course, many ways in which government dysfunction and the uncertainty it breeds may adversely affect small businesses. Regulatory confusion, overly complex or temporary statutory obligations and a general lack of focus on the small business sector all present potentially significant hurdles. There is no doubt that where a particular regulator, like the NLRB, becomes dysfunctional because of political discord in the appointment process, the businesses that are affected have reason for concern. They are unable to move beyond the relevant labor issues and get on with business. This concern translates into uncertainty and is likely to disrupt plans, promote unnecessarily conservative business practices and, for certain individual companies, may be life threatening.

The overall impact of the various forms of government instability on small business is well documented and not surprising. Nearly 70% of small businesses say that federal government policies and conduct "are hurting small businesses". Greg Bianco, "Survey: Small Business Scared to Expand Because of Government Uncertainty," Bizjournals (September 25, 2012), available at http://www.bizjournals.com/washington/news/2012/09/25/survey-small-businesses-scared-to.html. Explaining the findings of the survey, co-sponsored by NFIB and the National Association of Manufacturers, NAM's CEO, Jay Timmons, commented: "The findings of this survey show that manufacturers and

other small businesses have a starkly negative outlook for their future – with good reason. . . . There is far too much uncertainty, too many burdensome regulations and too few policymakers willing to put aside their egos and fulfill their responsibilities to the American people". *Id.* *See also* NFIB and NAM, "Summary of Findings NFIB and NAM Survey of 800 Small Business Owners, Manufacturers, and Owners or C-Level Decision Makers, August 13-September 4, 2012," available at http://pos.org/2012/09/nfib-and-nam-survey-of-small-businesses-and-manufacturers/.

Studies over the last decade culminating in a 2012 investigation by NFIB's Research Foundation confirm that the extraordinarily high degree of concern over government dysfunction causes significant adverse consequence for hiring, investment, innovation and growth. While no one activity is singled out as a principal culprit, an overall sense of failing or floundering institutions is changing the behavior of the small business community, and not for the better. *See* Holly Wade, "Small Business Problems and Priorities," NFIB Research Foundation, available at http://www.nfib.com/pnp2012; *see also* U.S. Chamber of Commerce, "Prolonged Uncertainty Impacting Small Business Ability to Create Jobs" (October 3, 2012), available at http://www.uschamber.com/press/releases/2012/October/prolonged-uncertainty-impacting.

There is little, if any, reporting to the contrary and the prospects for a more favorable environment are elusive.

The Constitution should not be interpreted to advance political dysfunction and it was neither drafted nor intended to accommodate the current *status quo*. The Framers had an opposite purpose.

II. The Separation of Powers Doctrine Should Be Enforced in this Case to Prohibit the Usurpation of Senatorial Powers By the President

The system of government established by our Constitution was not intended to be and is not a game for clever players. The Constitution both grants and limits the powers it defines. The Framers intended to build a system that would provide no fertile ground for the tyranny of the despotic systems that prevailed elsewhere. *See Freytag v. Comm'r*, 501 U.S. 868, 883-84 (1991); *Bowsher*, 470 U.S. at 730.

In addressing the power of the President to select subordinate executives for the new government, the Framers were clear enough in their intent to distinguish the powers of the President to nominate for high office from the power of the Senate to confirm the president's choices. The discussion in THE FEDERALIST Nos. 76 and 77 (Henry Cabot Lodge ed. 1889) on the Appointments Clause reveals the intent of the Framers to create a smooth and rational process that would enhance the prospects for the selection of qualified and properly credentialed executives whose performance in office would satisfy both the President and the Senate and complement the functioning of

both institutions. *Id.* ("The true test of good government is its aptitude and tendency to produce a good administration. . . . It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union; and it will not need proof that on this power must essentially deepen the character of its administration."). *See also id.* at 473, 475; *id.*, No. LXXVII at 477, 479.

These prescriptions do not include, and by their apparent intent, prohibit maneuvers to diminish or downgrade the power of either institution in the appointment process. They call for strict obedience to the words ultimately selected by the Framers and those words and that intent caution that the conduct this Court is reviewing in this case is not what the Framers had in mind. The legal conclusion the Executive Branch is seeking would diminish the power of one branch to suit the objectives of the other, overriding the longstanding rules of the Senate. It assumes also that the appointment, even temporarily, of candidates that are not acceptable to one branch should serve anyway because the other prefers it that way. In *Plaut v. Spendthrift Farm*, *Inc.*, 514 U.S. 211 (1995), this Court held:

> But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls

> and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Plaut, 514 U.S. at 239.

The principles discussed caution against an expansive or creative interpretation of the text of the Recess Appointments Clause. Although it may be desirable to fill important jobs that happen to be vacant, it serves no good purpose to fill them notwithstanding Constitutional limitations.

