

**ORAL ARGUMENT NOT YET SCHEDULED**

**Case Nos. 12-1161 and 12-1214**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CENTER FOR SOCIAL CHANGE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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**On Cross-Petitions for Review and for Enforcement of a  
Decision and Order of the National Labor Relations Board**

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**BRIEF FOR AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL  
DEFENSE FOUNDATION, INC. IN SUPPORT OF PETITIONER CENTER  
FOR SOCIAL CHANGE, INC. AND FOR REVERSAL OF THE DECISION  
AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the National Right to Work Legal Foundation, Inc. (“NRTW”) hereby certifies:

(A) Parties and Amicus: The parties who appeared before the National Labor Relations Board (“NLRB”) are: Center for Social Change, Inc., Region 5 of the NLRB and Service Employees International Union Local 500. NRTW is an amicus in this Court, in support of the Petitioner, the Center for Social Change.

(B) Rulings Under Review: The ruling under review is the Decision and Order of the NLRB in *Center for Social Change, Inc.*, Case No. 5-CA-72211, which is reported at 358 NLRB No. 24 (Mar. 29, 2012).

(C) Related Cases: In addition to the instant case, Counsel know of several other cases that raise the issue of the constitutionality of President Obama’s January 4, 2012 recess appointments to the NLRB: D.C. Circuit: *Noel Canning v. NLRB*, Case Nos. 12-1115 and 12-1153; *Milum Textile Services v. NLRB*, Case No. 12-1235; and *Stewart v. NLRB*, Case No. 12-1338. Seventh Circuit: *Richards v. NLRB*, Case No. 12-1973 and *Lugo v. NLRB*, Case No. 12-1984 (consolidated).

Respectfully submitted,

/s/ Glenn M. Taubman

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Amicus National Right to Work Legal Defense Foundation, Inc. (“NRTW”) certifies that no publicly-held company owns 10% or more of it, and that it has no parent companies as defined in the Circuit Rule. NRTW is a non-profit, charitable, legal defense foundation that provides free legal aid to individual employees.

Respectfully submitted,

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\* Authorities upon which we chiefly rely are marked with asterisks.

## **GLOSSARY**

Board means the National Labor Relations Board

CSC means the Petitioner, Center for Social Change, Inc.

NRTW means the amicus, National Right to Work Legal Defense Foundation, Inc.

NLRB means the National Labor Relations Board

SEIU means Service Employees International Union

## INTEREST OF AMICUS<sup>1</sup>

The National Right to Work Legal Defense Foundation, Inc. (“NRTW”) is a non-profit, charitable, legal aid organization. Through its staff attorneys, NRTW provides legal aid to employees who have been coerced in the exercise of their right to refrain from collective activity. Cases brought by NRTW staff attorneys include: *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012); *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); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); and *Abrams v. CWA*, 59 F.3d 1373 (D.C. Cir. 1995).

NRTW supports Petitioner Center for Social Change’s (“CSC”) argument that President Obama’s January 4, 2012 recess appointments to the National Labor Relations Board (“NLRB” or “Board”) were unconstitutional, and that the Board therefore lacked a quorum to issue decisions in this or any other case. *New*

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<sup>1</sup> Pursuant to D.C. Circuit Rule 29, NRTW filed a notice of intent to participate as an amicus curiae on May 30, 2012. Both the NLRB and CSC consent to the filing of this brief.

Additionally, pursuant to Fed. R. App. P. 29(c)(5), NRTW states that (1) no party’s counsel authored the brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the amicus curiae—contributed money that was intended to fund preparing or submitting this brief.

*Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). NRTW takes no position on the other issues raised by CSC, although they each appear meritorious.

NRTW is particularly interested in challenges to the legality of President Obama's January 4, 2012 recess appointments to the NLRB since it is currently providing free legal aid to employee-petitioners in several federal court cases that raise similar challenges to the appointments. These cases include:

1) *Stewart v. NLRB*, D.C. Cir. Case No. 12-1338 (appeal filed Aug. 1, 2012);

2) *Richards et al. v. NLRB*, 7th Cir. Case Nos. 12-1973 and 12-1984 (appeal filed Apr. 23, 2012).

Additionally, NRTW expects to file an amicus brief in another case in this Court to oppose the recess appointments, *Noel Canning v. NLRB*, D.C. Cir. Case Nos. 12-1115 and 12-1153. Finally, NRTW is providing free legal aid to two employees in *Milum Textile Services Co. v. NLRB*, D.C. Cir. Case Nos. 12-1235 and 12-1275, and those employees expect to file an amicus brief opposing the recess appointments.

