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., ET AL.,

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

BRIEF OF AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF AMICUS[1]

The Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate government dysfunction and gridlock and to preserve the constitutionally-mandated separation of powers among the branches of government. It has played a leading role in advocating for a more effective U.S. Congress by seeking to curb abuses of the filibuster rule in the Senate, including publishing two reports on the subject and submitting written and oral testimony to the Senate on the historical and modern use of the filibuster.[2]

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[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for the Brennan Center affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

[2] *See* Mimi Marziani et al., The Brennan Center, *Curbing Filibuster Abuse* (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Curbing_Filibuster_Abuse.pdf; Mimi Marziani, The Brennan Center, *Filibuster Abuse* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Filibuster%20Abuse_Online%20Version.pdf; *Examining the Filibuster: Legislative Proposals to Change*

The Brennan Center respectfully submits this brief *amicus curiae* in support of the National Labor Relations Board as Petitioner, urging reversal of the Court of Appeals' judgment below. The Brennan Center also supports Petitioner's argument that the stratagem of holding *pro forma* sessions cannot extinguish the President's express constitutional authority to make recess appointments when in fact the Senate is simultaneously unavailable to provide advice and consent. The Brennan Center is concerned that the unduly restrictive interpretation of Article II, section 2, clause 3 ("the Recess Appointments Clause") propounded by the Court of Appeals below, together with the Senate's

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Senate Procedure Before the Sen. Comm. on Rules & Admin., 112th Cong. (2012) (statement of Mimi Marziani, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-mimi-marziani-filibuster-legislative-proposals-change-senate-procedure; *Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of Mimi Marziani & Diana Lee, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-mimi-marziani-and-diana-lee-examining-filibuster; *The Filibuster Today and Its Consequences Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-senate-rules-committee-modern-filibuster; *Examining the Filibuster: History of the Filibuster 1789-2008 Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of Mimi Marziani & Diana Lee, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-filibuster-reform-submitted-senate-committee-rules-and-administration; *see also* Alicia Bannon, The Brennan Center, *Federal Judicial Vacancies: The Trial Courts* (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf.

unprecedented adoption of *pro forma* sessions to eliminate recesses, threaten to subvert the carefully-calibrated balance of powers between the President and the Senate mandated by the Constitution.

SUMMARY OF ARGUMENT

This Court has emphasized that "one of [its] most vital functions . . . is [to] police with care the separation of the governing powers." *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). The Court has therefore consistently intervened to prevent one branch from aggrandizing its powers at the expense of the other two. In this brief, amicus shows that the D.C. Circuit's unduly narrow interpretation of the Recess Appointments Clause, and allowing the Senate's adoption of illusory *pro forma* sessions to eliminate recesses, would facilitate and encourage serious infringements on the separation of powers. It would eliminate the check that the Recess Appointments Clause has long been understood to impose against obstructive tactics that would aggrandize the Senate's advice and consent power at the expense of the President. Here, elimination of that check would have empowered a Senate minority, through an abuse of the filibuster rule, to deny the President any means of appointing officers needed to assist him in carrying out his executive functions under Article II of the Constitution, including the duty "to take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

The Founders designed the appointments power as a carefully balanced mechanism to assure

the timely appointment of qualified officers needed to assist the President in carrying out his executive functions. To that end, in the Appointments Clause, the Founders conferred on the President the power to nominate, and subject to the Senate's advice and consent, to appoint senior government officers, judges, and other officials. U.S. Const. art. II, § 2, cl. 2. As a failsafe device to assure that such appointments are timely made when the Senate is unavailable to perform its advice and consent function, the Recess Appointments Clause was added to give the President the unilateral power to make temporary appointments to fill vacancies. U.S. Const. art. II, § 2, cl. 3.

For almost two centuries, the appointments process worked almost as smoothly as the Founders expected. The President's appointments were rarely overruled by the Senate, and as Senate recess practices evolved, Presidential and Senate practice interpreted the Recess Appointments Clause in the manner best suited to carry out its purpose to assure that vacancies were timely filled when the Senate was unavailable to offer advice and consent. As so interpreted, the Recess Appointments Clause has operated as a check against the natural temptation of the Senate to seek to aggrandize its advice and consent power by converting it into a license to obstruct democratically-elected Presidents from governing.

The D.C. Circuit's restrictive interpretation of the Recess Appointments Clause and the Senate's adoption of *pro forma* sessions to eliminate recesses would eviscerate that check, and do so at a time

when it is most needed. In recent decades, the delicate balance struck by the Founders has been undermined by extreme partisan tactics that the Founders never anticipated. Senate majorities of both parties have sought to thwart the President's nominations by simply refusing to submit them to the advice and consent process. Most significantly here, changes to the Senate filibuster rules in the 1970s facilitated and greatly increased the use of the filibuster by both Democratic and Republican Senate minorities as an obstructionist device to prevent the operation of the advice and consent process and deny or delay submission of the President's nominees for confirmation by the Senate.

