No. 12-1281

In The
Supreme Court of the United States

THE 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 Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

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 arose 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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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3(a), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondent Noel Canning.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF's members include individuals who live and work in every State of the Nation. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Central to the notion of a limited government is the constitutional principle of separation of powers.

[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with the Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Indeed, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo,* 424 U.S. 1, 122 (1976). Executive actions that negate the safeguards so painstakingly crafted by the Framers result in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Therefore, MSLF respectfully submits this amicus curiae brief in support of Respondent Noel Canning, urging that this Court affirm the D.C. Circuit's ruling curtailing the politically-motivated abuse of the Recess Appointments Clause.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Recess Appointments Clause.

The Appointments Clause of the United States Constitution provides that 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 3. The Recess Appointments Clause

allows the President to make appointments when the Senate is in recess and thus unavailable to provide its advice and consent: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 4.

B. The National Labor Relations Act.

The Labor Management Relations Act of 1947 created the National Labor Relations Board ("NLRB"), an independent federal agency meant to:

> [P]rotect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141. The NLRB has been characterized as a "fact-finding tribunal with inquisitorial powers." *N.L.R.B. v. Bell Oil & Gas Co.*, 98 F.2d 870 (1938). It hears appeals from adjudicative decisions made by the many administrative law judges who resolve disputes between employers and employees. The National Labor Relations Act provides that the NLRB "shall consist of" five members, "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). The Act requires the

NLRB to have a quorum of three members in order to operate. 29 U.S.C. § 153(b).

II. PROCEDURAL BACKGROUND.

On December 17, 2011, the Senate was in session. It passed an adjournment order by unanimous consent and, from December 20, 2011 to January 20, 2012, met every three days in *pro forma* sessions. During these sessions, the Senate passed "a 2-month extension of the reduced payroll tax, unemployment insurance, TANF, and the Medicare payment fix[.]" 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).

On January 4, 2012, during a three-day adjournment between *pro forma* sessions, the President invoked the Recess Appointments Clause in a putative effort to appoint Sharon Block, Terence Flynn, and Richard Griffin to the NLRB without the advice and consent of the Senate. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 498 (D.C. Cir. 2013). The NLRB thus consisted of five members, three – Block, Flynn, and Griffin – who were purportedly legitimate recess appointees. *Id.*

In September of 2011, an NLRB administrative law judge issued an order against Noel Canning in a dispute between the Washington soft-drink bottler and Teamsters Local 760 ("the Union"). *Id.* at 494. The Union had alleged that Noel Canning had failed to acknowledge a properly executed collective bargaining agreement, and Noel Canning alleged that the agreement had never been finalized. *Id.* Noel

Canning appealed the administrative law judge's decision to the NLRB, and the NLRB, acting through a three-member panel, affirmed that decision. *Noel Canning, A Division of the Noel Corp*., 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012). Noel Canning then appealed the NLRB's decision to the D.C. Circuit on both statutory and constitutional grounds. *Noel Canning*, 705 F.3d at 493.

Noel Canning's constitutional arguments alleged that because three of the board members had been illegitimately appointed, the NLRB lacked the quorum required by 29 U.S.C. § 153(b) and thus could not make legally binding decisions. *Id*. Noel Canning argued that NLRB members Block, Flynn, and Griffin were illegitimately appointed because: (1) they had been appointed during a Senate adjournment that was not a recess; and (2) their appointments filled vacancies that had not opened during the recess. *Id*. Therefore, the President did not have power under the Recess Appointments Clause to appoint any of them to the NLRB. *Id.* The D.C. Circuit held in favor of the NLRB on the statutory arguments and in favor of Noel Canning on the constitutional arguments. As to the constitutional question, the D.C. Circuit held that: (1) "the Recess" of the Senate, for purposes of the Recess Appointments Clause, is one between enumerated sessions of the Senate; and (2) a vacancy "happens" during the recess only when it first opens during the recess. *Id.* at 499. On April 25, 2013, the NLRB filed a petition for writ of certiorari. On May 23, 2013, Respondent

Noel Canning filed its response, but did not oppose the petition, due to the important constitutional issues at stake. On June 24, 2013, this Court granted the petition.