## ARGUMENT

### **I. The Board Lacked a Quorum to Issue the Decision and Order in This Case Because the Three Members' Recess Appointments Were Unconstitutional**

#### **A. Introduction and Background**

CSC challenges the constitutionality of President Obama's January 4, 2012 recess appointments to the NLRB on two principal grounds: 1) that the Senate was not in recess at the time of the appointments (CSC Brief at 15-19); and 2) that the Recess Appointments Clause (U.S. Const. art. II, § 2, cl. 3) does not allow recess appointments for short intra-session adjournments. (CSC Brief at 19-23). Amicus NRTW agrees with those points and will not duplicate them. Rather, it will expand upon those points and add additional material for the Court to consider as it reviews the text and history of the Recess Appointments Clause and related constitutional provisions.

Under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and 29 U.S.C. § 153(b), the Board lacks authority to issue orders or decisions absent a quorum of three members. The Board has had no valid quorum since January 3, 2012. Prior to that date, the Board consisted of Chairman Pearce, and Members Becker and Hayes. The remaining two seats were vacant, having been so for considerable time. One of those seats became vacant in August 2010, when Peter

Schaumber's term expired. The other seat became vacant in August 2011, when Wilma B. Liebman left the Board.<sup>2</sup> When Becker's term expired on January 3, 2012, the Board was left without its requisite quorum of three members.<sup>3</sup>

On December 15, 2011, President Obama nominated Sharon Block and Richard Griffin to fill longstanding vacancies on the Board. The Senate has never confirmed those nominees.<sup>4</sup>

On December 17, 2011, the Senate agreed by unanimous consent to adjourn from December 20, 2011 through January 2, 2012, but to convene periodically for pro forma sessions to continue its 111th Session. The Senate simultaneously agreed to begin its 112th Session on January 3, 2012 (as required by section 2 of the Twentieth Amendment to the U.S. Constitution), and to hold additional pro forma sessions through January 23, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). This decision to continue in session was necessary to

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<sup>2</sup> A complete list of Board membership and terms appears on the NLRB's webpage, *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited Aug. 6, 2012).

<sup>3</sup> *White House Announces Recess Appointments of Three to Fill Board Vacancies* (Jan. 4, 2012), <http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies>.

<sup>4</sup> White House Office of the Press Secretary, *Presidential Nominations and Withdrawal Sent to the Senate* (Dec. 15, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/15/presidential-nominations-and-withdrawal-sent-senate>.

discharge the Senate's constitutional obligations under both the Twentieth Amendment and article I, section 5, clause 4, which prohibits one House of Congress from adjourning for more than three days without the consent of the other.<sup>5</sup> The House of Representatives did not consent to a Senate recess or adjournment of longer than three days.

Nevertheless, only three weeks after sending the Block and Griffin nominations to the Senate—and before the relevant Senate Committee, let alone the full Senate, could take action on their nominations—the President decided to override and bypass the Senate's advice and consent responsibilities. On January 4, 2012, he announced his intent to “recess appoint” Block and Griffin, as well as Terence Flynn, as Members of the Board.<sup>6</sup> On January 9, 2012, Block, Griffin and

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<sup>5</sup> The Twentieth Amendment, section 2, provides that “The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” Article I, section 5, clause 4 of the Constitution provides that “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”

<sup>6</sup> White House Office of the Press Secretary, *President Obama Announces Recess Appointments to Key Administration Posts* (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

Flynn were sworn in and purported to take office as members of the Board.<sup>7</sup>

The nominations of Griffin, Block, and Flynn were never confirmed by the Senate—i.e., Senate has never given its advice and consent to their nominations under article II, section 2, clause 2 of the U.S. Constitution.

**B. The Constitution Authorizes the Senate to Make Its Own Rules of Proceedings, and the President Must Defer to Those Rules. The Senate Was Not in Recess, and the President Was Not Entitled to Disregard the Senate’s Pro Forma Sessions.**

CSC is correct (CSC Brief at 15-19) that the Senate has the sole authority to declare when it is, and is not, in session, and the President lacked authority to override the Senate’s determination that it was not in recess in January 2012. *United States v. Ballin*, 144 U.S. 1 (1892); U.S. Const. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings.”).