In this partisan atmosphere, Presidents of both parties increasingly have been forced to resort to the recess appointment power as a check on these obstructive tactics. In this case, for example, the Senate minority used the filibuster rule to block the President's nominees to the NLRB from receiving a Senate confirmation vote for more than three years. If the President had not exercised the recess appointment power to appoint sufficient members to the NLRB to achieve the required quorum, the Senate minority would have wholly paralyzed the operations of the NLRB from 2010 to 2013.

In his classic exposition of separation of powers, James Madison emphasized that:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each

> department the necessary constitutional means and personal motives to resist encroachments of the others.

The Federalist No. 51, at 349 (James Madison) (Jacob Cooke ed., 1961). The D.C. Circuit's narrow reading of the Recess Appointments Clause and the Senate's adoption of *pro forma* sessions to eliminate recesses would deprive Presidents of the constitutional means of resisting encroachment on the executive power, conferred by Article II, to appoint executive officers, a power "confirmed by his obligation to take care that the laws be faithfully executed." *Myers* v. *United States*, 272 U.S. 52, 163-64 (1926). This Court should reject such a subversion of the separation of powers and the constitutional design.

ARGUMENT

I. THE COURT SHOULD ADOPT AN INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE THAT RESPECTS ITS STRUCTURAL ROLE IN THE APPOINTMENTS PROCESS AS A WHOLE, AND THAT AVOIDS AGGRANDIZING THE POWER OF THE SENATE OR A SENATE MINORITY

This case presents a question that is among the most delicate and important of any this Court is called upon to decide: mapping the relative contours of important powers shared by the co-equal political branches, and preserving the constitutionally-mandated separation of powers between the

Executive and Legislative branches. As Justice Kennedy has explained:

> The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers . . . It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent.

Public Citizen v. *United States Dept. of Justice*, 491 U.S. at 468 (1989) (Kennedy, J., concurring).

In performing this function, the Court has eschewed formalistic categories or artificially rigid approaches to constitutional text. Instead, the Court has adopted a practical approach in its separation of powers decisions, emphasizing that:

> The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively . . . .

Buckley v. *Valeo*, 424 U.S. 1, 121 (1976).

Accordingly, this Court interprets the often ambiguous provisions of the Constitution that define and implement the separation of powers pragmatically, seeking to preserve the essential design of the Constitution without imposing unworkable limitations on the ability to govern. As Justice Jackson explained in his *Youngstown* concurrence:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but inter-dependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Moreover, in resolving separation-of-powers disputes, the Court has been particularly alert to efforts by one branch to aggrandize its powers at the expense of another. *See Morrison* v. *Olson*, 487 U.S. 654, 675-76 (1988) ("[S]eparation-of-powers concerns

. . . would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches . . . ."); *Freytag* v. *C.I.R.*, 501 U.S. 868, 878 (1991) ("[This Court's] separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." (citing *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989)).

The Court has been especially concerned with the tendency of the legislative branch to aggrandize its power at the expense of the other two branches. *See Buckley* v. *Valeo,* 424 U.S. at 129 ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."); *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) ("[T]he Appointments Clause prevents Congressional encroachment upon the Executive and Judicial Branches."); *see also INS* v. *Chadha*, 462 U.S. 919 (1983) (holding that Congress cannot grant itself a legislative veto over executive branch actions); *Bowsher* v. *Synar*, 478 U.S. 714 (1986) (holding that provisions in the Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws).

The text of the provision at issue—the Recess Appointments Clause—can be plausibly read to encompass either of the contending interpretations offered by the government and respondent, as the

conflicting readings of the lower courts demonstrate.[3] In these circumstances, in particular, the choice between two plausible readings of the Recess Appointments Clause should be governed by which interpretation of the clause best promotes, and does least violence to, the allocation of power between the President and the Senate that the Founders originally envisioned, and which reading best promotes the workable government they sought to achieve.

In the pages that follow, amicus shows that the D.C. Circuit's overly-narrow reading of the Recess Appointments Clause would upset the carefully-calibrated balance of powers established by the Constitution's appointments mechanism, by eliminating a crucial structural check on obstructive

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[3] *Compare Noel Canning* v. *N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) *with Evans* v. *Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *United States* v. *Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985*)*, *cert. denied*, 475 U.S. 1048 (1986). In the recent Third Circuit decision agreeing with the D.C. Circuit's interpretation of "the recess," the majority nonetheless acknowledges that either interpretation would fit within a natural reading of the text and dictionaries contemporaneous with the Founding, *N.L.R.B.* v. *New Vista Nursing & Rehab.*, 719 F.3d 203, 221 (3d Cir. 2013), while the dissent held that "the recess" encompassed *intrasession* recesses. *Id.* at 270 (Greenway, J., dissenting) ("The inclusion of intrasession recesses in the ambit of the Recess Appointments Clause is the interpretation most faithful to the text of the Constitution, the intent of the Framers, the purpose of recess appointments, and the tradition and practice of both the President and the Senate."). *See also N.L.R.B.* v. *Enter. Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), and the conflicting interpretation of the majority and the dissent there.

tactics designed to aggrandize the Senate's advice and consent power at the expense of the powers allocated to the President, subverting the President's capacity "to take care that the laws be faithfully executed." Amicus shows, as well, that the Senate's adoption of illusory *pro forma* sessions to eliminate formal recesses, in order to deprive the President of his recess appointment power entirely, would have the same unconstitutional effect.

