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 OF THE ATLANTIC LEGAL FOUNDATION AND THE JUSTICE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and application of sound science in legal proceedings. It provides effective and decisive legal representation, without fee, to parents, scientists, educators, and other individuals, corporations, and trade associations.

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Amici curiae have a vital interest in ensuring that the Constitution's structural protections remain a bulwark of individual liberty. The interests of *amici curiae* are directly implicated by this important case. The correct interpretation of the Recess Appointments Clause raises fundamental questions concerning the separation of powers that squarely affect the missions of both organizations.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

"The Appointments Clause sets out the respective powers of the Executive and Legislative Branches with admirable clarity." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring). Under Article II, "[t]he President has the sole responsibility for nominating [principal] officials, and the Senate has the sole responsibility of consenting to the President's choice." *Id.* "The Framers understood … that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). "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[.]" The Federalist 76, at 510 (A. Hamilton) (Jacob E. Cooke ed., 1961).

"Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself," and the Court may not "rewrite the particular balance of power that the Constitution specifies among the Executive, Legislative, and Judicial Departments." *Public Citizen*, 491 U.S. at 486-87 (Kennedy, J., concurring). The government nonetheless asks this Court to do just that by converting a narrow exception allowing the President to "fill up all Vacancies that may *happen* during *the Recess* of the Senate," U.S. Const. art. II, § 2, cl. 3 (emphases added), into a sweeping grant of unilateral executive authority to make such appointments whenever a vacancy may "*exist*" during any "period of cessation from usual work," Brief for the United States ("U.S. Br.") at 7-8.

The government's view is incompatible with the text, structure, purpose, and history of the Recess Appointments Clause. The Clause allows recess appointments that arise—and are then filled by the President—during a break between legislative sessions. Article II makes plain that "the Recess" occurs between a legislative Session and the "next Session." U.S. Const. art. II, § 2, cl. 3. The parties agree that the "Session" refers to Congress's annual assembly in which it formally conducts business. *See* Brief for Respondents ("Resp. Br.") at 11-12; U.S. Br. at 17. Textually, then, "the Recess" must be the period between the two sessions. This is not intricate draftsmanship.

The government tries to complicate a relatively staightforward question of textual interpretation by inventing the concept of an "intra-session" recess based on generic dictionary definitions. But the dictionaries are not as favorable to the government's position as its brief suggests, and the generic definition does not control. The Constitution already has a name—"adjournment"—for breaks "during the Session of Congress." U.S. Const. art. I, § 5, cl. 4. By defining "the Recess" and "adjournment" interchangeably, the government thus ignores a longstanding rule of interpretation: "It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 174 (1803).

Like "the People," "Ex Post Facto" and other similar concepts used throughout the Constitution, "the Recess" is a term of art that had an established meaning at the time of the Founding. *See generally* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005). As pre-Independence

British history shows, "the Recess" was understood to encompass only breaks between legislative sessions—not during one. That understanding carried over to colonial America, to the Articles of Confederation, to various state constitutions, to the First Congress, and to the Washington Administration. This historical background shaped and reflects the Framers' conception of the words they chose and confirms what is already clear from the Constitution itself, *viz.*, that "the Recess" is a defined concept, not a generic term describing any random adjournment.

But even were the President empowered to make recess appointments during intra-session adjournments, which he is not, the government cannot reconcile its position with the requirement that the vacancies at issue "happen" during the Recess. "A vacancy happens … only when it first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess." *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013). The claim that a vacancy perpetually "happen[s]" every day it "exists" does not pass scrutiny. Just like any singular event, a vacancy happens on a specific day. Interpreting "happen" to mean "exist" effectively reads the word out of the document or, at a minimum, attributes to it the trivial and unusual role of preventing the President from filling future vacancies via recess appointment. *See* U.S. Br. at 31. Including words or phrases with little or no discernible meaning was not the Framers' habit.

Confining recess appointments to vacancies arising during breaks between sessions also advances the Clause's purpose. The constitutional rule is "Advice and Consent," U.S. Const. art. II, § 2, cl. 2, and the

Framers chose to lodge that power in the Senate. "The Spirit of the Constitution favors the participation of the Senate in all appointments," so the Clause must "be interpreted strictly." Edmund Randolph, Opinion on Recess Appointments (July 7, 1792). The government's interpretation of the Recess Appointments Clause would run roughshod over the constitutional plan. It would permit recess appointments during *any* Senate adjournment and allow the President to fill a vacancy that occurred while the Senate was in session, encouraging the very inter-branch gamesmanship this case exhibits. Recess appointments are an exception designed to accommodate the Executive's need to fill important posts while the Senate is away for months between sessions, not an ingenious means for the President to circumvent the Senate anytime his nominations meet with resistance.

The government claims function supersedes form, but not where it concerns structural protections. While "minor adjustments might be seen as desirable attempts to modernize the original constitutional provisions, … where the Constitution draws a clear line, [the Court] may not engage in such tinkering." *Public Citizen*, 491 U.S. at 486 (Kennedy, J., concurring). Claims of public necessity in the name of expediency, moreover, ring hollow, and the doomsday scenarios the government posits here are no different. The President has the power to call a special session of the Senate to act on a nomination requiring immediate action, as has been done many times in the past. *See* U.S. Const. art. II, § 3. If the vacancy is not urgent, it can await the Senate's return.