Indeed, “[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session.” 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee). The President gets to decide whether to make a recess appointment, but the Senate gets to decide whether to recess. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630 (1935) (“The sound application of a principle that makes

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<sup>7</sup> *New Board Members Take Office, Announce Chief Counsels* (Jan. 10, 2012), <http://nlrb.gov/news/new-board-members-take-office-announce-chief-counsels>.

one master in his own house precludes him from imposing his control in the house of another who is master there.”).

In addition to *Ballin, United States v. Smith*, 286 U.S. 6 (1932), is instructive. There, a nominee was confirmed by the Senate and the President was officially notified of the confirmation. Afterwards, some senators sought to reconsider the confirmation vote, and a dispute arose as to whether the Senate’s rules could allow it to “undo” the confirmation even after the President was notified. The Supreme Court held the confirmation valid, stating that “It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.” *Id.* at 35. In other words, the President was entitled to rely upon Congress’ notification of the confirmation because its official journals and notifications must be viewed as true, correct and unimpeachable.

Here, the Senate gave official notice to the President and the nation. It voted unanimously to remain in session and its official journal, the Congressional Record, indicates that it regularly gaveled itself into session during that period.<sup>8</sup>

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<sup>8</sup> See 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The Senate’s winter schedule provided for a series of pro forma sessions at three and  
(continued...)

This is conclusive evidence that the Senate, during the relevant time, was in session, not in recess. Entries in the official journals of the Senate and House of Representatives must be accepted by the other branches of government as accurate, and cannot be second guessed. *Ballin*, 144 U.S. at 4-6.

When Congress makes rules that govern its proceedings, the President must, like the courts, defer to the Legislative Branch. *See Mester Mfg. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989) (“The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress.”). Courts honor Congress’ rules under the enrolled bill rule by treating the attestations of the two houses as “conclusive evidence that [a bill] was passed by Congress,” even in the face of evidence demonstrating otherwise. *Public Citizen v. U.S. Dist. Court for D.C.*, 486 F.3d 1342, 1343 (D.C. Cir. 2007) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892)); *see also OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197 (2d Cir. 2007). This doctrine reflects “the respect due to a coordinate branch of government,” *Marshall Field*, 143 U.S. at 673, and underscores the very limited inquiry courts make where Congress’ rules of

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<sup>8</sup>(...continued)

four day intervals. The Congressional Record indicates that those sessions actually occurred. *See* 158 Cong. Rec. S1 (Jan. 3, 2012), S3 (Jan. 6, 2012), S5 (Jan. 10, 2012), S7 (Jan. 13, 2012), S9 (Jan. 17, 2012), and S11 (Jan. 20, 2012).

proceedings are at issue.

For similar reasons, this Court has held the meaning of ambiguous congressional rules to be nonjusticiable; were it otherwise, “the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone.” *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995). In short, as Senator Michael Lee aptly noted, “[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session.” 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee).

The clash over President Obama’s recess appointments underscores the Founders’ wisdom in giving each House of Congress exclusive authority to make its own rules, precisely to preserve the checks and balances built into the system. Here, the President purported to tell the Senate what it must do to bring itself into session and retroactively declared a series of Senate sessions a constitutional nullity for purposes of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. But the Rulemaking Clause (art. I, § 5, cl. 2) does not permit such Executive Branch interference in the Senate’s internal procedures any more than it permits similar interference by the courts. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). To hold otherwise would threaten Congress’ ability to function as an independent branch of government, and undermine the checks and balances that the Founders

“built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”

*Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). The judiciary has “not hesitated to invalidate provisions of law which violate this [separation of powers] principle,” *Morrison v. Olson*, 487 U.S. 654, 693 (1988), citing *Buckley*, 424 U.S. at 123. The same principles must govern here. *See also Bowsher v. Synar*, 478 U.S. 714, 721-28 (1986) (discussing importance of separation of powers and checks and balances).

In conclusion, the challenged recess appointments cannot stand. The President’s actions violate our Constitution’s most fundamental separation of powers principles, which prohibit one branch of government from overriding the determinations of another branch about its own proceedings.

**C. Several Other Factors Show That the Senate Was Not in Recess When the Purported Recess Appointments Were Made, and the President Was Wrong to Determine Otherwise.**

Several additional factors show that the President had no lawful power to make the challenged recess appointments, and was wrong to attempt to do so.