SUMMARY OF THE ARGUMENT

MSLF submits this amicus brief to emphasize the textual and historical absurdity of any departure from the D.C. Circuit's reasoning and ruling. The D.C. Circuit's decision in *Noel Canning* is consistent with the history and text of the Recess Appointments Clause. The modern purpose of the Recess Appointments Clause is also best served by the D.C. Circuit's interpretation of the clause. Petitioner's interpretation of the Recess Appointments Clause would render the clause a nullity, in violation of well-established constitutional jurisprudence. Such an interpretation would also eliminate basic procedural safeguards set forth in the Constitution in favor of political gamesmanship. Indeed, Petitioners explicitly point to political expediency as a reason to nullify the Recess Appointments Clause.

ARGUMENT

The D.C. Circuit correctly held: (1) that "the Recess" refers to an intersession of the Senate; and (2) that "may happen" refers to vacancies that first open during the recess of the Senate. *Noel Canning*,

705 F.3d at 499. The most natural reading of the Recess Appointments Clause supports the D.C. Circuit's holding. Moreover, the historical purpose of the Recess Appointments Clause supports the D.C. Circuit's holding.

I. THE RECESS APPOINTMENTS CLAUSE PLACES CLEAR TEMPORAL LIMITS ON PRESIDENTIAL POWER.

On its face, the Recess Appointments Clause is a narrow temporal exception to the general rule requiring the President to secure the Senate's advice and consent when making appointments. U.S. Const. art. II, § 2, cl. 4. The clause was meant to prevent government paralysis when the Senate was unavailable. More recently, however, it has been used as a political tool to avoid the advice and consent requirements of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The D.C. Circuit's decision in *Noel Canning* interpreted the Recess Appointments Clause correctly, and as a result, limited the future improper use of the clause for political ends.

A. The Original Purpose Of The Recess Appointments Clause Was To Prevent Government Paralysis When The Senate Was Unavailable.

It is axiomatic that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention

is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731-32 (1931) (citations omitted). This Court has recognized that inquiries into the early interpretations of a legal text are "a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Early interpreters such as Alexander Hamilton, George Washington, and Thomas Jefferson were keenly aware of the political context in which the Constitution was drafted, and their interpretations are more likely than later interpretations to comport with the Constitution's original meaning. An examination of early interpretations shows that the Recess Appointments Clause was originally meant to ensure the government's smooth operation in the event of the Senate's unavailability, by allowing the President to temporarily replace an important officer. It was a practical solution to a practical – not political – problem.

When explaining the Constitution's requirement that the Senate advise and consent to the President's nominations of officials, Alexander Hamilton wrote that it "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters. . . ." FEDERALIST NO. 76, at 425 (Hamilton) (Clinton Rossiter ed., 1961). Hamilton viewed the possibility of senatorial disapproval of nominees as a "considerable and salutary restraint" on the President's power. *Id.* at 427. However, the Constitution's drafters recognized

that the Senate would be unavailable to provide their advice and consent for up to nine months out of the year, when the Senate was in its intersession recess. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 380 (2005). Not only did the founding era's transportation and communication technology make it difficult to reconvene a recessed Senate, but the political theory of the time also held that it was "improper to oblige [the Senate] to be continually in session." FEDERALIST NO. 67, at 378 (Hamilton) (Clinton Rossiter ed., 1961). If the government were to run smoothly despite the opening of vacancies at times when the Senate was unavailable to provide its advice and consent, then the President's appointment power needed to be expanded during those times.

The Recess Appointments Clause, as Hamilton explained, provided the President not with a means of circumventing the advice and consent requirement, but rather with "an auxiliary method of appointment, *in cases to which the general method was inadequate*." *Id.* at 377 (emphasis added). Early Presidents' use of their recess appointment power demonstrates the function of the clause as a stopgap measure. When George Washington was faced with a vacancy late in the session of the Senate, he would use the advice and consent procedure to appoint a suitable candidate to the office before finding out whether or not he wanted the job. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA

L. Rev. 1487, 1522 (2005). Then, if the appointee resigned from the office during the Senate's recess, Washington would fill it with a temporary recess appointment. *Id.* Washington's method of filling these appointments clearly showed a strong preference for the advice and consent procedure; recess appointments were used to fill offices only in the event that an appointee declined to serve.