The government's last line of defense is a claim to tradition. But history undermines the contention that the

President may make recess appointments during intra-recess adjournments. There were none for the 80 years following the Constitution's ratification, and only two before 1947. The intra-session appointment is a novelty of the last half-century. That is not a pedigree meriting veneration. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 907-09 (1997); *INS v. Chadha*, 462 U.S. 919, 951 (1983). What counts for constitutional purposes is the understanding of the terms used in the Clause at the time of the Founding and in the years immediately following it.

What the government calls "tradition" is in truth a mostly recent effort by Presidents to concentrate power in their hands. The increasing frequency of intra-session appointments is thus cause for concern. "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). That is why "[i]t remains one of the most vital functions of this Court to police with care the separation of the governing powers. …When structure fails, liberty is always in peril." *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring).

Nor does the government's overblown assertion of Senate acquiescence answer the separation of powers concern. Even accepting the argument's validity, "[t]hat a congressional cession of power is voluntary does not make it innocuous. … Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). The Court is tasked with the ultimate responsibility of preserving

the Constitution's balance of power even when one of the political branches will not protect itself. The Court should exercise that solemn responsibility by affirming the D.C. Circuit's decision and declaring unconstitutional the three recess appointments to the National Labor Relations Board ("NLRB") at issue here.

ARGUMENT

I. The Constitution's Text Demonstrates that the Recess Appointments Clause Applies Only to Vacancies that Arise and Are Filled Between Legislative Sessions.

Under the Appointments Clause, "[t]he 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 … ." U.S. Const. art. II, § 2, cl. 2. The Recess Appointments Clause then provides a narrow exception to this rule. It provides that "[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." *Id.* cl. 3.

When interpreting the Constitution, the Court must "begin with its text." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Two terms —"the Recess" and "happen"— thus demarcate the authority the Recess Appointments Clause vests in the Executive to make temporary appointments without the Senate's advice and consent. The plain meaning of those terms—taken together and viewed individually—demonstrates that the vacancy must arise

and be filled during the same break between a Session of Congress for the recess appointment to be valid under Article II. The recess appointments under review do not meet either of these requirements. *See Noel Canning*, 705 F.3d at 498-99.

"the Recess." The Constitution contemplates that the Senate will conduct formal business when in "Session," and there will be at least one "Session" each calendar year. U.S. Const. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.").[2] "Neither House, during the Session of Congress, shall without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." *Id.* § 5, cl. 4. The "Session" ends either upon adjournment *sine die*, *see Noel Canning*, 705 F.3d at 512 & n.1, or "automatically at the time appointed by law for the start of a new session," U.S. Br. at 12 n.5 (citing Thomas Jefferson, A Manual of Parliamentary Practice § LI, at 166 (2d ed. 1812)).

The existence of this defined period of time during which the Senate will be in "Session" necessarily connotes the existence of a break between one "Session" and the beginning of the "next Session" when the Senate will be unavailable to act on Presidential nominations or conduct other Senate business. This period of time is "the Recess," during which the President may temporarily fill vacant

2. Article I, Section 4, Clause 2 was revised by Section 5 of the 20th Amendment. *See* U.S. Const. amend. XX, § 5 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

offices without Senate advice and consent. From a textual perspective, the Clause's architecture is not complicated.

The government seeks to sever the relationship between the "Session" and "the Recess," in which the Senate is either in "Session" or in "Recess," but never both at the same time. In its view, the President also may make appointments during a so-called "*intra*-session" recess, which it defines as an adjournment "to a specified time or date" when the Senate "typically resumes the business of its current session" upon reconvening. U.S. Br. at 12. But the Constitution independently provides for such breaks—*i.e.*, it provides for intra-session "adjournment[s]" distinct from "the Recess." *See Noel Canning*, 705 F.3d at 500. Congress "may adjourn from day to day," but neither chamber "*during the Session of Congress*" may "adjourn for more than three days" without the other's concurrence. U.S. Const. art. I, § 5 (emphasis added); *id.*, art. I, § 7; *id.*, art. II, § 3 (referring to "Adjournment").[3]

3. The North Carolina Constitution, which likely served as the model for the Recess Appointments Clause, *see* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1770-72 (1984), also distinguished the "recess" from an "adjournment." *Compare* N.C. Const. of 1776, art. XX, reprinted in 7 Sources and Documents of United States Constitutions 406 (1978) ("That in every case where any officer … shall, during *their recess*, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.") (emphasis added), *with id.* art. X ("That the Senate and House of Commons, when met, shall each have power to choose a speaker and other their officers; be judges of the qualifications and elections of their members; sit upon their own

An adjournment "during the Session of Congress" therefore must mean something different from "the Recess." Failing to distinguish between the two concepts would "disregard … the elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). Had the Framers considered adjournments "during the Session of Congress" part of "the Recess," the Constitution's text would so indicate. *See Wright v. United States*, 302 U.S. 583, 588 (1938) ("The many discussions which have taken place upon the construction of the constitution, … have … shown the high talent, the caution, and the foresight of the illustrious men who framed it. *Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.*" (citation and quotation marks omitted) (emphasis added)).

