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 *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC. AND JEANETTE GEARY IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

With respect to principal officers of the United States, the Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. As an exception to that provision, the Recess Appointments Clause of the Constitution provides that "[t]he President shall have the 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. 3. The questions presented are:

1. Was the exception to the general provision for appointment of principal officers during the recess of the Senate properly exercised during a period governed by the same Senate scheduling order under which the President previously sought and obtained official, collective action of the Senate?

2. May the exception to the general provision for appointment of principal officers during the recess of the Senate be exercised during a recess that occurs within a session of the Senate, or is it instead limited to the recess that occurs between sessions of the Senate?

3. May the exception to the general provision for appointment of principal officers during the recess of the Senate be exercised to fill vacancies that arise prior to the recess, or is it instead limited to vacancies that first arise during that recess?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE* [1]

Amicus National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, the freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include *Knox v. Service Employees International Union*, Local 1000, 132 S. Ct. 2277 (2012); *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The Foundation's legal aid program supports cases arising under the National Labor Relations Act, 29

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

U.S.C. § 151 *et seq*. Since January 2012, numerous Foundation-assisted employees have had their cases decided by the NLRB Members whose recess appointments are being challenged in this case. Those cases include *Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012); *Smith's Food & Drug Centers, Inc*., 358 N.L.R.B. No. 66 (July 10, 2012), *petition for review filed*, No. 12-1338 (D.C. Cir. Aug. 1, 2012); *United Nurses & Allied Professionals*, 359 N.L.R.B. No. 42 (Dec. 14, 2012), *petition for writ of mandamus voluntarily dismissed sub nom. In re Jeanette Geary*, No. 13-1029 (D.C. Cir. Aug. 9, 2013); *Communications Workers of America*, 359 N.L.R.B. No. 131 (June 10, 2013). For this reason, the Foundation has an interest in a resolution of this case in which the recess appointments are held unconstitutional and the decisions of the recess appointees declared null and void.

Amicus Jeanette Geary is a registered nurse who filed the unfair labor practice charge in *United Nurses & Allied Professionals*, 359 N.L.R.B. No. 42 (Dec. 14, 2012) (3-1 decision), raising claims under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). The outcome of her pending case will be directly affected by this case's resolution, because one of her claims was determined by a Board that had only two Senate-confirmed Members. In addition to challenging the recess appointments within the NLRB's adjudicatory process, Ms. Geary filed a Petition for Writ of Mandamus to stop the NLRB from ruling on the remaining issues in her case in the absence of a valid quorum of Members. *In re Jeanette Geary*, No. 13-1029 (D.C. Cir.).[2] Ms. Geary here seeks

[2] Ms. Geary's mandamus petition was voluntarily dismissed as moot upon Senate confirmation of a valid quorum of NLRB Members in July 2013.

to ensure that only a constitutionally valid NLRB will have determined her claims.

SUMMARY OF ARGUMENT

Much of the briefing in this case illustrates the adage about not seeing the forest for the trees. The exhaustive, competing analyses of text and historical practice obscure a few basic truths that may assist in framing the issues before the Court in a way that does justice to the Constitution's structure. *First*, a single Senate scheduling order covered the entire period in which the President[3] successfully called upon the Senate to take official, collective action with respect to legislation, though he now claims the Senate was unavailable during that same period. *Second*, the Constitution's recess appointment provision is an exception from the general rule governing appointments; it is not a power isolated from the general rule. *Third*, under the test articulated throughout the President's brief, it is evident that the Senate was, in fact, available for official, collective action at all relevant times, and that modern technology ensures that it is almost always available for such action.

[3] Although it is common for the Solicitor General to refer to his brief as that of "the Government," due to the separation of powers issues that have prompted Members of Congress to file briefs in this case, for sake of clarity his brief and the positions he takes are attributed to "the President."

ARGUMENT

I. THE PRESIDENT SIMULTANEOUSLY ASSERTS MUTUALLY INCONSISTENT POSITIONS WITH RESPECT TO WHETHER THE SENATE WAS IN RECESS

There is a narrow basis on which the Court can resolve this case without wading into deeper constitutional waters. The Senate's unanimous consent order of December 17, 2011, which governed the entire period from that date through January 23, 2012, Pet. App. 91a-92a, drew no distinction between *pro forma* sessions scheduled before or after noon, January 3, 2012. After the Senate adopted that consent order, while many of its members were geographically dispersed, the President expressly called upon the Senate to act in its official, collective capacity to enact legislation during the period covered by the order. Not only did the Senate act, the President signed the resulting bill during the period covered by the Senate's order. Pet. Br. at 52 n.49. Based on that actual official, collective action, it was no mere "remote possibility," *id*. at 52, that the Senate could act on business prior to January 23, 2012 – it was historical fact.

