

## ORAL ARGUMENT NOT YET SCHEDULED

Case No. 12-1338

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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KIMBERLY STEWART, KAREN MEDLEY, ELAINE BROWN,  
SHIRLEY JONES, SALOMEH HARDY, JANETTE FUENTES and  
TOMMY FUENTES,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

---

**On Petition for Review of a Decision  
and Order of the National Labor Relations Board**

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**BRIEF OF PETITIONERS**

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December 7, 2012

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners hereby certify:

**(A) Parties and Amici:** The list of parties, intervenors and amici who appeared before the National Labor Relations Board and who are parties, intervenors or amici in this Court is:

(1) Kimberly Stewart, Karen Medley, Elaine Brown, Shirley Jones, Saloomeh Hardy, Janette Fuentes and Tommy Fuentes were Charging Parties before the NLRB and are Petitioners in this Court;

(2) United Food & Commercial Workers Local 99 and Smith's Food & Drug Centers, Inc. (d.b.a. Fry's Food Stores) were Respondents in the agency proceedings. Neither of these entities has filed Motions to Intervene or requests to file amicus briefs in this Court;

(3) the National Labor Relations Board is the Respondent before this Court.

**(B) Rulings under Review:** The decision under review is *Smith's Food & Drug Centers, Inc. (d.b.a. Fry's Food Stores) and UFCW Local 99*, Nos. 28-CA-022836 *et alia* and 28-CB-007045 *et alia*, which is reported at 358 NLRB No. 66 (July 10, 2012).

**(C) Related Cases:** The instant case is not currently before this or any other Court with regard to the merits of the underlying dispute. However, there

exist several “related cases” within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Among other things, this case challenges the constitutionality of President Obama’s recess appointments of three NLRB Members on January 4, 2012. If the appointments were unconstitutional, the NLRB lacked a lawful and valid quorum of Members, as required by 29 U.S.C. § 153(b) and *New Process Steel, L.P. v. NLRB*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2635 (2010), when it issued the Decision and Order in this case on July 10, 2012. Counsel believes that the recess appointments are being challenged in the following cases:

D.C. Circuit: *Noel Canning v. NLRB*, Nos. 12-1115 & 12-1153 (oral argument held on Dec. 5, 2012); *Sands Bethworks Gaming, LLC v. NLRB*, No. 12-1240; *Milum Textile Serv. Co. v. NLRB*, Nos. 12-1235 & 12-1275; *Independence Residences, Inc. v. NLRB*, No. 12-1239; *Aerotek, Inc. v. NLRB*, No. 12-1271; *Meredith Corp. v. NLRB*, No. 12-1287; *Keck Hosp. of U.S.C. v. NLRB*, No. 12-1413 (consolidated with *Sodexo of Am., LLC v. NLRB*, No. 12-1426).

Other Circuits: *NLRB v. New Vista Nursing*, 3d Cir. No. 11-3440, 12-1027 & 12-1936; *NLRB v. Enterprise Leasing Co., SE, LLC*, 4th Cir. No. 12-1514; *NLRB v. Nestle Dreyer’s Ice Cream Co. v. NLRB*, 4th Cir. No. 12-1684; *Huntington Ingalls, Inc. v. NLRB*, 4th Cir. No. 12-2000; and *Richards v. NLRB* and *John Lugo v. NLRB*, 7th Cir. Nos. 12-1973 & 12-1984 (cases consolidated,

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U.S. District Courts: *Chilton v. NLRB*, S.D. Ohio No. 12-742.

Respectfully submitted,

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## **GLOSSARY OF ABBREVIATIONS**

“Act” means the National Labor Relations Act

“ALJ” means Administrative Law Judge of the National Labor Relations Board

“ALJD” means the decision of the Administrative Law Judge

“App.” means the Appendix (which is deferred in this case)

