No. 12-1281

In the
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE STATE NATIONAL BANK OF BIG SPRING, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE 60 PLUS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici State National Bank of Big Spring, the Competitive Enterprise Institute, and the 60 Plus Association, Inc. are plaintiffs in a separate lawsuit challenging the constitutionality of the President's appointment of Richard Cordray, without the Senate's advice and consent, to be Director of the newly created Consumer Financial Protection Bureau (CFPB).[2] Cordray's appointment occurred on the same day as the National Labor Relations Board (NLRB) appointments at issue in this case, and therefore the merits of *amici*'s claim in their own case may be affected by the Court's decision here.

State National Bank is a community bank that has served Big Spring, Texas and other communities for over a century. The Competitive Enterprise Institute (CEI) is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has

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

[2] *State Nat'l Bank of Big Spring* v. *Lew*, No. 1:12-cv-1032 (D.D.C. filed June 21, 2012), *appeal docketed*, No. 13-5247 (D.C. Cir. filed Aug. 2, 2013). The plaintiffs also raise a separation-of-powers challenge to the CFPB in that case.

participated in cases before this Court or lower federal courts that raised select constitutional or statutory issues. See, *e.g.*, *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). The 60 Plus Association is a non-profit, non-partisan seniors advocacy group devoted to advancing free markets.

INTRODUCTION

On January 4, 2012, the President appointed more than just the three NLRB members at issue in this case. He also appointed Richard Cordray to be the first Director of the newly created Consumer Financial Protection Bureau (CFPB). And as with his NLRB appointments, he appointed Cordray to the CFPB without the Senate's advice and consent. See Resp. Br. 69; U.S. Const. art. II, § 2.

That appointment's relevance to this case is greater than just its timing and nature. Rather, the CFPB's structure casts this case's constitutional issue into even sharper relief. Because the CFPB enjoys "full independence" from Congress's power of the purse, see *infra* p. 5, the Senate's confirmation process is Congress's last tool for "assuring properly functioning regulatory agencies," S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 Study on Federal Regulations: Congressional Oversight of Regulatory Agencies 58 (1977).

Accordingly, if presidents are able to evade the Senate's confirmation process by simply deeming the Senate to be in an intra-session recess, then Congress will lose much more than just its say in individual appointments. Congress will lose its last

substantive tool for overseeing the new generation of self-funded independent agencies.

BACKGROUND

The President appointed Richard Cordray to be the CFPB's first Director, without the Senate's advice and consent. He appointed Cordray without Senate confirmation not because the Senate was "unavailable to offer its advice and consent," Pet'r Br. 19, but because, as he said then, "I refuse to take no for an answer," Resp. Br. 69.

Having been appointed without Senate advice and consent, Cordray assumed control of an agency that was structured to be just as free from congressional oversight as his appointment was, as explained below.

A. The Self-Funded CFPB: An Overview

The CFPB was created in 2010 by Title X of the Dodd-Frank Act.[3] Dodd-Frank vested the CFPB with exclusive jurisdiction to administer myriad "Federal consumer financial law[s]" previously administered by other agencies. 12 U.S.C. §§ 5481(12) & (14), 5511. And Dodd-Frank further vested the CFPB with newly created authority to regulate or prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a).

The CFPB is an "independent bureau" within the Federal Reserve System. *Id.* § 5491(a); see also

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[3] Formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

44 U.S.C. § 3502(5) (designating the CFPB as an "independent regulatory agency," and thus excluding it from E.O. 12866's process for regulatory review by the Office of Management and Budget). And the CFPB's Director enjoys the "defining hallmark of an independent agency": the President cannot remove him except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 16 (2010) ("defining hallmark").

Going beyond mere protection against removal by the President, Dodd-Frank took still further steps to promote the CFPB Director's independence and discretion. Eschewing the traditional, bipartisan "independent commission" model, in which several commissioners check and balance each other,[4] the Act vested the agency's power in a single director. 12 U.S.C. § 5491(b)(1). And the Act would have courts give *Chevron* deference to the CFPB's interpretation of statutes that it does not exclusively administer, *id.* § 5512(b)(4)(B), even though such deference ordinarily is inappropriate in such cases, *Proffitt* v. *FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000).