Inconsistently, during the same period covered by the Senate's order, the President posited that the Senate was unavailable to act in its official, collective capacity and, as a consequence, he had the authority to unilaterally appoint principal officers of the United States. The traditional judicial tool of estoppel provides a basis to hold that, having benefitted from one characterization of the situation (enactment of requested legislation), the President may not now demand a conflicting characterization. Such a holding

would signal both to the President and the Senate (as well as the electorate) that there are judicially enforceable limits to the power to make recess appointments, without necessitating a broad articulation of those limits in this case.

Addressing more broadly on the merits the issue of when the Senate is in recess on the facts presented here can only entangle the Court in having to decide related disputes – *e.g.*, the minimum number of days that constitute a sufficient recess of the Senate for purposes of the recess appointment exception, the validity of *pro forma* sessions in calculating that length of time, whether Sundays should be counted as other days in calculating the length of the recess, and whether the Senate could constitutionally recess without the consent of the House of Representatives. The President asserts that the last of those items would constitute a mere intra-branch dispute that the Court need not resolve. However, where, as here, the House does not consent to an adjournment by the Senate precisely to ensure that the President obtains Senate approval of any nominees, Pet. Br. at 56, the dispute no longer involves only the two houses of Congress.[4]

The President concedes that "the advice-and-consent process engages political leaders in a long

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[4] Contrary to the President's suggestion, Pet. Br. at 56 n.55, the House of Representatives' objection to Senate adjournment was not designed to provide a role for itself in the appointment process. The House merely sought to ensure that any presidential nominees would be subject to the moderating influence *of the Senate*. If this Court were to determine that the House acted improperly in preventing the Senate from adjourning, the Court would become enmeshed in determining which future disagreements over adjournment are for proper reasons and which are not.

course of repeated interactions, in which short-term compromises can be made despite disagreements." *Id.* at 57-58 (footnote omitted). That acknowledgment undermines much of the President's brief. Under that explanation, it does not matter how many past Presidents made any number of recess appointments under whatever circumstances. Situations where an appointment drew no objections because the appointee was qualified and noncontroversial, or because the particular office and circumstances illustrated an unquestionable emergency, or because any Senate objection was ameliorated by political compromise on other matters, do nothing to resolve the deeper "disagreements" over the scope of the recess appointment exception.

II. THE RECESS APPOINTMENT PROVISION IS AN EXCEPTION TO THE GENERAL RULE GOVERNING APPOINTMENT OF PRINCIPAL OFFICERS

The President argues over the meaning of the recess appointment "power" as though it exists in a vacuum, ignoring the Constitution's establishment of a single, general rule for the appointment of principal officers to which the provision for recess appointments constitutes an *exception*.[5] This Court's "standard approach"

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[5] With respect to *inferior* officers, the Constitution permits additional exceptions from the general, default method of appointment. For those officers, Congress may authorize the President to make unilateral appointments. That the Constitution does not permit Congress to vest unilateral appointment power in the President for principal officers further underscores that, as a general matter, the Constitution requires Senate approval, with the recess appointment provision constituting only an exception.

is to construe exceptions narrowly so as to not undermine a general rule. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984) (citing *Nyquist v. Maculet*, 432 U.S. 1, 11 (1977)) (narrowly construing political function exception to bar discrimination on the basis of alienage). Here, in an effort to avoid rendering the general rule entirely meaningless, the President concedes that the recess appointment power does not extend to *future* vacancies that do not exist at the time of the putative appointment. Pet. Br. at 31. The very fact that the President requires such an absurd example to illustrate that any meaning remains to the general rule demonstrates the over-breadth of his reading of a mere *exception* to the general rule.

The President also acknowledges that some breaks in Senate business are too brief to permit use of the recess appointment exception, which he currently sets at "three or fewer days," *id*. at 45, while also contending that the period between some of the *pro forma* sessions here might be counted as four days. *Id.* at 44 n.45. But there is no assurance that the President or his successors may not claim the power to act unilaterally during even shorter breaks. The same rationales the President urges here – the need for prompt action and the President's duty to "take care" that the laws are executed – could well be asserted with respect to shorter breaks.[6] Rather than

[6] The President seemingly treats his duty to "take care" as justification to circumvent express constitutional limitations. For example, it is axiomatic that the "power of the purse" is vested in Congress. Just because Congress authorized some agency, it does not follow that the President could disregard the lack of appropriations – through "zero funding" or "defunding" – and order subordinates to enforce the substantive statute. *See, e.g.*, Anti-Deficiency Act, 31 U.S.C. § 1341; *United States v. Bean*,

acknowledge that improvements in communications and technology make it infinitely easier to consult with the Senate, even when its members are geographically dispersed, Presidents have relied on the need for faster responses to world events to justify unilateral appointments in ever more brief periods of time, gradually reducing the general rule's role.