“Board” means the National Labor Relations Board

“CRS” means Congressional Research Service

“Fry’s” mean the Respondent Employer, Fry’s Food Stores

“G.C.” means the General Counsel of the National Labor Relations Board

“LMRA” means Labor-Management Relations Act

“Local 99” means the Respondent union, UFCW Local 99

“NLRA” means the National Labor Relations Act

“NLRB” means the National Labor Relations Board

“OLC” means Attorney General’s Office of Legal Counsel

“Petitioners” means Petitioners Kimberly Stewart, Karen Medley, Elaine Brown,

Shirley Jones, Salomeh Hardy, Janette Fuentes and Tommy Fuentes

“UFCW” means United Food & Commercial Workers International Union

“ULP” means unfair labor practice charge

## STATEMENT OF JURISDICTION

### **I. Subject Matter Jurisdiction in the National Labor Relations Board**

All seven Petitioners filed ULP charges challenging Fry's and Local 99's continued deduction of union dues from their salaries after they had resigned from union membership and attempted to revoke the dues check-off authorizations they had signed. [App. \_\_, ULP Charges]. These ULP charges invoked the NLRB's jurisdiction pursuant to § 10 (a)-(c) of the NLRA, 29 U.S.C. § 160 (a)-(c). After investigating, the NLRB General Counsel issued an amended consolidated complaint against Local 99 and Fry's pursuant to § 10(b) of the NLRA, 29 U.S.C. § 160(b) on behalf of Petitioners and a class of similarly situated employees. [App. \_\_, Complaint].

### **II. Appellate Jurisdiction**

This Court has appellate jurisdiction over this case pursuant to § 10(f) of the NLRA, 29 U.S.C. § 160(f). On July 10, 2012, the NLRB issued a final and judicially reviewable decision dismissing Petitioners' case in its entirety, which is reported at 358 NLRB No. 66. [App. \_\_, NLRB Decision]. Because the NLRB dismissed Petitioners' case and granted no relief to them and the class of similarly situated employees, they have sustained injury-in-fact and are "persons aggrieved" within the meaning of 29 U.S.C. § 160(f). *Oil, Chem. & Atomic Workers Local 6-*

*418 v. NLRB*, 694 F.2d 1289 (D.C. Cir. 1982). The Petition for Review was filed on August 1, 2012. The NLRA sets no deadlines for the filing of Petitions for Review, so this appeal is timely.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1) Three NLRB Members were appointed by President Obama on January 4, 2012 as purported “recess appointments,” even though the Senate was holding periodic pro forma sessions and was not in recess at that time, and the vacancies that were filled occurred many months prior to the purported Senate recess. The issue presented is: Were these recess appointments unconstitutional, so that the NLRB lacked a lawful and valid quorum of Members, as required by 29 U.S.C. § 153(b) and *New Process Steel, L.P. v. NLRB*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2635 (2010), when it issued the Decision and Order dismissing this case on July 10, 2012?

2) Did the NLRB err in holding that the Petitioners and other employees’ resignations from union membership and/or their dues revocation letters were ineffective to cut off the continued collection of union dues by Local 99 and Fry’s?

## STATEMENT OF THE CASE

Beginning on December 28, 2009, Petitioners filed a series of essentially identical ULP charges against their employer, Fry's, and the union that represented their bargaining unit, Local 99. [App. \_\_\_, ULP Charges]. The charges allege that Fry's and Local 99 violated the NLRA by continuing to deduct union dues from Petitioners and similarly situated employees' salaries despite their sending resignation letters and/or dues check-off revocation letters to Fry's and Local 99.

On June 11, 2010, the General Counsel issued an amended consolidated complaint against Fry's and Local 99, seeking relief for the Petitioners and the class of similarly situated employees. [App. \_\_\_, Complaint]. Trial began before ALJ William Kocol in Phoenix, Arizona, on June 29, 2010. On that date, Judge Kocol dismissed a portion of the Complaint and revoked portions of the General Counsel's subpoenas. He then suspended the trial to allow the General Counsel to file special appeals of his rulings to the Board. On October 18, 2010, the Board granted the special appeals and reversed the ALJ's interlocutory rulings. [App. \_\_\_ NLRB Interlocutory Decision]. After the General Counsel received the subpoenaed documents, trial resumed on January 18, 2011. On March 22, 2011, the ALJ closed the record.

On May 3, 2011, the ALJ dismissed the case in its entirety, finding no

violations by Fry's or Local 99. [App. \_\_\_, ALJD]. The General Counsel and the Petitioners filed timely Exceptions to the Board. On January 4, 2012, while those Exceptions were pending, President Obama made several "recess appointments" to the Board. On January 30, 2012, Petitioners filed a Motion to Disqualify those Board Members, alleging that their recess appointments were unlawful. On July 10, 2012, the Board summarily affirmed the ALJ and dismissed the case. [App. \_\_\_, NLRB Decision]. The Board also denied the Motion to Disqualify. [App. \_\_\_, *Id.* at 1 n.1].