II. THE CONSTITUTION'S APPOINTMENTS PROVISIONS ESTABLISH A CAREFULLY BALANCED MECHANISM TO EFFICIENTLY AND TIMELY FILL THE OFFICES NEEDED TO ASSIST THE PRESIDENT IN EXECUTING THE LAWS

The Constitution's appointments mechanism has as its objective the appointment by the President of qualified officials needed to assist the President in fulfilling his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As this Court has emphasized:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should

> select those who were to act for him under his direction in the execution of the laws. . . . Our conclusion . . . is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . .

Myers v. *United States*, 272 U.S. at 117, 163-64. *Accord Buckley v. Valeo,* 424 U.S. at 135-36. The same principle was cogently put by President Polk's Attorney General long ago:

> The constitution . . . requires that the President shall take care that the laws be faithfully executed. In the performance of public executive duties, it is important that officers filling the offices authorized by law shall be appointed. Offices without officers are useless to the public; and the constitution may fairly receive such a construction as will accomplish its ends without doing violence to its terms.

Powers of the President to Fill Offices During the Recess of the Senate, 4 Op. Att'y Gen. 523, 525-26 (1846) (AG Mason).

The Founders carefully designed the appointments power as a mechanism to achieve that

objective of filling the offices authorized by law.[4] Article II, § 2, cl. 2 provides the President with the initial authority to nominate principal officers of the United States, and with the advice and consent of the Senate, ultimately to appoint officials, because as Alexander Hamilton explained:

> [O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. . . . A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body.

The Federalist No. 76, at 510-11 (Alexander Hamilton) (Jacob Cooke ed., 1961). This choice also reflected the Founders' belief that a single individual would be more accountable and therefore more reliable. As Hamilton further explained:

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[4] The appointments mechanism laid out in the Constitution provides, in relevant part: "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 . . . . The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." U.S. Const. art II, § 2, cl. 2-3.

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

Id.; see also Public Citizen, 491 U.S. at 483 n.4 (Kennedy, J., concurring) (citing Federalist No. 76).

The President's power to appoint is, nevertheless, made subject to the Senate's "advice and consent," to provide a check on any "spirit of favoritism" that might result in the appointment of unfit persons. The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961). The Founders, however, thought it "not very probable that [the President's] nomination would often be overruled. . . . where there were not special and strong reasons for the refusal" because the Senate could not be "certain that a future nomination [by the President] would present a candidate in any degree more acceptable to them . . . ." *Id.* at 512-13. Rather, the Founders believed:

> [T]he necessity of [the Senate's] concurrence would have a powerful, though, in general, a silent operation. 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 from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Id. at 513.

Finally, as a fail-safe mechanism to assure that important vacancies are promptly filled when the Senate is unavailable to perform its advice and consent function, Article II, § 2, cl. 3 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." As Hamilton explained:

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

The Federalist No. 67, at 455 (Alexander Hamilton) (Jacob Cooke ed., 1961).

In the years that followed ratification, the Recess Appointments Clause was interpreted in a pragmatic fashion to carry out the Founders' desire to assure that important vacancies were timely filled. After some controversy in the years immediately

following ratification about whether a vacancy occurring during a Senate session but continuing into the recess was a vacancy that "happens during the recess," it soon became evident that reading the Recess Appointments Clause as excluding such vacancies from the recess appointment power would undermine the purpose of the Constitution, which was to assure the continuous presence of important officials, temporarily appointed if necessary, needed to execute the laws.[5] Thus, in 1823, Attorney General Wirt advised President Monroe that a vacancy that "happens" during the recess could plausibly be read to mean "happens to exist" during the recess, and that such vacancies could be temporarily "filled up" during the Senate's recess. As Attorney General Wirt reasoned:

> The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy [first arising during the Senate session but not confirmed before it recessed], the powers are inadequate to the purpose, and the substance of the constitution will be sacrificed to a dubious construction of its letter. . . . [I]f we interpret the word "happen" as . . . equivalent to "happen to exist," (as I think we may legitimately do) . . . the

[5] *See* Brief of Petitioner, *National Labor Relations Board* v. *Noel Canning*, No. 12-281 (2013) ("Pet. Br."), at 28-44.

> whole purpose of the constitution is completely accomplished.

Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632-33 (1823) (AG Wirt). President Monroe's adoption of this common sense construction, and the principle it embodies, has been consistently applied by Presidents,[6] and endorsed by the courts for almost two centuries until this case.[7]

Thus, in the 20th century, when advances in transportation technologies permitted the Senate to take frequent and substantial *intrasession* recesses,[8] President Harding's Attorney General applied the same principle of common sense construction to the meaning of "recess." He concluded that the term included substantial *intrasession* recesses, as well as the *intersession* recess occurring between sessions of

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[6] *See* Pet. Br. at 21-28.

[7] *See Evans* v. *Stephens*, 387 F.3d at 1226-27; *United States* v. *Woodley*, 751 F.2d at 1012-13; *United States* v. *Allocco*, 305 F.2d at 712-13, *but see Noel Canning* v. *N.L.R.B.*, 705 F.3d at 512; *N.L.R.B.* v. *Enter. Leasing Co. Southeast, LLC*, 722 F.3d at 676; *N.L.R.B.* v. *New Vista Nursing & Rehab.*, 719 F.3d at 244.

[8] Given the realities of travel in the early years of the republic, *intrasession* recesses were rare and brief; there were only 11 such recesses prior to 1867, none lasting more than two weeks. Between 1867 and 1941 there were 64 such recesses, with one lasting 130 days. *See* Thomas Glavin, *Constitutional Law-Congressional Standing and the Pocket Veto During Intersession Adjournments,* 59 Temple L.Q, 151 app. (1986). *See also* Pet. Br. at 21-28. The fact that early recess practices were limited by travel realities to *intersession* recesses should no more determine the meaning of "recess" than the fact that at the time of adoption of the Second Amendment, "arms" were understood to mean muskets. *See District of Columbia* v. *Heller*, 554 U.S. 570, 622 (2008) (Scalia, J.).

Congress. He ruled, therefore, that the Recess Appointments Clause could be employed whenever "the Senate [was] absent so that it [could] not receive communications from the President or participate as a body in making appointments." Executive Power-Recess Appointments, 33 U.S. Op. Att'y Gen. 20, 21-22, 25 (1921). Prior to the D.C. Circuit's decision, that reading had been applied for almost a century.[9]

The common sense reading of the text of the Recess Appointments Clause adopted by President Monroe in 1823, and by President Harding a century later, has enabled the clause to operate for almost two centuries as a crucial structural check against Senate failure or refusal to perform its advice and consent responsibilities during its regular sessions. Until now, Senators tempted to aggrandize the advice and consent power in an effort to prevent a President from governing were on notice that if they prevented the Senate from voting on Presidential nominations, the President would eventually be empowered to "fill up" the vacancy with a temporary recess appointment. Moreover, when *intrasession* recesses of considerable duration became feasible and more common, the word "recess" was read to include both *intra-* and *inter-session* recesses, so the Senate could not deprive the President of his recess appointment power by reducing or eliminating *intersession* recesses in favor of *intrasession* recesses. Under the common sense reading of the word, if a Senate recess was of sufficient duration to render the Senate unable to perform its advice and consent function, the President remained able to fill

[9] *See* Pet. Br. at 24-28.

vacancies during that recess regardless of whether it was an *intersession* or *intrasession* recess.

As amicus now shows, the unduly narrow interpretation of the recess appointment power espoused by the court below, and the recent unprecedented use by the Senate of *pro forma* sessions to eliminate recesses, would effectively remove the Recess Appointments Clause as a structural check on Senate aggrandizement of the advice and consent power, at a time when it is most needed to counter extreme partisan obstructionism by both parties.

III. THE D.C. CIRCUIT'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE AND THE SENATE'S USE OF *PRO FORMA* SESSIONS WOULD UNDERMINE SEPARATION OF POWERS BY REMOVING THE PRINCIPAL STRUCTURAL CHECK ON SENATE OBSTRUCTION AT A TIME WHEN THAT CHECK IS MOST NEEDED

The unduly narrow interpretation of the recess appointment power espoused by the court below, and the Senate's use of *pro forma* sessions to eliminate recesses, would eviscerate the Recess Appointments Clause as a structural check on partisan obstructionism. This would invite the full Senate, when controlled by a party opposed to the President, or a Senate minority armed with the filibuster rule, to distort the advice and consent power into an engine designed to prevent the President from appointing officers of his choosing.

Eliminating the structural check provided by a viable Recess Appointments Clause would, moreover, be particularly destructive at this time, given the extreme and unprecedented level of partisan obstruction that currently prevails and the ease with which extreme partisans can hijack the Senate under the modern filibuster rule.