The Framers intended for the Senate to serve as a moderating influence on presidential nominations. As Alexander Hamilton explained in *The Federalist No. 76* (Jacob E. Cooke ed., 1961), the Framers denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. *Id*. at 513. If the general rule governing appointment of principal officers is swallowed to the extent the President advocates here, the inevitable result will be increasingly extreme and controversial appointees with a concomitant increase in partisan dissension.

III. UNDER THE PRESIDENT'S OWN STANDARD, THE SENATE WAS NOT IN RECESS–MODERN TECHNOLOGY RENDERED IT AVAILABLE TO TAKE OFFICIAL, COLLECTIVE ACTION

A central flaw in the President's position is that it purports to rely upon a functional analysis but then examines only how the government functioned at an earlier point in time. That is, it sets a modern test and

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537 U.S. 71, 74-75 (2002). So too, he may not rely on the existence of statutory authorization of an agency to justify appointment of an officer by means other than what the Constitution provides.

then concludes that remote historical examples fail the modern test. Other briefs before the Court demonstrate that under a consistent approach that emphasizes textual analysis or the contemporaneous public understanding of the Constitution, the appointments at issue here are outside the President's appointment power. If the functional analysis advocated by the President is applied in a consistent manner, it illustrates that the Senate was available to act in its official, collective capacity, thereby rendering the challenged NLRB appointments invalid under that analysis, as well.

A. The Test the President Advocates

The President repeatedly asserts that the key question in determining whether the recess appointment exception applies is whether the Senate is available to take official, collective action with respect to a nominee. *E.g.*, Pet. Br. at 18 ("render the Senate unavailable to provide advice and consent"), *id.* at 19 ("when the Senate is unavailable to offer its advice and consent"), *id.* at 20 ("despite its unavailability to give advice and consent"). The "essential facts" upon which the President relies are that "the Senate had undertaken to conduct 'no business' and was no more available to sit as a body than it is during a traditional intra-session recess." *Id.* at 45. But in applying that "functional understanding," *id.*, much weight is placed on the availability of the Senate under the conditions existing in the years 1905 (*id.* at 24, 45-46), 1921 (*id.* at 46), and 1929 (*id.* at 46-47). There is no analysis of whether the Senate was available to take official, collective action with the benefit of the technology of 2011.

B. Actuality Proves Possibility

In December 2011, during the period governed by the very same Senate order at issue here, despite geographical dispersal of many of the Senators, the Senate heard the President's call for prompt legislative action before the end of the calendar year. Acting in its official, collective capacity, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011), which was presented to the President for his signature. Pub. L. No. 112-78, 125 Stat. 1280 (2011). Those facts demonstrate that the Senate was available under any "functional" test.

As the President acknowledges, the Senate's action of December 23, 2011, was not an isolated incident. There are other recent examples of official, collective action by the Senate, despite the geographical dispersion of individual Senators. Pet. Br. at 52 n.49. The very same mechanisms that permitted such actions could easily have permitted the Senate here to act on nominations to fill vacancies either in the event of an urgent need to fill the post or in the event of a non-controversial nominee.

C. The Necessary Conditions for Official, Collective Action

As a practical matter, the mechanisms that permitted the Senate to pass a bill on December 23, 2011, were unavailable throughout much of American history due to limitations of technology. The required mechanisms are: (1) the ability of the President to communicate a nomination to a Senate officer; (2) the ability of that officer to communicate the fact of the nomination to the individual Senators wherever they may be located; (3) the ability of the individual

Senators to caucus with one another and as a group as to the advisability of confirming the nominee; (4) the ability of Senate leaders to poll individual Senators for their views to determine whether there exists a consensus that permits action; (5) if there is such a consensus, calling for and engaging in official floor action; and (6) upon completion of the official floor action, communicating the result to the President.

With the advent of the Internet, cellular and satellite telephones, "smart phones" and personal digital devices, mass party conference calls, e-mail, television and streaming video, even multi-party communications are achieved in a matter of minutes. The ubiquitous nature of transcontinental commercial aviation, air and rail shuttles that operate several times each day, and the automobile and interstate highway system together mean that official Senate action need never be delayed due to geographical dispersion by more than a day or two from the initial nomination. Consequently, as a practical matter, the Senate is always available to act on a nomination if there is sufficient consensus to do so. The absence of consensus is not related to geographical dispersion.