On August 1, 2012, Petitioners filed a timely Petition for Review with this Court. Neither Fry's nor Local 99 has moved to intervene or sought leave to file amicus briefs.

## STATEMENT OF THE FACTS

### I. Facts Related to the Recess Appointments

In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that the Board lacks authority to act when its membership falls below the requisite quorum of three Members. *Id.* at 2645. As of January 3, 2012, the Board had a quorum consisting of three validly appointed Members, Chairman Pearce and Members Becker and Hayes. Member Becker's term expired on January 3, 2012, thereby leaving the Board without its requisite quorum of three

Members.<sup>1</sup>

On December 15, 2011, President Obama had nominated Sharon Block and Richard Griffin to fill vacancies on the Board that had been unfilled for many months.<sup>2</sup> These nominees never received Senate confirmation.

But 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, while Petitioners’ Exceptions to the Board were pending, he announced his “recess appointments” of Block and Griffin, as well as Terence Flynn, as Members of the Board.<sup>3</sup> However, the Senate had not declared any recess during this time.

On December 17, 2011, the Senate agreed by unanimous consent to adjourn from December 17, 2011 through January 2, 2012, but convene periodically for

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<sup>1</sup> *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

<sup>2</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>.

<sup>3</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>.

pro forma sessions to continue the first session of the 112th Congress. The Senate simultaneously agreed to begin the second session of the 112th Congress 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.<sup>4</sup> This was necessary because, under the Constitution's Adjournment Clause, “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]” U.S. Const. art. I, § 5, cl. 4. Here, the U.S. House of Representatives did not consent to a Senate adjournment exceeding three days. Indeed, the Senate never sought the House's consent to adjourn for more than three days, and no concurrent resolution was ever issued.

During its December 17 to January 23 pro forma sessions, the Senate considered two important pieces of business. First, on December 23, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed the payroll tax cut

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<sup>4</sup> 157 Cong. Rec. S8783-84 (Dec. 17, 2011); *see also* U.S. Senate, Daily Summary, Senate Floor Schedule for Pro Formas and Monday, January 23, 2012 (Dec. 17, 2011), <http://democrats.senate.gov/2011/12/17/senate-floor-schedule-for-pro-formas-and-monday-january-23-2012/>.

extension, passed in a pro forma session, without questioning its validity.<sup>5</sup> Second, under the Twentieth Amendment to the Constitution, the Senate is required to “meet[] . . . on the 3d day of January.” U.S. Const. amend. XX, § 2. The Senate fulfilled this constitutional obligation by convening a pro forma session on January 3, 2012.

On January 4, 2012, the day after the Senate’s January 3 pro forma session commencing the Second Session of the 112th Congress, the President declared the Senate in recess and appointed Ms. Block and Messrs. Flynn and Griffin to the Board, without Senate confirmation. Recess appointee Block was named to a Board seat vacated by a confirmed Board member on December 16, 2004; Flynn was named to a Board seat vacated by a confirmed Board member on August 27, 2010; and Griffin was named to a Board seat that was vacated by a confirmed Board Member on August 27, 2011.<sup>6</sup> None of those vacancies “happened” during a recess of the Senate.

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<sup>5</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-pressoffice/2011/12/23/statement-press-secretary-hr-3765>.

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

## **II. Facts Related to Fry's and Local 99's Refusal to Give Effect to Employees' Resignations and Revocations of Their Dues Check-Off Authorizations**

Petitioners and the similarly-situated employees work for Fry's in its grocery stores in Arizona. They are subject to Local 99's exclusive representation, but are not required as a condition of employment to become or remain members of the union or pay any dues because Arizona is a Right to Work state.<sup>7</sup> Nevertheless, Petitioners and some of their co-workers had become members of Local 99 and had agreed to the automatic deduction of union dues from their paychecks.

The check-off authorization that the employees signed stated:

### **CHECK-OFF AUTHORIZATION**

To: Any Employer under contract with United Food and Commercial Workers Union, Local 99, AFL-CIO

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and Initiation fees as shall be certified by the Secretary-Treasurer of Local 99 of the United Food and Commercial Workers Union, AFL-CIO, and remit same to said Secretary-Treasurer.