Neither the small business community nor the country as a whole is well-served by appointments that are made in derogation of the Constitutional requirements. These appointments, contentious as they are, do not advance the seeking of middle ground that promotes predictability and certainty in the governing of regulated businesses. Since all partisan advocates may always seek the advantage of diminishing the power of their adversaries, such a practice ensures dysfunction well beyond the outcome or the government's objective in this case.

For all of these reasons, an outcome that causes significant unbalancing of our system of checks and balances and separation of powers is a bad outcome for the small business community.

III. The Court Below Properly Held that the Issues Presented Before this Court Were Not Waived

In *NLRB v. RELCO Locomotives, Inc.,* Nos. 12-2111, 12-2203, 12-2447, 12-2503 (8th Cir. Aug. 20, 2013), the Eighth Circuit found that the petitioner waived its challenge to the Board's composition because it did not raise the issue before the deficient Board itself. That finding poses no impediment to consideration of this case for three reasons.

First, reading 29 U.S.C. § 160(e) as a jurisdictional bar contravenes the presumption that judicial review is available for constitutional claims.[2] *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of judicial review is presumed.") (*citing Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975)). Because "[c]onstitutional questions . . . are unsuited to resolution in administrative hearing procedures, . . . access to the courts is essential to the decision of such questions." *Califano*, 430 U.S. at 109. Accordingly, statutes will not be construed "to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Id.*

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[2] Section 10(e) of the Act provides in relevant part that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e).

Here, reading section 160(e) as a jurisdictional or prudential bar to challenging the constitutionality of these recess appointments would do just that. It would impermissibly "close[ ] the federal forum to the adjudication of colorable constitutional claims." *Id.*

Second, in addition to impermissibly foreclosing review of an important constitutional question, such a reading of section 160(e) asks parties to predict that a constitutional claim might arise and then raise it before an agency that cannot and will not resolve it. The law imposes no such duty of clairvoyance.

Asking litigants to predict that the Board may lose its quorum or become populated with invalidly appointed Members while their cases are pending overlooks that cases can remain pending at the Board for years before a decision issues. At the time an appeal is filed with the Board, there is no way to know which "Board" will actually decide the case. *See e.g. Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (exceptions to ALJ decision filed in 2002, Board decision issued on June 27, 2008).

Requiring litigants to raise constitutional claims before an agency also contravenes the rule that agencies generally cannot resolve constitutional claims. *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 294 (7th Cir. 1976) ("Generally, federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative action.").

Finally, even if it could decide the constitutional issue, the Board refuses to decide challenges to the

validity of its Members' appointments. *See Center for Social Change, Inc.*, 358 NLRB No. 24 (2012) ("Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act.").

Third, the *RELCO* decision ignores that asking the invalidly appointed Board to refrain from deciding the case would have been futile in light of the Board's public statements and actions since the D.C. Circuit issued the decision in *Noel Canning*.

The day that *Noel Canning* was decided, the Chairman of the NLRB issued a statement expressing disagreement with the decision and stating that the Board "will continue to perform our statutory duties and issue decisions." *Statement by Chairman Pearce on recess appointment ruling,* dated January 25, 2013.[3] True to these words, the Board has treated the *Noel Canning* decision as a legal non-event. Shortly after *Noel Canning* was decided, the Board denied a motion to dismiss an unfair labor practice complaint based on the holding of that case. *See Bloomingdale's, Inc*., 359 NLRB No. 113 (2013). Since then, the Board has rejected challenges to its composition at every turn. *See, e.g., H&M Int'l Transp., Inc.*, No. 22-CA-095095 (May 20, 2013) (rejecting *Noel Canning* challenge to Board-issued subpoena "[f]or

[3] Available at http://www.nlrb.gov/news-outreach/news-story/statement-chairman-pearce-recess-appointment-ruling.

the reasons stated in *Bloomingdale's, Inc.*"); *Hyundai Power Transformers USA*, No. 15-CA-095044 (2012) (denying motion to dismiss "[f]or the reasons stated in *Bloomingdale's, Inc.*"). The government has not identified a single reported decision where the Board has adhered to the D.C. Circuit's decision in *Noel Canning*. In light of the Board's words and actions, asking it to adhere to *Noel Canning* would be futile. *See W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1346 (D.C. Cir. 2008) (noting that "extraordinary circumstances" may exist where an "agency had already rejected [petitioner's] contested argument in other proceedings."). Futility of this type is a recognized exception to the waiver provision of section 160(e).

Here, the D.C. Circuit found that extraordinary circumstances justified a waiver and no party has challenged that finding. The waiver argument is thus itself waived and that too disposes of any perceived jurisdictional or other impediment to reaching the merits of the constitutional challenge.

CONCLUSION

The decision of the United States Court of Appeals for the D.C. Circuit should be affirmed.

Respectfully submitted,

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