First, and contrary to the President’s legal position, the Senate’s pro forma

sessions were not shams.<sup>9</sup> During one of those sessions, on December 23, 2011, the Senate passed important legislation (the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid)). The President signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.<sup>10</sup> Although the announcement of the pro forma sessions specified that the Senate would conduct no business, 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden), that body was free to change its position at will and, in fact, did so to enact the tax cut legislation. Thus, the Senate's pro forma session of January 3, 2012, held to meet the requirements of section 2 of the Twentieth Amendment, was every bit as valid as the tax cut session held on December 23, 2011.<sup>11</sup> As with the tax cut legislation, had the

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<sup>9</sup> The President's legal position that the Senate's pro forma sessions were shams and, therefore, were ineffective to stop a recess appointment, was set forth in a Memorandum Opinion for the Counsel to the President (Jan. 6, 2012), *available at* <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>. This Opinion will be discussed in greater detail *infra*, in Section I.E.

<sup>10</sup> White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 3765* (Dec. 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765>.

<sup>11</sup> The Congressional Research Service recently opined that pro forma sessions are valid congressional sessions that fulfill a variety of constitutional and statutory mandates. Christopher M. Davis, Cong. Research Serv., *Certain Questions Related to Pro Forma Sessions of the Senate* (2012), inserted in 158 Cong. Rec. S5954-56 (daily ed. Aug. 2, 2012) (Sen. McConnell).

Senate desired to take up President Obama's NLRB nominees it was free at all times to do so. As such, there existed no Senate recess on January 4, 2012, when the President made the purported appointments.

The Senate's designation of a session as "pro forma" does not alter its validity. The very definition of a pro forma session, as articulated by the Congressional Research Service, is a "short meeting of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House."<sup>12</sup> When that happens, there is no recess within the meaning of the Recess Appointments Clause.<sup>13</sup>

Second, the President's unilateral declaration that the Senate was in a lengthy recess, notwithstanding the regular pro forma sessions, would, if true,

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<sup>12</sup> Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 4 (Jan. 9, 2012), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>.

<sup>13</sup> The Senate has used sessions designated "pro forma" in the recent past to specifically block recess appointments. On November 16, 2007, the Senate majority leader announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments." 153 Cong. Rec. S14,609 (Nov. 16, 2007) (Sen. Reid). Those pro forma sessions achieved the stated intent, as President Bush made no recess appointments between the initial pro forma session in November 2007 and the end of his presidency. See *Obama Tempts Fight Over Recess Appointments* (Jan. 4, 2012), <http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments/> (last visited Aug. 6, 2012).

render the Senate in breach of the Constitution's article I, section 5, clause 4 and Twentieth Amendment, section 2. These respective obligations limit either chamber from adjourning for more than three days without the consent of the other, and require Congress to assemble on January 3 of every year. On January 3, 2012, the Senate did, in fact, hold the constitutionally-required session, only a day before the attempted recess appointments. The President's assertion that the Senate was in recess—and therefore twice in violation of the Constitution—despite its holding of this constitutionally-mandated session the day before is untenable.

Third, the President's legal position contravenes his administration's earlier representation to the U.S. Supreme Court by then-Solicitor General Elena Kagan. She wrote that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period."<sup>14</sup> That is precisely what the Senate did here when it held periodic pro forma sessions. The President had no power to override the Senate's determination that it was in session.

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<sup>14</sup> Letter Brief from Solicitor General Elena Kagan to William K. Suter, Clerk of the Supreme Court 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (U.S. Apr. 26, 2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

Fourth, the Recess Appointments Clause is a limited exception to the normal joint appointments process that the Founders enshrined in the Constitution. The Recess Appointments Clause authorizes the President to make temporary appointments only where the Senate cannot do business due to an actual recess. It was not intended to enable the President to resolve political disputes with the Senate.<sup>15</sup>

Although past presidents have used their recess appointment power even during relatively short recesses,<sup>16</sup> President Obama's recess appointments here,

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<sup>15</sup> At the same time President Obama made the NLRB recess appointments challenged here, he also made a recess appointment of Richard Cordray to the Consumer Financial Protection Bureau. But in doing so, the President abandoned any pretense that he was acting because the Senate was "unavailable" to consider the nomination due to a recess. To the contrary, the President publicly declared that he was making that recess appointment despite the fact that the Senate had been considering Cordray's nomination for over six months. He said: "For almost half a year, Republicans in the Senate have blocked Richard's confirmation. . . . They refused to even give Richard an up or down vote . . . ." President Barack Obama, *Remarks by the President on the Economy* (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy>. The President was complaining not that the Senate was unavailable or unable to receive his messages regarding Cordray, but that the Senate *refused* to confirm him. As the President candidly proclaimed: "I refuse to take no for an answer." *Id.* In short, the President's NLRB recess appointments were driven not by concern that the Senate was "unavailable" to perform its constitutional role in the appointment of government officers, but by his determination to circumvent the Senate's role.