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner,

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<sup>7</sup> See Ariz. Const. art. XXV; Ariz. Rev. Stat. § 23-1301 *et seq.*; 29 U.S.C. § 164(b).

and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto.

[App. \_\_\_, G.C. Ex. 8, p. 1].

This check-off authorization does not mention that federal law provides employees with the right to revoke such authorizations whenever a collective bargaining agreement is not in effect. Section 302(c)(4) of the Labor-Management Relations Act (“LMRA”), 29 U.S.C. § 186(c)(4), allows for “a written [dues deduction] assignment which shall not be irrevocable for a period of more than one year, *or beyond the termination date of the applicable collective agreement*, whichever occurs sooner.” (emphasis added).

A collective bargaining agreement between Fry’s and Local 99 terminated on October 25, 2008. Between October 25, 2008 and October 4, 2009, Local 99 and Fry’s entered into nine temporary extension agreements, lasting for anywhere from 28 to 62 days respectively. [App. \_\_\_, G.C. Ex. 6]. The last extension agreement expired on October 31, 2009, and no agreement of any kind was in effect from that date until November 12, 2009, when Fry’s and Local 99 signed a Memorandum of Understanding adopting a successor contract. [App. \_\_\_, ALJD].

During the year-long contract hiatus, Petitioners and hundreds of their co-

workers attempted to disassociate themselves from Local 99 and stop the deductions of union dues from their paychecks. They exercised their rights in two manners.

First, Petitioners and many employees sent letters to Local 99 and/or Fry's simply stating that they resigned their membership in the union. [App. \_\_\_, ALJD; G.C. Exs. 7-15]. Local 99 and Fry's refused to accept employees' resignation letters as stating a desire to revoke their dues check-off authorizations at the earliest opportunity, and continued to collect dues from these nonmembers. [App. \_\_\_, ALJD].

Second, and in response to this tactic, Petitioners and many other employees also sent letters to Local 99 and/or Fry's during the contract hiatus period explicitly stating that they were revoking their dues check-off authorizations.<sup>8</sup> The

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<sup>8</sup> On October 6 and November 9, 2009, Petitioner Medley notified Local 99 in writing that she was revoking her check-off authorization, and on October 12 and November 16, 2009, Medley notified Fry's of the same. On September 30, November 9 and 13, 2009, Petitioner Stewart notified Local 99 in writing that she was revoking her check-off authorization, and on November 16, 2009, Stewart notified Fry's of the same. On September 30, November 9 and 10, 2009, Petitioner Brown notified Local 99 in writing that she was revoking her check-off authorization, and on November 16, 2009, Brown notified Fry's of the same. On November 12, 2009, Petitioner Jones notified Local 99 in writing that she was revoking her check-off authorization, and on November 12, 2009, Jones notified Fry's of the same. On September 29 and November 10, 2009, Petitioner Hardy notified Local 99 in writing that she was revoking her check-off authorization, and  
(continued...)

union, by means of a form letter, notified employees that it would not honor these revocations because they were not made within the short “anniversary date” window period specified in the check-off authorization.<sup>9</sup> Local 99 and Fry’s thereby disregarded the fact that § 302(c)(4) grants employees a statutory right to revoke dues check-off authorizations during a contract hiatus period. Local 99 and Fry’s continued to deduct money from Petitioners’ wages and those of hundreds of similarly-situated employees. [App. \_\_\_, TR. 97-104; G.C. Exs. 7-15].

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

on December 4, 2009, Hardy notified Fry’s of the same. On October 2 and November 11, 2009, Petitioners Janette and Tommy Fuentes notified Local 99 in writing that they were revoking their check-off authorizations, and on October 2 and November 11, 2009, both notified Fry’s of the same.

<sup>9</sup> For example, the denial letter Local 99 sent to Petitioner Stewart stated that her written revocation request would not be honored because “request for withdrawal must be made in writing not less than thirty (30) and not more than forty-five (45) days prior to the anniversary date of the execution of the agreement.” [App. \_\_\_, G.C. Ex. 8, p. 3; *see also* G.C. Ex. 9, p. 2]. Similar denial letters were sent to many other employees. (G.C. Ex. 7). The letters linked the employees’ ability to revoke to the 30-45 day period prior to the anniversary date of the signing of their specific dues check-off authorizations, and failed to acknowledge any opportunity that employees had to revoke the check-off authorizations after the expiration of the collective bargaining agreement, *i.e.*, during a hiatus period. Local 99 included in some of these form letters specific future dates when revocations would be “timely,” but these dates were again linked to the employees’ anniversary dates, not to the expiration of the contract or to any hiatus period. [*See, e.g.*, App. \_\_\_, G.C. Ex. 7, Discriminatee Packets K-(Revoc) for Kacie Kersey].