But the CFPB's most important "independence," for purposes of this case, is its independence from Congress's power of the purse. Instead of relying on congressional appropriations to fund its activities,

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[4] See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013) (describing benefits of independent commissions' multimember structure).

the CFPB is statutorily entitled to claim nearly $600 million annually from the Federal Reserve System.[5] Congress is prohibited even from attempting to "*review*" the CFPB's non-appropriated budget. 12 U.S.C. § 5497(a)(2)(C) (emphasis added).

Dodd-Frank sets the CFPB outside of Congress's appropriations process precisely to minimize Congress's influence over the agency. In first proposing the CFPB, the Executive Branch called for the agency to have a "stable and robust . . . funding stream" outside of congressional appropriations. Treasury Dep't, *Financial Regulation Reform—A New Foundation: Rebuilding Financial Supervision and Regulation* 58 (2009). The Senate Banking Committee, in turn, agreed that making the CFPB "independent of the Congressional appropriations process" was "absolutely essential" to prevent future Congresses from influencing the CFPB. S. Rep. No. 111-176, at 163 (2010).

The agency agrees. It stressed in a recent report that its statutory entitlement to "funding outside the congressional appropriations process" ensures its "*full independence*" from Congress. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013) (emphasis added) (hereinafter, *CFPB Strategic Plan*).

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[5] Specifically, the CFPB is entitled to up to 12 percent of Federal Reserve's operating expenses. 12 U.S.C. § 5497(a) According to the CFPB, this equals "approximately $598 million." CFPB, *FY 2013 Budget Justification* 7 (2012).

B. The CFPB Director: Appointed Without Senate Advice and Consent

Dodd-Frank did leave Congress one power over the CFPB, by providing that the agency would not receive its full powers until the CFPB's first Director was nominated by the President and "confirmed" by the Senate. 12 U.S.C. § 5586(a); see also *id.* § 5491 ("the Director shall be appointed by the President, by and with the advice and consent of the Senate"). Despite those requirements, the President appointed Cordray as CFPB Director without the Senate's advice and consent, Resp. Br. 69, after the Senate voted to deny "cloture" on his nomination, 157 Cong. Rec. S8422, S8428-S8429 (Dec. 8, 2011).

Under Cordray, the CFPB promulgated consequential rules governing everything from wire transfers to lending standards to mortgage servicing procedures.[6] Cordray held this office without Senate confirmation for eighteen months, when the President and Senators struck a deal for Cordray's confirmation (and that of five NLRB members).

Director Cordray later published a "Notice of Ratification" in the *Federal Register*, asserting that the actions he took during his original, unconfirmed appointment "were legally authorized and entirely

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[6] See, *e.g.*, *Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. 6194 (Feb. 7, 2012); *Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013); *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. 10696 (Feb. 14, 2013).

proper," but that in order to "avoid any possible uncertainty, however, I hereby affirm and ratify any and all actions I took during that period." *Notice of Ratification*, 78 Fed. Reg. 53734 (Aug. 20, 2013).

SUMMARY OF ARGUMENT

The Appointments Clause "serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (quoting The Federalist No. 76) (Alexander Hamilton). Ordinarily, the Senate confirmation process is just one way that Congress oversees the administrative state; the Appropriations Power provides another. See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch The Watchers Themselves)?*, 54 L. & Contemp. Probs. 205, 210 (1991).

Of course, the Appropriations Power is far more effective than the Advice-and-Consent Power, in terms of its capacity to meaningfully check the administrative agencies. See Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1834-36 (2012); *id.* at 1835 ("A more critical weakness of appointment is that it serves only as an ex ante tool of control.") (hereinafter, *The Importance of Appointment*).