<sup>16</sup> See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* (Jan. 9, 2012), available at

(continued...)

made one day after a session that was constitutionally required, are wholly without precedent. Contrary to the President's assertion of power, the opinion of Attorney General Daugherty in 1921 established the consistently followed rule that for recess appointments to be made the recess should be of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." 33 U.S. Op. Att'y Gen. 20, 24 (1921). No such break occurred in the present circumstances, because the Senate was regularly gavelled into session, received presidential communications, and during one of its pro forma sessions enacted important tax legislation.

Finally, Founders such as Edmund Randolph, the nation's first Attorney General and influential member of the Constitutional Convention, viewed the recess appointment power as limited.<sup>17</sup> In response to a question from Thomas Jefferson, Randolph warned that the Recess Appointments Clause had to be "interpreted strictly" because it represented "an exception to the general

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<sup>16</sup>(...continued)

<http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>; Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* (Mar. 12, 2008), available at <http://www.senate.gov/reference/resources/pdf/RS21308.pdf>.

<sup>17</sup> See Statement of Professor Jonathan Turley to the H. Comm. on the Judiciary, *Executive Overreach: The President's Unprecedented "Recess" Appointments* (Feb. 15, 2012), available at <http://judiciary.house.gov/hearings/Hearings%202012/Turley%2002152012.pdf>.

participation of the Senate.”<sup>18</sup>

Alexander Hamilton referred to the recess appointment power as “nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.” *The Federalist No. 67* (Alexander Hamilton). There was never a suggestion that the confirmation process was “inadequate” due to congressional opposition to a nominee or to a routine delay in the confirmation process. Rather, the inadequacy referenced by Hamilton was the inability to fill a vacancy that “happened” during one of the Senate’s frequent and lengthy absences that of necessity occurred during the nation’s horse and buggy days. Hamilton stressed that the Recess Appointments Clause was designed to recognize that Congress could not be expected to remain in session continually:

The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of offices; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding [Recess Appointments Clause] is evidently intended to authorise the President singly to make temporary appointments.

*Id.* (emphasis added).<sup>19</sup> Hamilton recognized that the recess appointments power

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<sup>18</sup> See note 17.

<sup>19</sup> See note 17.

was limited, and arose only when the joint power over federal appointments could not be utilized. That is not the case here. The Senate was in session and was fully capable of acting on the NLRB nominations if it had chosen to do so, just as it had acted on the tax cut legislation.

In short, the President's assertion of power to override the Senate's determination that it was in session, and unilaterally to deem the pro forma sessions shams, is unconstitutional because it undermines the separation of powers that the Founders built into the Constitution.

**D. The Vacancies That the President Attempted to Fill Did Not “Happen” When the Senate Was in Recess in Accordance with Article II, Section 2, Clause 3 of the U.S. Constitution, So There Were No Vacancies for Which Recess Appointments Could Be Made.**

The challenged recess appointments are invalid for another reason: the NLRB vacancies the President attempted to fill in January 2012 did not “happen” during a Senate recess, so those pre-existing vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointments power to be used only when the vacancy actually “happens” or occurs during a recess, not whenever a vacancy “happens to exist” during a recess.

Article II, section 2, clause 3 of the Constitution states: “[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.” (Emphasis added). That clause does not say that the President may fill all “vacancies that may happen to exist” whenever a Senate recess occurs.

Here, recess appointee Block was named to a Board seat vacated on December 16, 2004 by a confirmed Board member, Flynn was named to a Board seat vacated on August 27, 2010 by a confirmed Board member, and Griffin was named to a Board seat vacated on August 27, 2011 by a confirmed Board Member.<sup>20</sup> None of those vacancies “happened” during a recess of the Senate.

The Constitution’s plain text states that a vacancy can only be filled by a recess appointment if the vacancy actually occurred “during the Recess of the Senate,” such as through death or resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose months, or longer, before the purported Senate recess. As they did not “happen” during any recess, the appointments are unlawful.