A. The D.C. Circuit's Interpretation of the Recess Appointments Clause and the Senate's Use of *Pro Forma* Sessions Would Remove Checks on the Senate and Would Subvert the Separation of Powers

By limiting the power to fill vacancies to those arising during a recess, the D.C. Circuit would empower the Senate to refuse to act on nominations during its regular sessions, knowing that vacancies could not be filled temporarily by the President during a Senate recess. And, by limiting the recess appointment power to *intersession* recesses, the D.C. Circuit's interpretation would enable the Senate to manipulate recesses to eliminate *intersession* recesses, or to limit their duration to a metaphysical instant between two sessions, while expanding the number and duration of *intrasession* recesses, thus preventing the President from filling vacancies even though the Senate is unavailable to exercise its advice and consent function. In fact, in this very case, the D.C. Circuit found that there was no

intersession recess before the session of Congress that began on January 3, 2012.[10]

Allowing the *pro forma* sessions to prevent the exercise of the recess appointment power, even though the Senate is in fact unavailable to provide advice and consent, would have a similar destructive effect on the role of the Recess Appointments Clause as a structural check on unconstitutional efforts to abuse the advice and consent power. *Pro forma* Senate sessions permit the Senate to take what are in fact extended recesses in any common-sense understanding of the term, free from the check of the recess appointment power. Indeed, they would enable the Senate to eliminate the recess appointment power altogether.

Under any of these scenarios, the President could be deprived of any ability to fill crucial vacancies in the face of the Senate's, or a Senate minority's, obstruction of the regular method of appointment through advice and consent. The Senate minority would be able to engage in these obstructive tactics without any check and oblige the President to either leave vacancies unfilled or accept conditions that the Senate minority sought to extort. Such an aggrandizement of the powers of the Senate or a Senate minority at the expense of the President would severely distort the balance of powers which the Founders established in designing the Constitution's appointments mechanism.

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[10] *Noel Canning* v. *N.L.R.B.*, 705 F.3d at 512 ("First, the vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.").

B. The Elimination of the Checks Provided By the Recess Appointments Clause Would Be Especially Damaging Now

The elimination of the checks heretofore imposed by the Recess Appointments Clause would come at a time of extreme partisanship that first began in the late 1970s and is now at fever pitch, when the use of such obstructive tactics, in particular the filibuster, have increased to an unprecedented degree and already have caused severe government dysfunction.[11]

Most significantly for this case is the recent unprecedented use of the filibuster rule by a Senate minority to prevent the President from appointing officials to assist him in executing duly enacted laws through the regular appointments process of advice and consent.

The filibuster was originally designed as a means to promote debate in the Senate, but it has since been effectively transformed into a minority veto that imposes few if any costs on those invoking it. Earlier versions of the filibuster imposed the burden on those seeking to maintain it to speak without interruption, maintain a substantial attendance in the Senate, and be held publicly accountable for those delays. The current filibuster

[11] For a useful discussion of the rise and effects of such extreme partisan obstruction and the government dysfunction it has wrought, *see generally* Thomas E. Mann & Norman J. Ornstein, *It's Even Worse Than It Looks: How The American Constitutional System Collided With the New Politics of Extremism* (2012).

rule, reflecting the changes made in the 1970s, eliminates all those burdens. These changes now enable a Senate minority, on the mere threat of a filibuster, to force a sixty-vote supermajority to overcome that threat before the Senate can proceed to a confirmation debate and vote.[12]

The lack of any personal or institutional cost for the filibuster has been accompanied by the Senate's increased employment of this tactic. Prior to any rule changes, from 1961-1970 there was an average of 5.6 cloture motions filed per two-year Congressional session. (Cloture motions, which represent an attempt to end a filibuster, are often used as a proxy for determining the number of filibusters.) The number of cloture motions then steadily rose over the ensuing decades, rising to an average of 41 per Congressional session between 1981 and 1990, and reaching 139 cloture motions in the 2007-2008 Congressional session.[13] Likewise, during President Obama's first term, there was an average of 126 cloture motions in each Congressional session.[14]

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[12] *See* Marziani, *Filbuster Abuse*, *supra* note 2, at 5-6; Sarah A. Binder & Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* 150-52 (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster,* 49 Stan. L. Rev. 181, 200-09 (1997).

[13] *See* U.S. Senate, Senate Action on Cloture Motions, http://www.senate.gov/pagelayout/reference/cloture_motions/cloture Counts.htm. *See also* Mann & Ornstein, *supra* note 11, at 84-100.

[14] *See* U.S. Senate, *supra* note 13. *See also* Marziani, *Filibuster Abuse*, *supra* note 2, at 4-7.