But when Congress loses its power of the purse over an agency, then the Appointments Clause, limited as it is, becomes Congress's *last* substantive oversight power for that agency. If presidents can

evade the confirmation process by deeming the Senate to be in "recess" and appointing nominees unilaterally, then Congress will have lost even this last, limited means of oversight.

Finally, the Senate has not "acquiesced" to the Executive's unprecedented assertion of unilateral appointment power. More importantly, such focus on alleged congressional "acquiescence" ignores the fact that the "separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). "Neither Congress nor the Executive can agree to waive" the Appointments Clause's "structural protection," *Freytag* v. *Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991).

ARGUMENT

I. The Senate's Advice-And-Consent Power Is Congress's Last Oversight Tool For Self-Funded Independent Agencies

A. As More Agencies Are Freed From The "Power of the Purse," Congressional Oversight By Other Means Is Ever More Crucial

According to the CFPB's proponents, the agency's freedom from Congress's Appropriations Power is "absolutely essential" to the agency's independence from Congress. S. Rep. No. 111-176, at 163 (2010). But other analysts no less qualified—such as the Framers—would characterize regulators' "full independence" from Congress, *CFPB Strategic Plan* at 81, in much less charitable terms.

The Framers recognized that Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison). "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'" *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013) (quoting Federalist No. 58).

The Senate itself has stressed this point, too. "The appropriations process is the most potent form of Congressional oversight, particularly with regard to the federal regulatory agencies." S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 Study on Federal Regulations: Congressional Oversight of Regulatory Agencies 42 (1977); see also Curtis W. Copeland, Cong. Research Serv., *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* 2 (Aug. 5, 2008) ("Compared to the other congressional methods of influence, appropriations provisions related to agency rulemaking and regulatory activity have received comparatively little attention by scholars and analysts, but those provisions can have substantial effects on public policy.").

Myriad scholars agree.[7] Thus, as scholars have focused in recent years on ways in which agencies can be made independent (or, "insulated") from Congress's oversight, they have recognized that a "more powerful" way for agencies to be freed from Congress's influence "is to provide agencies with an

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[7] "The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control. . . . Viewed broadly, the financial control exercised by Congress over the commissions is a necessary and desirable form of supervision." Robert E. Cushman, *The Independent Regulatory Commissions* 674-75 (1972). See also Jack M. Beermann, *Congressional Administration*, 43 San. Diego. L. Rev. 61, 84-90 (2006); *id.* at 84 ("One way in which Congress has supervised agencies with great particularity, both formally and informally, is through the appropriations process."); Datla & Revesz, *supra* note 4, at 816 ("Congress primarily exerts influence over agency heads . . . through the power of the purse. Thus '[an] agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.'" (alteration in original) (quoting Randall L. Calvert *et al.*, *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588, 602 (1989))); Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse I*, 58 Pol. Sci. Q. 161, 173 (1943) ("Through [the appropriations committees] is accomplished most of the oversight that Congress exercises over administration."); Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse II*, 58 Pol. Sci. Q. 380, 413-14 (1943) ("Fitful legislative intervention is no substitute for controls within administration. The most valuable contribution of legislative oversight is to galvanize the disciplines of administration itself").

independent funding source . . . . With independent funding, the agency is insulated from Congress as well as the President." Barkow, *Insulating Agencies*, 89 Tex. L. Rev. at 42.[8]

The loss of that constitutional check and balance is not ameliorated by the fact that a single Congress helped to pass the statute eliminating Congress's power of the purse over the agency. After all, an individual Congress, like an individual President, "might find advantages in tying [its] own hands." *Free Enter. Fund*, 130 S. Ct. at 3155; see also James Q. Wilson, *Bureaucracy* 239 (1989) ("[P]oliticians have had good reasons to tie their own hands. But once tied, they cannot easily be untied."). "But the separation of powers does not depend on the views of individual Presidents," or on individual Congresses. 130 S. Ct. at 3155. A single Congress "cannot . . . choose to bind [its] successors by diminishing [its] powers." *Id.*