Founding-era history is full of interpretations supportive of the D.C. Circuit's most recent holdings on the Recess Appointments Clause. As long ago as 1792, Attorney General Edmund Randolph (the first to hold the position), advised then-Secretary of Foreign Affairs Thomas Jefferson that the Recess Appointments Clause could not be used to appoint a candidate to the newly-created position of Chief Coiner of the Mint. T.J. HALSTEAD, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 4 (2005) (citing Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 The Papers of Thomas Jefferson, at 165-67 (John Catanzariti et al., ed., 1990); Hartnett, *supra*, at 384-86; Rappaport, *supra*, at 1518-19)). Randolph determined that the vacancy had "happened" or arisen, when the position was created, at which time the Senate was in session. *Id.* (citing Randolph at 166; Rappaport, *supra*, at 1519). Randolph based his opinion on much of the same reasoning put forth in 2013 by the D.C. Circuit, and noted that the Recess Appointments Clause "must be 'interpreted strictly' because it serves as 'an exception to the general

participation of the Senate.'" *Id.* Similarly, in 1799, then Major General of the Army Alexander Hamilton advised the Secretary of War that the "President cannot fill a vacancy which happens during a session of the Senate." *Id.*

Examination of early interpretations of the Constitution and early use of the Recess Appointments Clause clearly shows that the original purpose of the clause was to ensure that the government's smooth operation would not be interrupted by the Senate's unavailability to help the President replace an important officer.

B. The Modern Use Of The Recess Appointments Clause For Political Purposes Is Not Supported By The Text Or History Of The Clause.

Professor Rappaport writes that "as a matter of constitutional theory, the claim that we can trust the President to exercise a power only when it is needed is flatly inconsistent with the approach of the Constitution." Rappaport, *supra*, at 1542. Indeed, the Framers were adamant that their proposed tripartite government would succeed in large part because "its constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." FEDERALIST NO. 51, at 290 (Madison) (Clinton Rossiter ed., Mentor 1999). It thus follows that every grant of power found in the Constitution has a dual function: at the same time as it serves to

provide the power to act, it also serves to limit the time, manner, or place where that power may be used.

The passing of centuries has not changed the basic function of the Recess Appointments Clause, but it has shown that Presidents can and will test the limits of when they may expand their appointment power. President Johnson was the first to make recess appointments under circumstances that suggest a purely political motive for expanding his appointment power; Rappaport notes that he made the appointments while he was "battling with the Republican Congress that impeached him," and that "[t]he disagreements between the President and Congress focused in part on appointments and personnel." Rappaport, *supra*, at 1487. Theodore Roosevelt's attempt to make 160 appointments during a seconds-long "constructive recess" was characteristic of the fondness for expanded executive power that he demonstrated throughout his presidency. *See* Hartnett, *supra*, at 416-17.

Although their context suggests that Johnson's and Roosevelt's recess appointments may have been politically motivated, President Carter seems to be "the first modern president to utilize the clause expressly to avoid the Senate's advice and consent." Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2213 (2004). Carter wanted to put John McGarry on the Federal Election Commission despite the Senate's concerns about his financial

history and his ties to House Speaker Tip O'Neil. *Id.* at 2214 n.54. After the Senate refused twice to act on his nomination to the Commission, Carter used a recess appointment to secure McGarry's spot. *Id.* at 2214. Following Carter's lead, President Reagan also used his recess appointment power to circumvent the Senate's disapproval of numerous appointments to administrative agencies such as the Board of Governors of the Federal Reserve System, the Nuclear Regulatory Commission, and the National Council on the Humanities. *Id*. As Professor Carrier observes, Reagan's use of the recess appointments power "shaped executive agencies in ways that would have been difficult, if not impossible, if the President had allowed the Senate to play its normal constitutional role." *Id.* at 2216. This trend has continued; while in office Presidents George H.W. Bush, William Clinton, and George W. Bush all made recess appointments during intrasession recesses. Rappaport, *supra*, at 1548.