The government also cannot reconcile its view with the Clause's structure given that a recess appointee's commission expires at "the End of [the Senate's] next Session." U.S. Const. art. 2, § 2, cl. 3. The "next Session" refers to the next annual session of Congress—not the next meeting following an adjournment, *see NLRB v. Enterprise Leasing Co. Se., LLC*, 722 F.3d 609, 645 (4th Cir. 2013), and the government has not suggested otherwise, *see* Resp. Br. at 11-12. Thus, an intra-recess appointment would last quite a bit longer than one made during the true Recess under the government's reasoning.

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adjournments from day to day, and prepare bills, to be passed into laws. The two Houses shall direct writs of election for supplying intermediate vacancies; and shall also jointly, by ballot, *adjourn themselves to any future day and place*.") (emphases added).

See id. at 11-13. As the Fourth Circuit explained, "the Senate's reconvening and first subsequent adjournment—whether that be for a long intrasession break or for the intersession break—would have no immediate effect on the recess appointment because the appointment lasts until the 'next Session,' as demarked by adjournments *sine die*." *Enterprise Leasing*, 772 F.3d at 645 (citation omitted).

In contrast, the Clause operates sensibly only if "the Recess" is confined to breaks between legislative sessions. Unlike the government's approach, it allows the President to make a recess appointment while the Senate is away and allows the appointee to remain in office until the Senate has had precisely one Session to fulfill its advice and consent function. It is therefore the only interpretation that allows the Clause to retain "an auxiliary role." *Id.* (citation omitted).

Instead of confronting these defects in its reasoning, the government looks to Founding-era dictionaries to buttress its interpretation of "the Recess" to mean any "period of cessation from usual work." U.S. Br. at 13 (citations and quotation marks omitted). As an initial matter, the contemporaneous dictionaries do not favor this reading. The common understanding of "recess" at the time of the Framing signified a degree of finality consistent with the long break that usually followed the end of a legislative session. *See, e.g.*, 2 Samuel Johnson, A Dictionary of the English Language 464 (6th ed. 1785) (defining "Recess" as "retirement; retreat; withdrawing; secession" or "[d]eparture" and "[r]emoval to distance"); 2 Frederick Barlow, The Complete English Dictionary, 323 (1772) (defining "Recess" as "Retirement. Secession").

The government's position suffers from a more a fundamental problem: a "recess" and "*the* Recess" are not the same thing. *See Noel Canning*, 705 F.3d at 499-500; Resp. Br. at 11. At the Framing, "the" is "the article noting a particular thing." 2 Samuel Johnson, A Dictionary of the English Language 835 (6th ed. 1785); 2 Frederick Barlow, The Complete English Dictionary 432 (1772) (defining "the" as "the article denoting a particular thing"). By contrast, "a" generally "signifies something indefinite." *Id.* at 4. The deliberate choice of "the" over "a" was a textual directive indicating "the Recess" is a term of art, unlike "adjournment," which is never preceded in the Constitution by "the" or any other signal that it had a specialized meaning. *See, e.g.*, U.S. Const. art. I, § 7, cl. 2-3, art. 2, § 3, cl. 1.[4] Consequently, "the Recess" must be interpreted according to the particular meaning denoted by the text of the Constitution irrespective of whether that meaning coincides precisely with the generic dictionary definition of a "recess."

United States v. Verdugo–Urquidez, 494 U.S. 259 (1990), and *Collins v. Youngblood*, 497 U.S. 37 (1990), illustrate the point. In *Verdugo-Urquidez*, the Court did not turn to dictionaries for guidance when interpreting "the People" in the context of the Fourth Amendment even though the ordinary definition of "person" was far broader than "a class of persons who are part of a

4. The only other time the Constitution uses "Recess" it also is preceded by "the." The so-called Senate Vacancies Clause—which was revised by the Seventeenth Amendment—provides that "if Vacancies 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, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2.

national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. Likewise, *Collins* interpreted the Ex Post Facto Clause of Article I, Section 10 to apply "only to penal statutes which disadvantage the offender affected by them" notwithstanding the fact that "the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact[.]'" 497 U.S. at 41 (citation omitted). In both cases, the Court understood that the Framers intentionally had chosen "a term of art with an established meaning at the time of the framing of the Constitution." *Id.*; *see also Verdugo-Urquidez*, 494 U.S. at 265 ("'[T]he people' seems to have been a term of art employed in select parts of the Constitution.").