Additionally, Senators can also place informal "holds" on nominations, which are often anonymous, by informing the party leadership of the Senator's intent to object to a particular nomination.[15] These holds must also be overcome by a cloture motion, requiring a sixty-vote *supermajority* to confirm any Presidential nominees subject to a hold.[16]

Moreover, the recent use of the filibuster by the Senate minority has been for explicitly partisan and ideological motives, rather than to foster debate about the qualifications of the nominees. For example, in filibustering President Obama's nomination of Richard Cordray to be Director of the Consumer Financial Protection Bureau ("CFPB"), forty-four Republican Senators sent a letter to President Obama stating that "we will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the Consumer Financial Protection

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[15] Marziani, *Filibuster Abuse*, *supra* note 2, at 2 ("The practice of placing 'holds' is an informal custom by which a single senator can indefinitely . . . stop legislation or nominations from reaching the Senate floor. To place a hold, a senator sends a letter to her party's leadership indicating her desire to halt progress on a specified bill or nominee. . . . A request for an indefinite hold contains two implicit threats: first, it signals a senator's intent to object to a unanimous consent agreement; and then, to filibuster the targeted legislation or nomination. . . . Often, senators use this tactic to gain bargaining leverage over other senators or over members of the Executive branch.").

[16] Richard Beth & Valeria Heitshusen, Cong. Research Serv., RL30360, *Filibusters and Cloture in the Senate* 1 (2013) ("Invoking cloture requires a super-majority vote (usually 60 out of 100 Senators.)").

Bureau is reformed."[17] Similarly, holds are frequently employed for reasons unrelated to the nominees at issue. Senators have used holds as leverage to obtain policy concessions on specific benefits for a favored constituency. For example, in 2009, Senator Menendez, a Democrat, placed a hold on two environmental agency nominees to protest the unrelated issue of Cuban trade restrictions. Senator Shelby, a Republican, placed a hold on seventy nominees in February 2010 to obtain earmarked funds for his home state of Alabama.[18]

The unprecedented and excessive use of the filibuster and holds by the Senate minority has restricted the operation of the appointments process envisioned by the Founders, blocking dozens, if not hundreds, of routine appointments for partisan or political reasons regardless of the qualifications of the nominee.[19]

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[17] Senator Richard Shelby, *44 U.S. Sens. To Obama: No Accountability, No Confirmation* (May 5, 2011), http://www.shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17.

[18] Marziani, *Filibuster Abuse*, *supra* note 2, at 13.

[19] Statistics demonstrate the recent rise in Senate obstructionism. From 1979 until 2003, executive branch agency positions subject to Senate confirmation had a vacancy rate of approximately 25%. After President Obama's first year in office, this vacancy rate approached 36%. The Senate is also engaging in increased delay of executive nominees through similar procedural tactics, when not blocking confirmation outright. Under President Clinton, the Senate took an average of 48.9 days to confirm nominees. Under President Bush (II), the average amount of time rose to 57.9 days. Under President Obama, the delay increased still further, to 60.8 days. In March 2010, President Obama had 217 pending nominees in

While this case relates to dysfunction created by filibusters affecting executive officers, these same obstructionist activities by the legislature have also had a devastating impact on judicial appointments and the judiciary. As Chief Justice Roberts stated:

> Over many years, however, a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads. . . . There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem.

Chief Justice John Roberts, U.S. Supreme Court, 2010 Year End Report on the Federal Judiciary 7-8 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf. Nearly ten percent of the entire judiciary was vacant as of mid-year 2012,[20] in large part due to the use—or

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the Senate, who had been awaiting votes an average of 101 days—and including thirty-four nominees who had been pending for more than six months. Alexander Platt, *Preserving the Appointments Safety Valve*, 30 Yale L. & Pol'y Rev. 255, 284-85 (2011).

[20] Bannon, *supra* note 2, at 1 ("[T]he slow pace of nominating and confirming judges has also precipitated a crisis in the

threatened use—of the filibuster. This not only harms judges but millions of Americans who are denied access to justice.

The conflict between the executive and the legislative branch over appointees to the NLRB, the issue that led to this case, shows both the scope of Senate minority obstruction of the appointments process and how the use of such tactics by both parties, if unchecked by the recess appointment power, can paralyze government operations and prevent the President from executing the laws.

In 2007, the terms of three of the NLRB board members were set to expire, thereby depriving the NLRB of the necessary quorum, unless the vacancies were filled. In the belief that the Senate majority could prevent President Bush from filling these vacancies by using the recess appointment power, the Democratic Senate majority leader Harry Reid developed the idea of conducting *pro forma* sessions during a Thanksgiving break and winter recess, expressly to preclude recess appointments.[21] The Senate majority subsequently refused to vote on any of President Bush's nominees, with Democratic Senator Boxer stating that it was "better to have fewer people on the commissions if the people who

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district courts . . . . As of July 1, 2013, there were 65 vacancies in the district courts out of a total of 677 judgeships, creating a vacancy rate of almost 10 percent. . . . The high number of vacant judgeships limits the capacity of district courts to dispense justice and affects the millions of Americans who rely on district courts to resolve lawsuits and protect their rights.").

[21] *See* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Harry Reid) ("[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.").

are nominated want to destroy the mission of their particular job . . . I'd rather have nobody."[22] (This Court subsequently invalidated a desperate maneuver by the Board intended to enable it to operate with two members, as a violation of the applicable statutory provisions requiring a three-member quorum. *New Process Steel, L.P.* v. *N.L.R.B.*, 130 S. Ct. 2635 (2010).)