This overview of presidential limit-testing has illuminated a secondary purpose of the Recess Appointments Clause: it is necessary not only to provide the President appointment powers in times when he must unilaterally act in order to keep the government running smoothly, but also to limit those times when the President may unilaterally appoint an officer if no such exigency exists. While early interpreters of the Constitution understood that the Recess Appointments Clause was a means to keep the government running smoothly in case of the Senate's unavailability,

more modern interpreters clearly see the clause as a convenient shortcut to be used whenever the Senate appears to disapprove of a President's favored nominee. The "considerable and salutary restraint" on Presidential power contemplated by Hamilton has, in recent years, been made into a paper tiger which the President may brush away so long as he is willing to wait for the Senate to turn its back.

Meanwhile, as Presidential creativity regarding the Recess Appointments Clause has increased, so has the size and power of the administrative state. In the past century, executive agencies have expanded their control of American life to the point where they operate as a fourth branch of government. *See City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863 (2013) (Roberts, J., dissenting). They are given broad powers by Congress and broad discretion to interpret those powers by the Judiciary; the power of the Executive to appoint and remove their officers is one of the few means left to the government of controlling the inertia of the administrative state.

As Carrier pointed out in his discussion of Reagan's recess appointments, the power to appoint administrative officers is the power to shape a branch of government with an immense amount of control over American life. Carrier, *supra*, at 2215. It is doubtful that the Constitution is intended to allow the President to wield this vital authority with no input from Congress. The Founding Fathers were skeptical about granting too much appointment power to the President precisely because of the

importance of appointment authority in the eighteenth century. *Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991) (noting that "[t]he 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.") (internal citation and quotations omitted). It follows that their skepticism on unilateral Presidential appointment authority would be increased, rather than decreased, by the growth of the administrative state in the years since the Founding Era.

Furthermore, as time has built up the importance of the President's appointment power, it has worn away the necessity for a stopgap measure to keep the government running smoothly in the event of the Senate's unavailability. Today's technology has made communication and travel far easier, quicker, and less expensive than the Founders could have imagined. The Senate can be made aware of vacancies in government posts immediately after they open, and most Senators can be called from other business into the Capitol within a few days. This stands in stark contrast to the technological situation acknowledged by the Drafters in 1789, when the Senate would truly be unavailable and out of contact with the President for the majority of the year. Hartnett, *supra*, at 380.

When the Constitution was first drafted, the advice and consent requirement of the Appointments

Clause was considered a valuable check on Executive power. The Recess Appointments Clause was intended to keep the government running smoothly in the event of a vacancy happening while the Senate was unavailable. Advances in technology have made the Recess Appointments Clause less necessary as a practical matter. At the same time, Presidents have made increasing use of the Recess Appointments Clause to circumvent the advice and consent requirement. Thus, the need for expanded Presidential power has decreased at the same time as Presidents have become increasingly fond of expanding their power for purely political reasons. The D.C. Circuit's holding in *Noel Canning* appropriately recognized this dichotomy and interpreted the Recess Appointments Clause correctly: as a temporal limit on the President's appointment powers.

II. THE D.C. CIRCUIT CORRECTLY HELD THAT "THE RECESS" REFERS TO RECESSES BETWEEN ENUMERATED SESSIONS OF THE SENATE.

The D.C. Circuit held that "the Recess" refers not to the intrasession recesses which occur while the Senate is still in session, but rather to the intersession recesses which occur between sessions of the senate. *Noel Canning*, 705 F.3d at 500. The D.C. Circuit was correct in its holding, as well as in the observation that "[n]ot only logic and language, but also constitutional history supports [this] interpretation." *Id*.

A. The Text Of The Recess Appointments Clause Supports The Intersession Interpretation Of "The Recess".

Sound analysis of legal text begins with the text's plain meaning. *Heller*, 554 U.S. at 605-06. The most natural, grammatical reading of the Recess Appointments Clause clearly implies that "the Recess" of the Senate occurs only when the Senate is not in session. First, the Framers used a definite article – "the" – to modify "recess." Second, "the Recess" and "session" are juxtaposed in a way that makes it implausible to read "the Recess" as ever occurring at the same time as "session." Moreover, at the time the Constitution was drafted, the term "recess" had a technical meaning which supports the intersession interpretation.