The key historical indicators show that "the Recess" was a term of art meaning a break between legislative sessions—not during one. Contrary to the government's assertion, *see* U.S. Br. at 14, this conception of "the Recess" follows directly from the British model, *see* Rappaport, *supra*, at 1550-53. As Professor Rappaport explained:

> In England, there were three types of breaks in legislative proceedings. First, an adjournment was a break in the business of a house that occurred during the legislative session. An adjournment was called by a house and could be of extremely short duration. Second, a prorogation was an order by the King that would end the session for both houses. The resulting break in the business of the Parliament would eventually be followed by a new session. Finally, a dissolution would end the Parliament and require elections for a new Parliament. A dissolution could occur through

> a proclamation by the King, through the death of the King, or after the Parliament had lasted for seven years.

Id. at 1550-51 & nn. 192-94 (collecting sources).

The Constitution borrows these concepts, and then modifies them "to eliminate the monarch's role" where necessary to reconcile the regime with the republican form of government. *Id.* at 1551. Because "[a]djournments did not involve the King … they were retained," while "the King's role was omitted" from dissolutions so that only those "that occurred after a term of years" were carried over to the Constitution. *Id.* (citation omitted). "Thus, every two years, the entire House of Representatives and one third of the Senate would be newly elected." *Id.* (citations omitted). Last, the Constitution "eliminated prorogations by the monarch," allowing that power to reside exclusively in "the two houses." *Id.* (citation omitted). Likely because the term "was associated with a monarchial prerogative … [and] thought to be inappropriate for a republic," however, the Framers instead "used the term 'recess,' which previously had been employed with this meaning in American law" to "refer to breaks between sessions." *Id.* (citations omitted).[5]

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5. This British approach carried over into state constitutions, including the Massachusetts Constitution of 1780. *See id.* at 1552. The Massachusetts Constitution granted the Governor, "with advice of Council," the "full power and authority, during the session of the General Court, to adjourn or prorogue the same at any time the two Houses shall desire." Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. V. But "in the recess of the said Court," the Governor could "prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together

Contrary to the government's suggestion, *see* U.S. Br. at 15, the Articles of Confederation also support the distinction between "the Recess" and an "adjournment." The Articles allowed for the creation of a "Committee of the States" consisting of one delegate from each state to be appointed by the Continental Congress "to sit in *the recess* of Congress" and vested that Committee with the authority "to execute, in *the recess* of Congress, such of the powers of Congress as the United States in Congress assembled." Articles of Confederation, art. IX and X (emphases added). The Articles used the terms "adjourn" or "adjournment" to refer to breaks within sessions. *See id.*, art. IX, cl. 6 (recognizing that the Continental Congress would "adjourn" from "day to day"); *id.* cl. 7 (providing that "no period of adjournment" would "be for a longer duration than the space of six months"). By necessary implication, then, a Committee of the States could *not* exercise the powers of the Continental Congress during an adjournment.

During the Continental Congress's tenure, the Committee was appointed only during a break between sessions and never during an adjournment. *Compare* 26 J. of the Continental Congress 295-96 (1784) ("So it was Resolved, That the President be, and he hereby is

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sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same." *Id.* The Massachusetts Constitution therefore draws the same line between an adjournment and prorogations as in England. There could only be an adjournment "during the session" because prorogation was the break that occurred "in the recess." *See* Rappaport, *supra*, at 1552.

authorized and directed to adjourn Congress on the third day of June next, to meet on the thirtieth day of October next at Trenton, for the despatch of public business, and that a committee of the states shall be appointed to sit in the recess of Congress."), *with* 24 J. of the Continental Congress 410 (1783) (appointing no committee for 4-day adjournment); 25 J. of Continental Congress 807-09 (1783) (appointing no committee for 21-day adjournment); 27 J. of Continental Congress 710 (1784) (appointing no committee for 17-day adjournment).[6]

Finally, the First Congress understood "the Recess" to refer to breaks between sessions and not breaks during a session. Beginning in 1789, Congress adopted a payment scheme for the Senate clerk that included "two dollars per day *during the session*, with the like compensation to such clerk while he shall be necessarily employed *in the recess*." Joseph Gales, 2 Annals of the Congress of the United States 2236-38 (September 22, 1789) (1834) (emphases added). In 1791, the Senate passed The Excise or Duties on Distilled Spirits Act, which provided that "the inspectors of surveys, or any part of them, shall not be made *during the present session of Congress*, the President may, and he is hereby empowered to make such appointments, during *the recess* of the Senate, by granting commissions, which shall expire at the end of their next session." 1 J. of the

6. The government incorrectly contends that the 5-month break in 1784 during which the Committee was convened was intra-session because it was scheduled to end before the next session began. *See* U.S. Br. at 15. That ignores the specific reference to "the recess" in the Journals and Congress's failure to reconvene until the start of the next session. *See* 28 J. of Continental Congress 639–41 (1785) (convening "[p]ursuant to the Articles of Confederation" rather than the previous adjournment); *see also* Resp. Br. at 22 n.15.

Senate 263-64 (1791) (emphases added). Both of these statutes are incompatible with an interpretation treating "the Recess" and "adjournment" interchangeably; and a statute "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, … is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co. of New Orleans,* 127 U.S. 265, 297 (1888) (citation omitted); *see infra* at 28-31.