While some modern authorities interpret the Recess Appointments Clause to mean that recess appointments are allowed for pre-existing vacancies, *i.e.*, those vacancies that “may happen to exist” at the time of the recess, *United States v.*

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<sup>20</sup> *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited Aug. 6, 2012).

*Allocco*, 305 F.2d 704, 709-14 (2d Cir. 1962) (endorsing the “happen to exist” construction); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), the federal court precedent is far from uniform. *Schenck v. Peay*, 21 F. Cas. 672, 674-75 (E.D. Ark. 1869) (recess appointment unlawful where the vacancy “existed, but did not happen, during the recess of the senate”); *In re Dist. Attorney*, 7 F. Cas. 731, 734-38 (D.C. Pa. 1868) (doubt cast upon such appointments because they defeat the system of checks and balances and allow the Executive Branch to aggrandize power).

As in other cases, “[t]he words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary.” *Okanagan v. United States (The Pocket Veto Cases)*, 279 U.S. 655, 679 (1929), citing *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816), and *Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). The words in the Recess Appointments Clause are clear: only “Vacancies *that may happen* during the Recess” can be filled without the Senate’s advice and consent. The words do not contemplate the filling of vacancies “that may happen to exist” during a recess.

Indeed, an interpretation of the Recess Appointments Clause that allows the filling of any “vacancies that may happen to exist” defeats our constitutional

system of checks and balances and negates the *joint* power of appointment vested in the Executive and Legislative Branches. A “vacancies that may happen to exist” interpretation allows a President to wait for an inevitable recess, and then unilaterally appoint nominees *seriatim*, thereby permanently writing the Senate out of the confirmation process.<sup>21</sup> This is something the Founders surely opposed. *See generally, Bowsher*, 478 U.S. at 721-27 (discussing importance of separation of powers and checks and balances). Precisely because the Founders wanted to diffuse governmental power and ensure the Senate’s check on the President’s appointment power, they did not grant the President the broad power to fill any vacancies that “may happen to exist” during a recess.<sup>22</sup>

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate’s advice and consent: 1) Congress

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<sup>21</sup> Here, for example, recess appointee Block was appointed in place of a prior recess appointee, Member Becker, who himself was appointed in place of a prior recess appointee, Dennis Walsh. *Id.*

<sup>22</sup> *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Schenck*, 21 F. Cas. at 674-75 (recess appointment unlawful where the vacancy “existed, but did not happen, during the recess of the senate”); *In re Dist. Attorney*, 7 F. Cas. at 734-38) (doubt cast upon such appointments because they defeat the system of checks and balances and allow the Executive Branch to aggrandize power); *but see Alocco*, 305 F.2d at 709-14 (“happen to exist” construction endorsed); *Woodley*, 751 F.2d at 1012-13 (same).

may authorize the appointment of inferior officers by other governmental branches;<sup>23</sup> and 2) the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. Precisely because these are *exceptions* to the normal joint power of appointment preferred by the Founders, they must be narrowly construed. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1501-46 (2005).

Attorney General Edmund Randolph, writing only three years after the Constitution's ratification, concluded that the scope of the Recess Appointments Clause is limited to vacancies that arise (*i.e.*, "happen") during a recess. *Id.* at 1518-19. Randolph wrote that such vacancies arise in "a case of necessity only; as where the Officer has died, or resigned during the recess."<sup>24</sup> Such presidential power must "be considered as an exception to the general participation of the Senate" because the "[s]pirit of the Constitution favors the participation of the Senate in all appointments." *Id.*

Famed Justice Joseph Story agreed. In his Commentaries on the

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<sup>23</sup> See U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991) (Congress has authority to grant the Chief Judge of the United States Tax Court power to appoint inferior trial judges).

<sup>24</sup> Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti *et al.* ed., 1990).

Constitution, Story focused on the causal nature of the word “happen,” and whether a newly created post could count as a “vacancy.”<sup>25</sup> Many other Founders and their disciples agreed that the recess appointment power was limited to vacancies that “happen” during the recess. Rappaport, 52 UCLA L. Rev. at 1518-37, citing, *inter alia*, Alexander Hamilton, St. George Tucker and George Washington.