The Constitution is explicit that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Accordingly, the Senate has the sole authority to authorize a session, even while many of the individual Senators are geographically dispersed. This Court has long recognized that where "[t]he Constitution has prescribed no method of making [a] determination" as to a question of congressional procedure, "all matters of method are open to the determination of the house [of Congress in question], and it is no impeachment of the rule [chosen by that house] to say that some other way would be better,

more accurate, or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

It may be difficult to comprehend how vastly different the Senate can function today compared to 1789, 1840, 1905, 1929 or even 1970. As a starting point, it is essential to recognize that prior to the 1844 commercialization of the telegraph, communication was no faster than the speed of travel by horse. Allan R. Pred, *Urban Growth and the Circulation of Information: The United States System of Cities*, *1790-1840*, at 12 (1973). When the Constitution was drafted and ratified, the speed of travel had not yet benefitted from the introduction of significant turnpikes or bridges, let alone steamboats and railroads. George Rogers Taylor, *The Transportation Revolution*, *1815-1860*, at 15, 17-18, 57, 76-77 (1951).

The postal system then consisted of only 69 offices that did little more than "link[] the major Atlantic seaport towns and offered no special facilities for the press." Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse*, at 27, 64 (1995). As late as 1828, "American postal officers had at their disposal few mechanical contrivances that would have been unfamiliar to the ancients. [At that time] the fastest, cheapest, and most reliable way to transmit information over land was by horse express, just as it had been in ancient Greece and Rome." *Id*. at 110. The slow speed of postal communications was further hampered by the fact of infrequent service. For example, in 1785, mail between New York City and Albany ran only once every two weeks. Wesley Everett Rich, *The History of the United States Post Office to the Year 1829*, at 60-61 (1924). In 1788, mail

from Philadelphia to Lancaster and York, Pennsylvania, ran once per week. *Id*. at 64. On other routes, mail ran only monthly. *Id*. at 76, 85.

In the Framers' experience, there was no practical means for Senators to consult with each other and reach a consensus when geographically dispersed. The months it would require to exchange correspondence among far-flung Senators would be almost as long as the time before their scheduled return to the Capitol. For example, in 1789 "it took forty days to receive a reply to a letter sent from Portland, Maine, to Savannah, Georgia," and by 1810 that reply time still required twenty-seven days. John, *supra* at 17. Even the biggest items of news disseminated at a pace that demonstrates the futility of trying to coordinate action among geographically dispersed Senators. News of George Washington's 1799 death at Mount Vernon did not reach New York City for a week and did not reach Cincinnati for twenty-four days. Pred, *supra* at 12-14. News of the Battle of New Orleans in 1815 did not reach New York City for twenty-seven days. *Id*.

Even after the introduction of the telegraph and telephone permitted prompt communication between the President and Senate leadership, between Senate leadership and individual Senators, and between two Senators, an essential piece of technology remained missing. Before the recent advent of mass party conference calls, e-mail, and chat features, there was no effective way for groups of Senators to caucus when geographically separated. Those innovations dramatically change the ability of the Senate to operate from what was the fact in 1905 and 1929.

The final innovation required was the procedure to schedule a Senator to take the floor on a periodic basis,

even if other Senators were geographically dispersed. That development, together with the Senate's long practice of operating by unanimous consent (and its presumption of a quorum), provided a ready means for the Senate to take official, collective action, even if most Senators were not physically present in the Chamber. In a very real sense, the Senate did make itself available to act on presidential nominations in December 2011 and January 2012, by scheduling such sessions. If the President had nominated someone who was not controversial to a position that genuinely required prompt action, the Senate was available to perform its advice and consent function.

Even in the absence of unanimity with respect to a nominee, in the event of need for immediate action, Senate leadership could communicate the necessity to reassemble and gather the individual Senators at the Capitol within three days. Advances in communications and transportation mean that, as a practical matter, the Senate is rarely, if ever, unavailable for a period greater than three days. The President acknowledges that a break of that length is too brief to authorize his unilateral appointment of principal officers. Pet. Br. at 45.

D. The Remaining Scope of the Recess Appointment Exception

The President may object that the consequence of actually applying the functional test he advocates to the *current* ability of the Senate to demonstrate its availability at virtually all times should prompt the Court to take a different approach so as to not render the recess appointment exception mere surplusage. That argument assumes that the Senate would never again actually recess rather than remain in *pro forma* session, which is unlikely, particularly when the

President's political party either controls both houses of Congress or has a filibuster-proof majority in the Senate.

That argument also would be misplaced. There are several substantive provisions in the Constitution that, simply due to changed circumstances, are now merely vestigial, such as the article I, section 2, paragraph 3 allocation of Representatives in the House prior to the first census. The provision for a citizen of the United States "at the time of the Adoption of this Constitution" to be eligible to be President also has no current utility. U.S. Const. art. II, § 1, ¶ 5.

Moreover, the recess appointment exception could well have future applicability. In the event of a Clancyesque mass destruction that results in the death or incapacitation of the entire Senate,[7] for example, the President would not need to wait for States to send replacement Senators before appointing officers essential to addressing such an attack. And, should a breakdown in modern communications and transportation technology occur that would, as a practical matter, render the Senate unavailable to take official, collective action, the exception also provides the necessary safeguard.

[7] *See* Tom Clancy, *Debt of Honor* (1994).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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