In sum, "the Recess" is a parliamentary term of art referring to breaks between legislative sessions—not an "adjournment" during one. That understanding not only follows from the term's ordinary meaning, but unlike the government's ahistorical approach, keeps faith with the concept's British lineage and the contemporaneous usage by the States. Because the NLRB recess appointments at issue were not made during such a break, *see Noel Canning*, 705 F.3d at 498-99, that should be the end of the matter.

"Happen." The NLRB vacancies at issue also did not "happen" during any congressional recess—intra-session or otherwise. For several reasons, "happen" must mean to arise at a point certain. Foremost, this reading best reflects the understanding of the term at the time of the Framing. In the 18th century lexicon, "happen" meant "[t]o fall out; to chance to come to pass." 2 Samuel Johnson, A Dictionary of the English Language 928 (6th ed. 1785); *see also* 2 Frederick Barlow, The Complete English Dictionary, 8 (1772) (same). A vacancy thus "come[s] to pass" on the date it arises. Indeed, only this construction of "happen" is compatible with the term's use elsewhere in the Constitution. *See Noel Canning*, 705 F.3d at 508

(discussing the Senate Vacancies Clause of Article I, Section 3); *see also* Resp. Br. at 33-34.

The government attempts to avoid this unequivocal meaning of "happen" by focusing on the term "vacancy." According to the government, a "vacancy" arising during a recess continues to "happen" for the entire time the position is unfilled. U.S. Br. at 29-30. But the government confuses an occurrence with a condition. *See* Resp. Br. at 34. Thus, although a vacancy (like any condition) exists until the position is filled, it "happens" on a specific date (like any occurrence). The plain meaning of "happen" simply cannot bear the weight of the government's construction. *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1553 (1833) ("The word 'happen' … had relation to some casualty, not provided for by law."); *see also Schenck v. Peay*, 21 F. Cas. 672, 674 (C.C.E.D. Ark. 1869) (holding that appointment of various tax commissioners was contrary to the Recess Appointments Clause because the vacancies "may have existed, but did not happen, during the recess of the senate"); *Case of the Dist. Attorney*, 7 F. Cas. 731, 735 (E.D. Pa. 1868) (rejecting the recess appointment of a U.S. Attorney because reading "happen" to mean "exist" "is not conformable to either the literal or the ordinary import of the words").

The government's interpretation runs into another textual roadblock: reading "happen" as "exist" effectively writes it out of the Recess Appointments Clause. Resp. Br. at 34-35. There is no difference between "Vacancies that may [exist] during the Recess" and "Vacancies … during the Recess." As the Court has explained, "every word must have its due force, and appropriate meaning;

for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Wright*, 302 U.S. at 588 (citation and quotations omitted).

The government makes the strained claim that "happen" would not be surplusage under its interpretation because it keeps the President from filling "a known *future* vacancy" as opposed to "vacancies that actually do exist during the recess … ." U.S. Br. at 31. The use of the word "vacancy" already accomplishes that objective since a "future vacancy" is no vacancy at all. *See* Resp. Br. at 35. The President cannot "fill up" a position that is presently occupied. In any event, the government offers no evidence that the sole function of "happen" is to keep the President from filling offices that are occupied. Absent such evidence, there is no reason to believe that "happen" was used by the Framers for such a narrow and trivial purpose. *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988) (rejecting a proposed interpretation of the Confrontation Clause because "the phrase 'be confronted with the witnesses against him' [would be] an exceedingly strange way to express a guarantee of nothing more than cross-examination").

That the government can point to a few examples of the advice-and-consent process being used to fill not-yet-vacant offices, *see* U.S. Br. at 31 n.21, does not alter the conclusion given the distinct constitutional anchor relied on in those instances. After all, the Appointments Clause concerns the President's power to "nominate" and the Senate's power to confirm, while the Recess Appointments Clause concerns the President's unilateral authority to "fill up vacancies that may happen … ." Whether a nomination under the Appointments Clause must await a

vacancy thus is a different question from the one presented by this case.

The issue here, in other words, is not whether an appointment under the Appointments Clause can be made on the day the officeholder announces impending plans to depart, the day of resignation, or at some point in between. The issue is whether, under the Recess Appointments Clause, the vacancy happened on a particular day or the vacancy perpetually happens each day until the office is filled. The government's anecdotes shed no light on how this question should be answered.

The Executive's interpretation at the Framing and for many years thereafter of "happen" to mean "arise" is far more pertinent than the government's anecdotes. Resp. Br. at 36-40. The first Attorney General Opinion issued by Edmund Randolph directly addressed the issue, stating that a vacancy that "commenced" on a specific day "may be said to have *happened* on that day." Edmund Randolph, Opinion on Recess Appointment (July 7, 1792). The Randolph Opinion explained that only in "a case of necessity" could "advice and consent" be bypassed, and he provided three instances where that high bar would be met: (1) when "the Officer has died … during the recess," (2) when "the Officer has … resigned during the recess," or (3) when the "person appointed during the Session shall not notify his refusal to accept, until the recess." *See id.* In all three examples, the vacancy arose during the Recess and did not just "happen to exist" during one. This contemporaneous evidence of the Clause's meaning cuts sharply against the government's position.[7]

7. The first Attorney General Opinion attempting to justify the "exist" interpretation of "happen" was Attorney General

II. Limiting Recess Appointments to Vacancies that Arise and Are Filled Between Sessions Advances the Clause's Purpose.

Not only does Respondent's interpretation of the Recess Appointments Clause vindicate the constitutional text, it ensures that the Clause's limited purpose is not overridden through Executive encroachment. The Framers decided that the "ordinary power of appointment [would be] confined to the President and Senate *jointly*[.]" The Federalist 67, at 455 (A. Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original). Thus, they viewed "advice and consent" as the default mechanism for those executive appointments for which "the senate should have had an opportunity to act on the subject." 3 Story, *supra*, § 1551.