The CFPB is perhaps the most prominent agency to have been freed from Congress's power of

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[8] See also Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733 (2013); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 611 (2010) ("Several of the financial independent agencies have funding sources, usually from users and industry, which frees them from depending on congressional appropriations and annual budgets developed by the executive branch."); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822 (2012).

the purse, but it is not alone. The Public Company Accounting Oversight Board, too, enjoys "a revenue stream independent of the congressional appropriations process," in order to "insulate the Board from congressional . . . influences." *Free Enter. Fund*, 130 S. Ct. at 3174 (Breyer, J., dissenting); see also Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. at 1735 (listing self-funded agencies). Meanwhile, incumbent agencies pine for such fiscal independence from Congress. See, *e.g.*, Gina Chon, *CFTC Can Self-Fund Via Fines, Says Chief*, Financial Times, Oct. 9, 2013, at 14 ("[Commissioner Chilton] has called on lawmakers to alter the way the CFTC is funded, an argument supported by CFTC chairman Gary Gensler"); Mary L. Schapiro, Chairman, Securities and Exchange Comm'n, *Statement Concerning Agency Self-Funding* (Apr. 15, 2010) (arguing that "self funding ensures independence").

When a Congress gives up the Legislative Branch's power of the purse over an agency, future Congresses lose their ability to put weight behind their oversight of the agency. This, too, is exemplified by the CFPB. While the CFPB may appear before congressional committees, submit reports to Congress, and undergo audits by the Government Accountability Office, see 12 U.S.C. §§ 5496-5496a, it faces no serious consequences for refusing to respond meaningfully to Congress's inquiries. Congressmen and Senators can write letters to the CFPB, complaining that the agency is "wholly unresponsive

to our requests for additional budget information,"[9] or that the agency "has yet to explain its basis for" controversial policies.[10] At hearings, Congress can criticize the agency's failure to answer questions about its secret "data gathering activities".[11] But without the Appropriations Power, Congress has few tools left to put true weight behind its oversight activities.[12] In such cases, the Senate's Advice-and-

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[9] Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations, *et al.* to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012).

[10] Letter from Sen. Rob Portman, *et al.* to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013) (bipartisan coalition of twenty-two Senators write that the CFPB "has yet to explain its basis for" the agency's conclusion that "disparate impact" discrimination is present in certain auto loans).

[11] Rachel Witkowski, *Lawmakers Fume Over Unanswered Questions to CFPB*, Am. Banker (online) (Sept. 12, 2013) ("Lawmakers blasted the Consumer Financial Protection Bureau on Thursday, claiming it had failed to respond to questions lawmakers have about its data gathering activities. During the CFPB's semi-annual report to the House Financial Services Committee, lawmakers demanded to know why the agency's director, Richard Cordray, and his staff have not yet answered roughly 200 questions sent to the agency . . . .").

[12] The Impeachment Power for example, is no alternative to the Appropriations Power or Advice-and-Consent Power, because impeachment is not available for matters of maladministration not rising to the extraordinary level of "Treason, Bribery, or other high Crimes and

Consent Power stands as Congress's last, limited tool for overseeing the administrative state.

B. When Agencies Are Unchecked By The Appropriations Power, The Senate's Advice-And-Consent Power Becomes Congress's Last, Limited Means For Overseeing The Administrative State

The Senate's Advice-and-Consent Power's purpose and utility extend beyond any individual nomination and appointment. While the Senate confirmation process's *ex ante* nature prevents it from rivaling the Appropriations Power as Congress's primary check on administrative agencies, *see The Importance of Appointment*, *supra*, 125 Harv. L. Rev. at 1834-36, the Advice-and-Consent Power remains "an efficacious source of stability in the administration." The Federalist No. 76 (Alexander Hamilton).