Admittedly, some modern commentators and courts have approved the broader “vacancies that happen to exist” interpretation, but the Supreme Court has never ruled on that issue. *Woodley*, 751 F.2d at 1033 (en banc) (Norris, J., dissenting); *Evans v. Stephens*, 387 F.3d 1220, 1228 (11th Cir. 2004) (en banc) (Barkett, J., dissenting).

In short, a plain reading of the constitutional text and the intention of the Founders supports the narrow interpretation of “vacancies that may happen” urged here. As such, President Obama’s recess appointments were invalid because the

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<sup>25</sup> 3 Joseph Story, *Commentaries on the Constitution*, § 1553, available at [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_2-3s58.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html) (“By ‘vacancies’ they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word ‘happen’ had relation to some casualty, not provided for by law.”); *see also The Federalist No. 67* (Alexander Hamilton) (“vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay”) (emphasis added); *Evans v. Stephens*, 387 F.3d 1220, 1232 (11th Cir. 2004) (en banc) (Barkett, J., dissenting).

vacancies he attempted to fill pre-dated the existence of the purported Senate recess. Moreover, if the words “vacancies that may happen” in the Recess Appointments Clause are not given their plain meaning, then the Clause swallows the basic rule of joint appointments and allows a President to fill virtually all federal offices via *seriatim* recess appointments, without a shred of advice from, or consent of, the Senate.

**E. The Office of Legal Counsel’s Opinion Justifying the Recess Appointments Is Erroneous.**

On January 6, 2012, the Attorney General’s Office of Legal Counsel (“OLC”) issued a Memorandum Opinion purporting to justify the President’s recess appointments.<sup>26</sup> The OLC Opinion, which was not made public until January 12, 2012, declared for the first time that the Senate’s convening of periodic pro forma sessions does not have the legal effect of interrupting an intra-session adjournment otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. The Opinion is wrong for numerous reasons.

At the outset, it must be noted that many previous legal opinions on the Recess Appointments Clause have been written by Attorneys General or OLC.

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<sup>26</sup> See Memorandum Opinion for the Counsel to the President (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

Almost always, the occasion for these opinions was a President's attempt to appoint a nominee during a slightly shorter recess than had been attempted by previous administrations. Unsurprisingly, the opinions generally concluded that the appointment was permissible. The cumulative effect of these opinions has been the re-defining of a Senate "recess" by the Executive Branch into shorter and shorter periods. It has also resulted in a re-conceptualization of recess appointments as an Executive prerogative that the Senate infringes upon, rather than a limited exception to the constitutionally prescribed joint appointments process.

The OLC Opinion approving President Obama's recess appointments follows this trend. It gives short shrift to *Ballin* and the Senate's determination that it was in session, while granting a wide berth to presidential overreach. The Opinion virtually nullifies the Senate's constitutional power to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. By declaring the Senate's on-going pro forma sessions to be a nullity—at least for purposes of the Recess Appointments Clause—the OLC Opinion implicitly declared the Senate to be in violation of the constitutional requirement that neither House shall adjourn without the consent of the other for more than three days. U.S. Const. art. I, § 5,

cl. 4.<sup>27</sup> In making this declaration, the OLC Opinion for the Executive Branch grievously disrespects the proceedings of a co-equal branch of government.

The OLC Opinion also declares that the Senate's pro forma sessions were shams, but such a jaundiced view is directly contradicted by the actual experience of those sessions, which demonstrate that the Senate was, in fact, available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. As noted above, by unanimous

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<sup>27</sup> Since at least 1949, the Senate has repeatedly held pro forma sessions to comply with article I, section 5's requirement that it not adjourn for more than three days without the House's permission. *See, e.g.*, 95 Cong. Rec. 12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); 96 Cong. Rec. 7821 (May 29, 1950); 96 Cong. Rec. 16,980 (Dec. 22, 1950); 96 Cong. Rec. 17,020 (Dec. 26, 1950); 96 Cong. Rec. 17,022 (Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); 97 Cong. Rec. 2898 (Mar. 26, 1951); 97 Cong. Rec. 10,956 (Aug. 31, 1951); 97 Cong. Rec. 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr. 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957). Congress has also used pro forma sessions to satisfy the Twentieth Amendment's requirement that it meet at noon on January 3 to start a new session, unless a different time is specified by statute. *See* H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) (pro forma session to be held on January 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (pro forma session to be held on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (pro forma session to be held on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session to be held on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session to be held on January 3, 2012). Pro forma sessions have been widely accepted as a permissible method of fulfilling those constitutional mandates, and the Senate could not logically be in session for purposes of one constitutional provision while in recess for purposes of another.

consent the Senate passed important tax legislation during a pro forma session, the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid). This is the very same procedure that the Senate uses to conduct much of its business, including the vast majority of its advice and consent functions. If the President can sign tax legislation passed in the Senate by unanimous consent during a pro forma session, it is untenable to argue that the Senate was unavailable to confirm the President's nominees in the same manner at the same session.