The decision was informed by important separation-of-powers concerns. *See* Resp. Br. at 66-68. By lodging approval of principal federal officers in the Senate, the Framers sought to curtail abuses they had experienced under British rule. *See Freytag*, 501 U.S. at 883-84. They rightly viewed the Appointments Clause as an "efficacious source of stability in the administration" and an "excellent check upon a spirit of favoritism … appointment of unfit characters … family connection … or … popularity." The Federalist 76, at 513. In the words of Gouvernor Morris, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there

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Wirt's letter to President John Quincy Adams in 1823. *See* 1 Op. Att'y Gen. 631 (1823). Even he, however, conceded that the "arise interpretation was the more 'natural sense' of the language and was more 'accordant with the letter of the constitution.'" Rappaport, *supra*, at 1504-05 (quoting 1 Op. Att'y Gen. 631 (1823)).

would be security." 2 Max Farrand, The Records of the Federal Convention of 1787 539 (1911); *see also Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring).

The Framers also appreciated the difficulties associated with Senate confirmation and accommodated the concern. First, "the 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." U.S. Const. art. II, § 2, cl. 2. "A degree of flexibility was thought appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority." *Weiss*, 510 U.S. at 186-187 (Souter, J., concurring) (citation omitted). The Framers required Senate participation in the appointment to those federal offices for which a check on Executive abuse was deemed indispensable. Even then, however, they carefully "structured the alternative to ensure accountability and check governmental power: any decision to dispense with Presidential appointment and Senate confirmation is Congress's to make, not the President's, but Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law." *Id* at 187 (citation omitted).

Second, even with regard to the appointment of principal officers, the Framers understood that the Senate could not be "perpetually in session" to provide advice and consent without being "burdensome to the senate, and expensive to the public." 3 Story, *supra*, § 1551. It "would have been improper to oblige this body to be continually in

session for the appointment of officers." The Federalist 67, at 455. Indeed, Hamilton predicted that the Senate would be in session for merely "a third" of the year and the House for "a fourth," The Federalist 84, at 586 (A. Hamilton) (Jacob E. Cooke ed., 1961), and given the difficulties with travel at the time, the Senate could not be expected to be quickly recalled to provide "advice and consent," Raoul Berger, Federalism: The Founders' Design 23-24 (1987).

Ultimately, then, the Framers limited the federal offices for which advice and consent would be required, and provided, through the Recess Appointments Clause, an "*auxiliary* method of appointment, in cases to which the general method was inadequate." Federalist 67, at 455 (emphasis added). And by making the Recess Appointments power limited in "time" (only during "the Recess") and in "duration" (with an expiration at the end of the "next Session"), *id*., the Framers ensured the exception would not swallow the rule. It comes as no surprise, then, that the Recess Appointments Clause was ratified at the Philadelphia Convention with little or no debate. *See* 2 The Records of the Federal Convention 540 (1787). "The propriety of this grant is so obvious, that it can require no elucidation." 3 Story, *supra*, § 1551.

There is nothing "obvious" about the "propriety" of the government's conception of the Recess Appointment power. The view that "the Recess" constitutes any "period of cessation from usual work," U.S. Br. at 7, would allow the President to make an appointment if the Senate adjourns for one hour. The most the government will say is that adjournments of three days or less do not qualify as recesses because "such short … breaks … do not genuinely render the Senate unavailable to provide advice

and consent … ." *Id.* at 18. But that invented limitation on "period of cessation" is devoid of any principle rooted in the Constitution, *see* Resp. Br. at 14, or in the meaning of the words the government uses, and, regardless, would permit the President to make a recess appointment if the Senate adjourns for merely four days. In short, the government's interpretation would eviscerate the Clause's role as a narrow exception to the rule of advice and consent for important federal offices.

The government's interpretation of "happen" is even more destructive of the constitutional balance as it would allow the President to manipulate the appointments process to evade Senate oversight. If "happen" means any vacancy that "happens to exist" during a recess, the President could just wait for the next "Recess" to fill that vacancy even if it arose on the first day of a legislative session that lasted for nine months. And to add insult to injury, the government's construction of "happen" coupled with its expansive interpretation of "the Recess" would mean that the President would not even have to wait long at all to circumvent Congress—the next intra-session break would be just around the corner. Whatever else might be worthy of debate, the Framers could not have intended for the President to so easily avoid the Senate's joint role under the Appointments Clause.