The Framers used a definite article, referring to "the Recess." Definite articles are ordinarily used to refer to a singular object, such as "recess," as well as to demarcate an object from others which can be described by the same noun. MARK LESTER, GRAMMAR AND USAGE IN THE CLASSROOM 318 (2d ed. 2001). Reading the Recess Appointments Clause with this conventional rule in mind illustrates that the clause addresses not just any recess, but only one particular recess. This interpretation matches perfectly with the typical schedule of the Senate at the time that the Constitution was drafted: the Senate would meet for one session per year, which was followed by one intersession recess. Carrier, *supra*, at 2210. Furthermore, other uses of "recess" in the Constitution demonstrate that the definite article "the" distinguishes

"the Recess" as a singular event. As Carrier observes, Art. I, § 3.2 references vacancies which occur "during *the* Recess" of State legislatures, which generally had annual meetings and annual recesses. *Id.* at 2219.

Much has been made of the fact that another clause of the Constitution refers to "the absence of the Vice President." Hartnett, *supra*, at 414; Rappaport, *supra*, at 1567 n.225. The argument goes that because "the absence" does not refer to a specific absence of the Vice President, the Framers were using "the" and "a/an" interchangeably. Hartnett, *supra*, at 413-14. From there, proponents of the intrasession interpretation of "recess" go on to argue that "the" and "and" are used interchangeably throughout the Constitution, but this argument is flawed from its beginning. *Id*. "The absence of the Vice President" does *not* refer to just any absence of the Vice President, but rather to absences of the Vice President from the Senate which occur during the session of the Senate and therefore require the Senate to appoint a President *pro tempore* before conducting business. It is perfectly logical to use a definite article to refer to a particular kind of absence which occurs during a particular period of time and which triggers a particular event. The presence of a definite article in Article I is not a sound basis for an argument against the intersession interpretation.

Second, as the D.C. Circuit pointed out, there is a dichotomy between "the Recess" and "session" in the Constitution which strongly suggests that "the Recess" cannot take place within a session. *Noel Canning*, 705

F.3d at 500. The textual positioning of "the Recess" and "session" provides strong support for the court's finding that the Drafters created a dichotomy between those words. The full text of the clause shows this positioning: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 4. Here, we see that the Drafters have created a parallel structure wherein the practical end of the clause (filling vacancies that arise during recesses) is separated from its means (granting commissions which expire at the end of the Senate's next session) by a comma. Both "the Recess" and "session" are included in adverbial phrases of time which limit the ends and the means of the clause, respectively. "The Recess" limits the time in which the ends of the clause are necessary; obviously, there would be no need for interim appointments were the Senate available to provide its advice and consent. Similarly, "session" puts a time limit on the means which may be used to accomplish the ends: the President cannot make permanent appointments to fill a recess vacancy, but may only appoint an officer to serve until the end of the next session. The distinct functions of the two phrases suggest that they have distinct meanings, and strongly support the D.C. Circuit's ruling that "[e]ither the Senate is in session, or it is in the recess." *Noel Canning*, 705 F.3d at 500.

Finally, the intersession interpretation is supported by historical evidence showing that "the Recess"

had a technical meaning in the political field. Rappaport discusses three types of legislative adjournments used by the English Parliament at the time of the Revolution: adjournments, prorogations, and recesses. Rappaport, *supra*, at 1550. Adjournments were short breaks and could be called by either house; prorogations were monarchically-ordered ends to a session (followed by a new session); and dissolutions ended Parliament and triggered elections after a monarchical order, the death of the monarch, or after a Parliament had lasted seven years. *Id.* at 1550-51. The Founders continued these mechanisms while expunging the role of the monarchs; thus, adjournments were expressly allowed by the adjournments clause, and dissolutions were engineered to occur every two years. *Id*. Prorogations, on the other hand, had to be restructured somewhat to eliminate the monarch's role. *Id*. The power to prorogue, Rappaport argues, was given to the houses, and prorogations were re-named "Recesses" in order to further bury the memory of monarchial rule in the language of republican government. *Id.* This history of the intersession recess shows that "the Recess of the Senate" does not refer to just any break in legislative proceedings, but rather to the democratic progeny of the monarchically-ordered prorogation.