Moreover, the OLC Opinion concedes that the Constitution empowers the Senate to block all recess appointments simply by refusing to recess.<sup>28</sup> The validity of the President's January 4 recess appointments thus depends on his judgment that the Senate unsuccessfully exercised its power. But, as Senator Michael Lee correctly noted in response to these recess appointments, "[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session." 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee).

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<sup>28</sup> As noted earlier, the Solicitor General also recognizes that the Senate can entirely foreclose the President's recess appointment authority by choosing to remain in session. Letter Brief from Solicitor General Elena Kagan to William K. Suter, Clerk of the Supreme Court at 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (U.S. Apr. 26, 2010), *available at* <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

As Alexander Hamilton explained in *The Federalist No. 76*, the Founders 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. The prospect of an intransigent Senate that refuses to confirm the President’s nominees is an unavoidable corollary of the Founders’ decision to “divid[e] the power to appoint the principal federal officers . . . between the Executive and Legislative Branches.” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 884 (1991).

The OLC Opinion ignores these principles and fails to recognize the importance of the *joint* appointments power, which was designed by the Founders precisely to avoid one branch becoming dictatorial. *See In re District Attorney*, where the court struck down a recess appointment and stated:

Under a complicated political system of mutually counteracting checks, like the government of the United States, the continuance of our freedom could not be maintained without incessant caution to guard against both executive and legislative encroachments. Either of them tends towards usurpations of despotic power, and the tendency may be so gradual as to be almost imperceptible. The dangers from such encroachments would be more serious than from the occasional suspension or inefficiency of governmental functions through temporary vacancies in office.

7 F. Cas. at 735.

The OLC Opinion is correct that the Recess Appointments Clause was

intended to provide “an auxiliary method of appointment,” as Alexander Hamilton stated in *The Federalist No. 67*, for filling “Vacancies that may happen during the Recess of the Senate,” when the Senate is unavailable to perform its advice-and-consent function. But even accepting at face value the Opinion’s “practical construction” of the Recess Appointments Clause, the President’s January 4 recess appointments cannot reasonably be justified on the ground that the Senate was unavailable or otherwise unable to perform its advice and consent function. Rather, the Senate was *unwilling* to provide its advice and consent regarding the President’s controversial nominees on his timetable. It is therefore untenable for the Opinion to claim that the President acted to fill these vacancies because the Senate was not “capable of exercising its constitutional function of advising and consenting to executive nominations.” OLC Opinion at 12 (citation omitted).

As with every branch of our government, there is a “hydraulic pressure” within the Executive Branch “to exceed the outer limits of its power.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). The OLC Opinion stretches logic and the Founder’s intentions to the breaking point. Indeed, rather than furthering the checks and balances underlying the joint appointments process, the OLC Opinion allows the President to subvert the Senate’s authority to withhold its consent when it believes a nominee should not be confirmed. Regardless of whether the

President has sought to exceed his power for good or ill, it is for this Court to maintain the proper balance between the Executive and Legislative Branches of government by striking down the recess appointments.

### CONCLUSION

The Court should grant CSC's Petition for Review and find that the Board had no lawful quorum to issue the Decision and Order in this case because the recess appointments were unconstitutional.

Respectfully submitted,

/s/ Glenn M. Taubman

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**RULE 32 CERTIFICATE OF COMPLIANCE**

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,777 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by WordPerfect Version 11; and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & (6) and Circuit Rule 32(b). It was prepared using WordPerfect Version 11, and was written in proportionally spaced 14-point Times New Roman type.

Respectfully submitted,

/s/ Glenn M. Taubman

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Glenn M. Taubman

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 13, 2012, he electronically filed a true and correct copy of the foregoing Amicus Brief with the Clerk of the Court using the CM/ECF system, and thereby served a copy of this document on the following counsel:

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In addition, on August 13, 2012, two copies of the Amicus Brief were mailed to the above-referenced parties.

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