During the first fifteen months of the Obama administration, several of President Obama's appointees to the NLRB were blocked by the Republican Senate minority, with Senator Graham stating, "the NLRB as inoperable could be considered progress," and several other Senators indicating that "they would block any new Obama nominees because of their ire over labor board moves . . . ."[23] Confronting the prospect of a paralyzed NLRB, the President exercised the recess appointment power in March 2010, enabling the agency to continue to function. The Senate minority continued to frustrate the efforts of the President to appoint new NLRB members through the regular appointments process, and the NLRB once again faced the loss of a quorum in January 2012.

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[22] Ryan Grim, *Politics Freezes Regulatory Boards*, The Politico (Feb. 28, 2008), http://www.politico.com/news/stories/0208/8744_Page2.html.

[23] *See* Steven Greenhouse, *Labor Panel is Stalled by Dispute on Nominee*, N.Y. Times (Jan. 14, 2010), http://www.nytimes.com/2010/01/15/us/politics/15nlrb.html?_r=0.; Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?*, Wall Street Journal-Washington Wire (Jan. 6, 2012), http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/.

The Senate minority sought to preclude President Obama from exercising the recess appointment power during the 2011-2012 holiday recess, by enlisting the aid of the Speaker of the House, John Boehner, to compel Senate Majority Leader Reid to conduct *pro forma* sessions during the holiday recess, in an effort to preclude recess appointments.[24] Using the Adjournments Clause's requirement that an adjournment of either House for more than three days be agreed to by both Houses (U.S. Const. art. I, § 5, cl. 4), Speaker Boehner informed Senator Reid that the House would not consent to a Congressional holiday adjournment unless the Senate conducted *pro forma* sessions during this period.[25] This intrusion of the House of Representatives into the appointments process was unprecedented, as the Founders had explicitly precluded the House from any role in the appointments process. The President, maintaining that the *pro forma* sessions could not deprive him of his recess appointment power, made recess

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[24] Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments,* (May 25, 2011), http://www.vitter.senate.gov/newsroom/press/vitter-demint-urge-house-to-block-controversial-recess-appointments ("Sen. David Vitter (R-LA), Jim DeMint (R-SC) and 18 other senators today sent a letter to Speaker of the House John Boehner asking him not to pass the Senate's adjournment resolution in order to block recess appointments by the Obama Administration.").

[25] Charlie Savage*, Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. Times (Apr. 23, 2013), http://www.nytimes.com/2012/04/23/us/politics/shift-onexecutive-powers-let-obama-bypasscongress.html?pagewanted=all ("House Republicans had been forcing the Senate to hold 'pro forma' sessions through its winter break to block such appointments.").

appointments of three new members to the NLRB. Had President Obama lacked the recess appointment power for any of the reasons advanced by Respondent, the NLRB would have been paralyzed for three years.

A similar illustration is provided by the circumstances that forced President Obama to make a recess appointment of Richard Cordray as director of the CFPB on the same day he made the three NLRB recess appointments. On December 8, 2011, the Senate minority used a filibuster to block the President's appointment of Mr. Cordray to this post.[26] The Senate minority made clear that its refusal had nothing to do with Cordray's qualifications.[27] Rather, as noted earlier, they informed the President in a letter signed by forty-four members of the Senate minority that they would

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[26] John Cushman Jr., *Senate Stops Consumer Nominee*, N.Y. Times (Dec. 8, 2011), http://www.nytimes.com/2011/12/09/business/senate-blocks-obama-choice-for-consumer-panel.html ("[F]ilibustering Republicans who oppose the powers of the new agency successfully challenged one of the administration's main responses to the financial crisis . . . The vote was 53 yes, 45 no.").

[27] *Id.* ("'This is not about the nominee, who appears to be a decent person and may very well be qualified,' said Senator Orrin Hatch, Republican of Utah . . . 'It's about a process that is running out of control.'"); Jonathan Weisman & Jennifer Steinhauer, *Senators Reach Agreement to Avert Fight Over Filibuster*, N.Y. Times (July 16, 2013), http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html?pagewanted=all ("'Cordray was being filibustered because we don't like the law' that created the consumer agency, said Senator Lindsey Graham, Republican of South Carolina. 'That's not a reason to deny someone their appointment. We were wrong.'").

not confirm any nominee to the post unless the President agreed to an amendment to provisions of the Dodd Frank law pertaining to the CFPB. *See supra* note 17.