Because the syntax, grammar, and textual history of the Recess Appointments Clause clearly support the intersession interpretation of "the Recess," the D.C. Circuit correctly held that "the Recess" refers to intersession recesses.

B. The Modern Purpose Of The Recess Appointments Clause Supports The Intersession Interpretation Of "The Recess."

As demonstrated above, it remains the primary purpose of the Recess Appointments Clause to place a temporal limit on the President's appointment power, even though its anti-paralytic purpose has taken a secondary role in the twenty-first century. Either purpose is served far better by the intersession interpretation of "the Recess" than the intrasession interpretation.

First, the anti-paralytic purpose is served well by a Recess Appointments Clause which only allows appointments during intersession recess. The Framers included the clause as a way to keep the government running during periods where the Senate was unavailable to provide its advice and consent on Presidential appointments. Today, the Senate is seldom unavailable as a practical matter; communication and transportation technology have advanced to the point where the President and Senate will be made aware of a vacancy's sudden opening by death or retirement within hours or even minutes of the occurrence. No serious argument can be advanced that limiting recess appointments to intersession recess will seriously impair the government's operation. Even in the unlikely event that an important vacancy opens and the Senate cannot be reconvened within a practical period of time, the President's existing power to make acting appointments is

adequate to keep the government running. Rappaport, *supra*, at 1562.

Second, the power-limiting function of the Recess Appointments Clause is better served by the intersession interpretation than the intrasession interpretation. By restricting the President's ability to unilaterally make appointments to times when the Senate is between sessions, the intersession interpretation of the Recess Appointments Clause ensures that the President cannot sit on controversial appointments until the next convenient intrasession recess. Neither can he peck away at the period of time that is commonly considered long enough to count as an appointment-worthy intrasession recess, as Presidents during the twentieth century have been very eager to do. *See* Rappaport, *supra* at 1548. The intrasession interpretation, on the other hand, provides Presidents with a plethora of opportunities to circumvent the Constitution's requirement that the Executive not unilaterally make appointments when the Senate is available to provide its advice and consent. The tendency of Presidents to use the Recess Appointments Clause for purely political purposes, combined with the decreased practical necessity for a stopgap measure to keep the government running in the event of Senatorial unavailability, demonstrate that the power-limiting function of the Recess Appointments Clause is better served by the intersession interpretation than the intrasession interpretation.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT "MAY HAPPEN" REFERS TO VACANCIES THAT OPEN DURING THE RECESS.

The D.C. Circuit held that "happen" refers to vacancies that first arise during the recess of the Senate, rather than to vacancies which happen to exist when the Senate goes into recess. The Circuit Court correctly held that the "arise" interpretation of "happen" is correct, because (1) the text of the Recess Appointments Clause supports the "arise" interpretation, and (2) the modern primary purpose of the Recess Appointments Clause supports the "arise" interpretation.

A. The Text Of The Recess Appointments Clause Supports The "Arise" Interpretation Of "May Happen."

When analyzing an ambiguous textual provision, one should begin, as the D.C. Circuit did, "by looking to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution." *Noel Canning*, 705 F. 3d at 501 (citing *Heller*, 554 U.S. at 605-06); *see also Sprague*, 282 U.S. at 732; *Edwards v. Aguillard,* 482 U.S. 578, 594-95 (1987) (statutory interpretation requires inquiry into the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute. . . ."); *Crawford v. Washington*, 541 U.S. 36, 42-47 (2004) (surveying the common-law right of

confrontation at the time of the founding in conjunction with the text to interpret the Confrontation Clause). The most natural initial reading of "may happen" supports the "arise" interpretation; moreover, logic and grammar support that reading as well.