The government incorrectly claims that the Framers could not have supported Respondent's interpretation of the Clause because it would undermine the Executive's ability to faithfully execute the laws during long intra-session breaks. *See* U.S. Br. at 19-20. The government confuses its self-serving concern with the considerations that actually animated the Framers. There would have

been no reason for the Framers to build in protections for intra-session recesses because they did not exist. Until the Civil War, Congress customarily held a single session of between three and six months, followed by a long recess of six to nine months between sessions. *See* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2210 (1994); Rappaport, *supra*, at 1498; *see generally* Floyd M. Riddick & Alan S. Furman, *Riddick's Senate Procedure: Precedents and Practice: Adjournment*, S. Doc. No. 101–28, at 14-16 (1992). Until that point, intra-session breaks were rare and lasted only for days. *See* Carrier, *supra*, at 2211. The Senate took only three brief intra-session breaks before 1857. *See id.* (explaining that in 1800, 1817, and 1828, the Senate took a five-to-seven-day intra-session break at the end of December).[8]

The government also posits a hypothetical scenario in which a vacancy arises just before the Recess, which could conceivably last longer than six months, keeping an important federal office vacant for an unacceptable length of time. *See* U.S. Br. at 33. But the hypothetical ignores that the Constitution already provides a solution. The President may "on extraordinary Occasions, convene both Houses, or either of them … ." U.S. Const. art. II, § 3. Thus, the President can call a Special Session of the Senate to act on a nominee if timing is of the essence. Prior to the 20th Amendment, when Presidential and Congressional terms began on March 4 and Congress

8. It was not until the 20th century that Congress began regularly to schedule longer sessions, more frequent intra-session adjournments, and shorter recesses between sessions; significant departures from the traditional Senate calendar did not begin until the 1940s. *See* Carrier, *supra,* at 2239-40.

generally did not meet until the first Monday in December, Presidents called Special Sessions for this purpose no less than 42 times. *See* 4 Robert C. Byrd, Senate, 1789-1989: Historical Statistics, 1789-1992 at 452-53 (1993). As Senator Byrd explained, "[w]hen a new president was to take office, his predecessor would issue an advance call for the Senate to meet in special session at the start of the new administration's term, in order to confirm nominations to the cabinet and other significant posts and to consent to the ratification of treaties." *Id.* There is no warrant for subverting the Senate's joint role in the appointments process when the Constitution already addresses the concern.

In any event, the government's hypothetical is far less troubling than the abuses that would occur—and indeed have occurred in recent administrations—under the government's approach. Where structural principles are concerned, the Court should err on the side of formalism to prevent "a gradual concentration of the several powers in the same department." *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (citation and quotation marks omitted); *see also Mistretta v. United States*, 488 U.S. 361, 382 (1989) (Scalia, J., dissenting) ("To disregard structural legitimacy is wrong itself—but since structure has purpose, the disregard also has adverse practical consequences."). The tendency is for even small inter-branch encroachments gradually to escalate to major disruptions of our skillfully constructed tripartite system. *See* The Federalist 50, at 321 (J. Madison) (Jacob E. Cooke, ed., 1961). History teaches that adherence to structural principles in the face of claims of necessity is the only surefire means of neutralizing the "'hydraulic pressure

inherent within each of the separate Branches to exceed the outer limits of it power.'" *Mistretta*, 488 U.S. at 382 (quoting *Chadha*, 462 U.S. at 951).

Finally, the government argues that the Senate has acquiesced to recess appointments during intra-session breaks, and that proves such a practice is faithful to the Clause's purpose. *See* U.S. Br. at 20. But the claim is overstated, if not entirely wrong. *See* Resp. Br. at 25-30. In 1863, for example, the Senate Judiciary Committee took the position that "the [Constitution's] language [is] too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun." S. Rep. No. 80, 37th Cong., 3d Sess. (1863), at 3. The Committee also rejected Attorney General Wirt's 1823 Opinion asserting that "happen" means exist, warning that such a pliable construction of the Clause "[i]n the hands of an ambitious, corrupt, or tyrannical executive … would soon bring about the very state of things which the Constitution so carefully guards against." *Id.* at 6.

Even accepting the government's incorrect claim that Congress has at times surrendered its advice and consent prerogative, it offers little insight into the Clause's original purpose. The Constitution's meaning does not depend on whether "the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). The "structural principles secured by the separation of powers protect the individual." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also Freytag*, 501 U.S. at 880. Structural protections exist to thwart the concentration of power—not to safeguard the

parochial interests of government institutions. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). Congress's acquiescence makes this Court's intervention all the more essential.

III. History Shows that the Recess Appointments Clause Applies Only to Vacancies that Arise and Are Filled Between Sessions.

Given the limitations of its other arguments, the government devotes most of its attention to history. *See* U.S. Br. at 21-28, 38-44. In the government's view, the frequent intra-session appointments that have been made—particularly in recent decades—inoculate the practice against constitutional attack. But the theory violates first principles. "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). If a practice or custom violates the Constitution, the Court is duty bound to stop it no matter how long it has been followed by the other branches. *See Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940) ("Illegality cannot attain legitimacy through practice."). In a contest between the "principle, and its later misapplications, the principle must prevail." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (internal quotations omitted).