Following Cordray's recess appointment, he was finally confirmed by the Senate on July 16, 2013, almost two years after he was first nominated, as part of an agreement between the Senate majority and minority entered under a threat by the Senate majority leader to eliminate filibusters of Presidential nominees to executive offices. Had President Obama not exercised his recess appointments power to appoint Cordray in January 2012, key functions of the CPFB would have been paralyzed for almost two years, because the Dodd Frank law permits those functions to be performed only by the Director or his designee.[28]

C. The Recent Senate Agreement to Permit an Advice and Consent Vote in Connection With Seven Pending Executive Branch Nominees Does Not Lessen the Need to Preserve a Viable Recess Appointments Clause

The recent Senate agreement, referred to above, that finally resulted in the confirmation of nominees to the NLRB and CFPB, as well as several other posts in which the filling of vacancies had been delayed by the obstructive use of the filibuster, does not lessen the need to reject the efforts to eviscerate the President's recess appointment power. The Senate agreement makes clear that neither

[28] 12 U.S.C. §§ 5493-96 (2010).

Republican nor Democratic Senators are willing to relinquish the filibuster rule—and the current Senate minority specifically emphasizes its right to employ the filibuster again.[29] In such a climate of partisanship, the structural importance of a viable recess appointment power remains crucially important to the functioning of the Article II process. The Founders empowered the President to make timely recess appointments when the Senate was unavailable. The restrictions that the D.C. Circuit and the Senate seek to impose on that power would erase it from the Constitution.

D. The Balance of Risks to Separation of Powers Favors the Government's Interpretation of the Recess Appointment Power

Finally, there is no basis for the fear expressed by the D.C. Circuit that the government's interpretation of the Recess Appointments Clause would enable the President to bypass the normal appointments process. Any such risk is remote and greatly outweighed by the very real risks to separation of powers posed by the D.C. Circuit's restrictive reading that would enable the Senate or a Senate minority to further aggrandize their powers at the President's expense.

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[29] Paul Kane & Ed O'Keefe, *Senate Reaches Tentative Deal On Filibuster Rules*, Washington Post (July 16, 2013), http://articles.washingtonpost.com/2013-07-16/politics/40601790_1_republicans-filibuster-majority ("[T]he Senate rules will remain unchanged – so Republicans can filibuster in the future and Reid can threaten to unilaterally change the rules again.").

As Professor Adrian Vermeule explains:

> [T]he *Canning* court focuses selectively, even to the point of obsession, on a particular target risk, while ignoring countervailing risks, including risks generated by the precautions themselves. . . . [T]he court's narrow interpretation of the recess appointments power indirectly promotes the power of a blocking minority in the Senate. Madison assumed in Federalist 10 that the risk of oppression by entrenched minorities was low, because 'the republican principle . . . enables the majority to defeat [a minority faction's] sinister views by regular vote.' But if that principle is disabled, the risk of presidential aggrandizement has to be weighed against the risk of minoritarian factional oppression.

Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 Harv. L. Rev. F. 122, 123-24 (2013), *available at* http://www.harvardlawreview.org/issues/126/february13/forum_990.php. Indeed, notwithstanding the checks provided by the Recess Appointments Clause as heretofore interpreted by the courts and Presidents alike, Senate Democrats and Republicans have demonstrated their willingness to aggrandize their powers—and to a large extent have already succeeded in doing so. *See supra* pp. 22-24 and notes 12-16. Thus, the greater risk, as the circumstances of this case show, is from an unaccountable Senate

minority with partisan incentives to obstruct the President's ability to carry out his executive responsibilities under Article II.

Moreover, there are important restraints preventing presidential abuse. The Founders provided a significant deterrent by making recess appointments temporary, and so an inadequate substitute for appointees confirmed through the regular appointments process. Of equal importance, the President is accountable to the public in ways that a collective body is not. Any presidential abuse of the recess appointment power would be quickly identified and exploited by the opposing party to the President's disadvantage.

Further, the President has little to gain by abusing the recess appointment power. Were he to delay nominating persons to fill vacancies while the Senate is in session, so that he could unilaterally appoint them during a recess, he would only be damaging his own agenda by depriving himself of assistance he needs to carry it out for the period of the delay. The risks here of legislative aggrandizement therefore clearly outweigh the unsubstantiated risks of presidential aggrandizement.

* * *

In sum, the D.C. Circuit's interpretation of the Recess Appointments Clause would subvert the balance of powers envisioned by the Founders. It would allow the Senate or a Senate minority to aggrandize its powers at the expense of the President and the nation's interest in effective government. It

would enable the Senate to hold the advice and consent process hostage to obstructionist tactics and deprive the President of any alternative means of timely filling vacancies with the officials needed to enable the executive to carry out its responsibilities under Article II, including the duty to take care that the laws be faithfully executed. Permitting the Senate to use *pro forma* sessions to deprive the President of his recess appointment power would have the same effect, eliminating the Recess Appointments Clause as a crucial structural lynchpin for the entire appointments process. This would be a dramatic example of the legislative aggrandizement at the expense of the executive that the Founders most feared.

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to reverse the Court of Appeals' judgment invalidating the President's recess appointments to the NLRB and to reject the use of *pro forma* sessions of the Senate to prevent the President from exercising his constitutional prerogative to make recess appointments.

Respectfully submitted,

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