Founding-era dictionaries define happen as "to come by chance" and "to come without one's previous expectation." Rappaport, *supra*, at 1503. These definitions are consistent with the common usage of "happen" which has survived into the modern era. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 567 (11th ed. 2003). Although interpreters such as Hartnett argue that "happen" may be used to describe an event which is already occurring (e.g., the Vietnam War happened during the presidency of Richard Nixon, although it began earlier), this contention fails to account for the fact that different conjugations of "to happen" carry different meanings in the English language. *See* Hartnett, *supra* at 382 n.22. In fact, the Merriam-Webster Dictionary has separate entries for "happen" and "happening." The entry for "happen" offers five definitions which conform to the "arise" interpretation, and the two entries for "happening" offer definitions which conform to the "exist" interpretation. MERRIAM-WEBSTER COLLEGIATE DICTIONARY at 567. When something "happens," according to Merriam-Webster, it occurs by chance. *Id.* A "happening" or something that is "happening," on the other hand, "is particularly interesting, entertaining, or important" or "offer[s] much stimulating activity." *Id.* The various conjugations of "happen" may all originate from

the same infinitive, but they carry distinct meanings which should be noted in a thorough textual analysis.

The logic of the clause's sentence structure also supports the "arise" interpretation. Constitutional provisions should not be read in a way which makes any part of them superfluous. *Marbury v. Madison,* 5 U.S. 137, 174 (1803) ("[i]t cannot be presumed that any clause in the constitution is intended to be without effect. . . ."). If the clause is interpreted to mean that "the President shall have power to fill up all Vacancies that may happen to exist during the recess," it becomes indistinguishable from a clause which states that "the President shall have power to fill up all vacancies during the recess." Professor Hartnett argues that this is not the case, and that "that may happen to exist during the Recess" is necessary language which restricts the President from filling future vacancies with recess appointments. Hartnett, *supra*, at 381 n.20. However, it is difficult to see why the Drafters would choose to restrict Presidents from filling future vacancies with recess appointments while leaving them free to fill already-existing vacancies. A recess appointment made to a future vacancy would, after all, be shorter in duration than a recess appointment to an existing vacancy. The office would become vacant during the next session of the Senate, and the recess appointment would last only until its end, whereas a recess appointment to fill an existing vacancy would last for the entirety of the Senate's next session. In both cases, as Hartnett himself observes, the President

and Senate would have ample time to perform their constitutional duty of nominating and confirming a new appointee to the vacancy before the end of the next session. Because there is no clear distinction between allowing the President to fill vacancies that existed before the recess and allowing him to fill vacancies that will not exist until after the recess, the "happen to exist" interpretation creates a superfluity. Because constitutional provisions should not be read in a way which renders any of their language superfluous, the "arise" interpretation is permissible while the "happen to exist" interpretation is not.

It has been further suggested that the "exist" interpretation does not necessarily create a superfluity, because it is unclear whether the prepositional phrase "during the Recess" modifies (1) "vacancies that happen" or (2) "shall have the power." *Id.* This suggestion is without merit. There are three types of prepositional phrases which are used according to the information the writer needs to convey: prepositional phrases of time, prepositional phrases of place, and prepositional phrases of manner. LESTER, *supra*, at 61. Throughout the Constitution, textual grants of power to a governmental authority are modified by prepositional phrases of manner (which often have a temporal and/or spatial element, but convey a broader range of information than prepositional phrases of time or place). *See* U.S. Const. art. II, § 1, cl. 2; art. III, § 3, cl. 2. Thus, when looking for a phrase which modifies "shall have the power," the most likely

candidate is a prepositional phrase denoting the manner in which the President shall use the power.

To say that the President shall have the Recess-Appointments power "during the Recess" is clearly out of line with the overall structure of textual grants of power within the Constitution, because that prepositional phrase of time does not convey the kind of information used elsewhere in the Constitution to modify textual grants of power. Rather, "shall have the power" is modified by a prepositional phrase of manner: "by granting Commissions which shall expire at the end of their next Session." U.S. Const. art. II, § 2, cl. 4. "During the Recess" clearly modifies "vacancies that happen." For the reasons described in the previous paragraph, an interpretation of the Recess Appointments Clause which essentially substitutes "happen to exist during the Recess" renders superfluous the phrase "vacancies that happen." Because of the presumption against superfluity, the "exist" interpretation of "happen" is impermissible.