To that end, Judge Friendly observed that the Senate's review of the President's nominations offered the opportunity for "a more positive role" in overseeing the administrative state—"not in pushing particular candidates, which is the executive's responsibility, but in maintaining standards" for the President to heed in making nominations. Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 445 (1960); cf. Henry J. Friendly, *The Federal Administrative Agencies* 166 (1962) ("I cannot follow this conception

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Misdemeanors." *Bowsher* v. *Synar*, 478 U.S. 714, 729-30 (1986).

of the agencies as satellites which, once having put them in orbit, Congress may not deflect.").

Of course, Judge Friendly recognized the Senate confirmation process's practical limits as a tool for overseeing agencies. In its advice-and-consent role, the Senate "must exercise its essential functions of oversight and criticism with caution and restraint." 60 Colum. L. Rev. at 445. But at the very least, the confirmation process allows the Senate to "look at how the agency is doing its job in general[.]" *Id.*

But, he added, while the Senate might reject nominees sparingly, "that prerogative is not to be relinquished[.]" *Id.* Even if it "seldom rejects a nominee," Professors Pierce and Shapiro explain, Congress still "uses confirmation hearings as an opportunity to review an agency's policies and performance, to emphasize the agency's responsibility to Congress, and to seek to force the nominee to indicate his substantive views about the direction of the agency." Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175, 1199 n.142 (1981); see also Beermann, *Congressional Administration*, 43 San Diego L. Rev. at 111 ("The choice of which officials to subject to the advice and consent process is also reflective of Congress's interest in the execution of the laws.").

Again, these oversight functions of the Senate confirmation process are limited—far more limited than Congress's potent power of the purse. But where Congress's purse has no power over an agency, the Senate confirmation process allows the Senate at least some opportunity to oversee the administrative state. If presidents can unilaterally deem the Senate

to be in a "recess" and appoint officers without the Senate's advice and consent, then even this last, limited oversight tool is lost.

II. The Senate Has Not "Acquiesced"—Nor Could It "Acquiesce"—To The Executive's Unprecedented Recess Appointments

The Executive defends its interpretation of the Recess Appointments Clause by invoking "long-established practice"—that is, the history of dealings between the President and the Senate. Pet'r Br. 21-28. The Executive alleges that Congress showed "acquiescence" in the President's appointments by passing the Pay Act to allow for payment to recess appointees who were appointed during intra-session recesses. See, *e.g.*, *id.* at 36-37; but see Resp. Br. 28-29 (rebutting that interpretation of the Pay Act).[13]

But as the Respondent explains, the "authority" claimed by the Executive "has not been 'accepted'" by the Senate; rather, the "Executive's current position is simply the latest in a string of increasingly aggressive assertions of mid-Session recess-appointment power." Resp. Br. 26; *see generally id.* at 25-30. The Executive's practice "has consistently evolved," *id.* at 26, and it will continue to evolve in

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[13] But the Pay Act applies only to recess appointments to agencies funded "from the Treasury of the United States[.]" 5 U.S.C. § 5503(a). That would not appear to include the CFPB, which receives its funds from the Federal Reserve System, not the Treasury. 12 U.S.C. § 5497(a); see also *id.* § 5497(c)(2) ("Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.").

ever more aggressive directions. This is clearest in the Executive's express refusal to concede *any* lower limit to how brief an adjournment might be yet still constitute a "recess." OLC, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___, slip op. at 9 n.13 (Jan. 6, 2012) ("there is no lower time limit that a recess must meet to trigger the recess appointment power"). While the Executive refuses to draw a line, the courts must respect the line already drawn by the Constitution's original public meaning and reject the President's unprecedented "recess" appointments.

Ultimately, the Executive's allegations of "congressional acquiescence" reflect not just a misrepresentation of facts, but also a much more fundamental misunderstanding of principle. The Senate cannot "acquiesce" in unconfirmed appointments outside of "the Recess of the Senate." Just as "the separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment,'" *Free Enter. Fund*, 130 S. Ct. at 3155, "[n]either Congress nor the Executive can agree to waive" the Appointments Clause's "structural protection," *Freytag*, 501 U.S. at 880.

"The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Id.* They deserve this Court's protection.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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November 25, 2013