In any event, the history is not nearly as favorable to the government as its brief suggests. *See* Resp. Br. at 24-32. For the first 80 years following ratification, no President made an intra-session appointment. *See* Carrier, *supra*, at 2211. The first one did not occur until 1867,

when President Andrew Johnson appointed a district court judge during a three-month adjournment. *See id.* Following that, only one more intra-session appointment was made before 1947. *See id.* at 2212. In reality, the intra-session appointment is a recent invention that has appeared with regularity only in the past 50 years. *See id.*[9]

The issue, then, is not whether uniform history can trump the Constitution's text; it is whether recent practice can overcome the text *and decades of practice* following ratification. The Court resolved that issue long ago: "[A] contemporaneous construction of the Constitution since acted on with … uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution." *Cooley v. Board of Wardens*, 53 U.S. 299, 315 (1851). The Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States*, 272 U.S. 52, 175 (1926); *see also Burrow-*

9. The government's claim to historical pedigree with regard to "happen" is no stronger. *See* Resp. Br. at 38-48. Even accepting the government's retelling of these incidents, however, the evidence is inconclusive and therefore falls far short of what would be required to make it pertinent to the judicial inquiry—let alone powerful enough to overcome the Constitution's text. In any event, as the government acknowledges, *see* U.S. Br. at 39-42, almost all of its examples are distinguishable from the present case as they involved newly-created positions. That situation is different from the one presented here and raises the distinct issue of whether "Vacancies" refers only to existing positions or newly-created ones as well.

Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (Congress' copyright authority based mainly on a constitutional understanding from the First Congress that was followed for nearly a century).

In *Myers*, for example, the Court determined the scope of the President's removal power based in large part on how it was originally understood by the First Congress and then applied for the next 73 years. *See* 272 U.S. at 174-75 ("We have, first, a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification."). So too here. The understanding that recess appointments would be confined to breaks between sessions of Congress was endorsed by the First Congress and the Washington Administration, and it remained the view for 80 years after the Constitution's enactment. *See supra* at 28-29. This "uniform practice," 23 Op. Att'y. Gen. 599, 602-03 (1901), and settled understanding of the Recess Appointments Clause at the time of the Founding must control, even if contemporary practice deviates from the constitutional principle.

The illegitimate modern practice is more akin to the recent "political invention" of commandeering state officials to implement federal programs, which the Court struck down in *Printz*. The Court found that a nearly two-century absence of commandeering state officials to conduct federal business outweighed the recent statutes endorsing the practice. *See* 521 U.S. at 917-18. Just as in

Printz, the 80-year absence of intra-session appointments, even when it may have been in a President's interests to do so, clearly "suggests an assumed *absence* of [the] power" to make such appointments. *Id.* at 908 (citation omitted) (emphasis in original).

The government appears to suggest that recent history shows the institutional need for the President to have a unilateral means of overcoming "modern Senate practice." U.S. Br. at 19; *see also* Brennan Center Amicus Br. at 22-31. But "the original meaning of the Constitution cannot turn on modern necessity." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring). Moreover, it is far from clear that intra-session appointments are more necessary to keep the government functioning today than in the 18th Century. *See supra* at 25-27. Early Presidents (no less than recent ones) surely would have found it convenient and useful to avoid "advice and consent" and unilaterally fill vacancies during congressional sessions. Yet no president embraced the practice during that period. *See* Resp. Br. at 36-39. In fact, several were advised that intra-session appointments violate the Constitution. *See, e.g.*, 23 Op. Att'y Gen. 599 (1901).

Furthermore, modernity only undermines many of the government's claims of necessity. Recent advances in communication and the increased speed of travel negate the asserted need for unilateral Executive appointments, as the Senate can readily reconvene to provide advice and consent on short notice. *See supra* at 25-26. It would be hard to conceive of a situation in which the President could not fill an important vacancy for a significant period of time due to his inability to reach the Senate for advice and consent. *See* Resp. Br. at 68.

Regardless, while it may at times seem efficient to avoid the constraints of "advice and consent" when Congress is in session, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944. As the Court has succinctly put it, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution[.]" *Id.* at 945. Therefore, even though the legislative veto had been included in 295 legislative provisions over 55 years, *see id.* at 944, and notwithstanding the efficiency it brought to the lawmaking process, the Court did not hesitate to strike it down as violating separation-of-powers principles of bicameralism and presentment, *see id.* at 946.

The same reasoning applies here. The recent history of intra-session appointments cannot outweigh the separation-of-powers problems the practice undoubtedly engenders no matter how customary it may now be or how convenient the President finds the ability to circumvent the Senate. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government" and the Court's "inquiry" should be "sharpened rather than blunted by the fact that" recess appoints "are appearing with increasing frequency...." *Id.* at 944. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

CONCLUSION

For all of the reasons set forth herein and all those set forth in the Respondent's brief, *amici curiae* The Atlantic Legal Foundation and The Justice Foundation respectfully request that the Court affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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