Because the "exist" interpretation of "happen" is impermissible, and because the "arise" interpretation of "happen" is supported by the logic, grammar, and history of the Recess Appointments Clause's text, the D.C. Circuit correctly held that "happen" refers to vacancies which first open up during the recess of the Senate.

B. The Modern Primary Purpose Of The Recess Appointments Clause Supports The "Arise" Interpretation Of "May Happen."

The "arise" interpretation adequately performs the power-limiting function of the Recess Appointments Clause, and the "exist" interpretation fails to serve that function. The modern primary purpose of the Recess Appointments Clause is to restrict the President from unilaterally appointing officers unless it is necessary to do so in order to keep the government running smoothly. The centuries that have passed since the Constitution's ratification have brought both technological advances and an increase in Presidential use of the Recess Appointments Clause for purely political purposes; as the need for the Recess Appointments Clause as an anti-paralytic tool has decreased, the need for the Recess Appointments Clause as a restraint on unilateral Executive action has increased.

The "arise" interpretation clearly limits the President's ability to unilaterally appoint officers on those occasions when a vacancy first opens up during a recess of the Senate. In such a situation, the Senate is unavailable to provide its advice and consent, and the President must expand his appointment power to keep the government running smoothly. This necessity was recognized by the Drafters, and it is the reason that the Recess Appointments Clause was included in the Constitution. The "arise" interpretation of "may happen" not only allows the President to unilaterally

make appointments in times of need, but also constrains his ability to use that power to those times of need. Under this interpretation, he may not sit on contentious appointments until the Senate has gone into recess; instead, he must work with the Senate, which is able to use its advice and consent as the "considerable and salutary restraint" on the President's power envisioned by Hamilton. The "arise" interpretation is thus sufficient to perform the power-limiting function of the Recess Appointments Clause as well as its anti-paralytic function.

The "exist" interpretation, on the other hand, is unnecessary for the clause's anti-paralytic function and fails completely to perform its power-limiting function. It may be argued that the Drafters must have intended to allow the President to fill any vacancy that might happen to be open at the time the Senate goes into recess, because news of a vacancy that opened during the Senate's session might not have reached Washington until the recess. Developments in communication and transportation technology have weakened this argument. In the age of the smart phone and the Twitter feed, news literally travels at light speed; the President will have ample opportunity to present a nominee to the Senate for its advice and consent even if a vacancy opens close to the end of the session. Should the Senate be unable to confirm a nominee in time, Congress still retains its power to make acting appointments to keep the government running smoothly. Rappaport, *supra*, at 1513-17 ("[u]nder acting appointments, Congress

permits the occupant of one office to perform the duties of a second office when that second office is vacant . . . acting appointments offer an extremely flexible mechanism for addressing the problems of late session vacancies or any vacancies that would take a long time to fill. Yet, these appointments fully respect the senatorial consent provision, because they both require all of the officials who act as superior officers to have secured senatorial consent and also allow Congress to restrain acting appointments should it believe the President has abused his authority."). The "exist" interpretation is thus unnecessary for the Recess Appointments Clause to fulfill its anti-paralytic function; at the same time, it fails to perform its power-limiting function. As described above, a President attempting to cooperate with a contentious Congress would neither need to compromise nor settle his differences with the Senate as the Drafters envisioned. Rather, he may override the Senate's advice and consent by simply waiting until the next convenient recess to secure the nominee he desires.

Not only does the text of the Recess Appointments Clause strongly support the "arise" interpretation of "may happen" through grammar and logic, but the original and modern purposes of the clause also support this interpretation. The "arise" interpretation is the natural and logical reading of "may happen," and the "arise" interpretation is necessary and sufficient to fulfill both the anti-paralytic and power-limiting functions of the Recess Appointments Clause. For these reasons, as well as the numerous strong

arguments against the "exist" interpretation, the D.C. Circuit correctly held that "may happen" should be interpreted to mean "arise."

CONCLUSION

For the foregoing reasons, this Court should affirm the D.C. Circuit's holdings (1) that the President may only make recess appointments during intersession recesses, and (2) that the President may only make recess appointments to fill vacancies that first opened during a recess of the Senate.

Respectfully submitted,

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