The NLRB General Counsel issued a Complaint against Local 99 and Fry's alleging that the union had violated §§ 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. §§ 158(b)(1)(A) and (2), and the employer had violated §§ 8(a)(1), (2) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1), (2) and (3), by continuing to deduct dues from Petitioners and hundreds of similarly-situated employees who had resigned and/or revoked their dues check-offs after the expiration of the contract. [Complaint, App. \_\_\_]. The ALJ held Fry's and Local 99's actions to be lawful. [App. \_\_\_, ALJD]. On July 10, 2012, the Board summarily affirmed the ALJ without an opinion. [App. \_\_\_, NLRB Decision]. In that same order, the Board denied Petitioners' Motion to Disqualify that was based on the illegality of the recess appointments.

## **STATUTES AND REGULATIONS**

All applicable provisions are reproduced in the Statutory Addendum bound at the end of this brief, pursuant to D.C. Circuit Rule 28(a)(5).

## **SUMMARY OF ARGUMENT**

1. The Board lacked a lawful quorum under NLRA § 3(b) and *New Process Steel* to issue the order *sub judice* because the NLRB Members' recess appointments were unlawful. These Members' nominations were never confirmed by the Senate, as required under NLRA § 3(b), 29 U.S.C. § 153(b) and the

Constitution's Appointments Clause, U.S. Const. art. II, § 2, cl. 2. Moreover, the President's unilateral recess appointments on January 4, 2012 did not occur during a "recess" of the Senate under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3.

On January 4, 2012, the Senate could not be in recess because it was holding sessions every 3-4 days. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The President cannot override the Senate's determination on this matter, as the Constitution provides that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. *United States v. Ballin*, 144 U.S. 1 (1892). Indeed, the Senate's decision to remain in session on January 3 was necessary to discharge its obligations under both the Twentieth Amendment to the Constitution and the Adjournments Clause. Moreover, the President's determination that the pro forma sessions were shams is factually and legally wrong. During one of the pro forma 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)), that the President signed, never protesting that it was invalidly enacted due to a recess.

Finally, the recess appointments are invalid for two other reasons. First, because the NLRB vacancies the President attempted to fill in January 2012 did

not “happen” during a Senate recess, those pre-existing vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointment power to be used only when the vacancy “happens” during “the recess,” not whenever a vacancy “happens to exist” during any recess. Second, the Recess Appointments Clause only allows for vacancies to be filled during an inter-session recess, and that did not occur here.

Accordingly, the President’s unilateral appointments to the Board without the Senate’s consent were constitutionally invalid.

2. Even if the Board had a quorum to issue the decision here (which it did not), its order must still be vacated. Foremost, Local 99’s refusal to accept employees’ resignations as indicating their desire to revoke the dues check-off authorizations as quickly as possible was unlawful. It is patently obvious that employees who resign their union membership also wish to cease paying dues to the union as quickly as possible, just as employees resigning from a church or health club also wish to stop paying dues as quickly as possible. The Board’s position to the contrary is irrational and subverts the NLRA’s policy of voluntary unionism.

Second, and even more egregiously, Local 99’s refusal to honor employees’ express revocations of their dues check-off authorizations during a contract hiatus

period violated the Act. Section 302(c)(4) of the LMRA explicitly provides that a dues check-off cannot be made irrevocable “beyond the termination date of the applicable collective agreement.” 29 U.S.C. § 186(c)(4). Federal labor law provides an employee “two distinct rights when he executes a check-off authorization under a collective bargaining agreement: (1) a chance at least once a year to revoke his authorization, and (2) a chance upon the termination of the collective-bargaining agreement to revoke his authorization.” *Atlanta Printing Specialities*, 215 NLRB 237 (1974), *enforced*, 523 F.2d 783 (5th Cir. 1975).

The Board’s position in this case, and in *Frito Lay*, 243 NLRB 137 (1979), that § 302(c)(4) does not afford employees an automatic right to revoke their check-offs after the termination of a contract, is inconsistent with the unambiguous language of that statute and must be reversed.

### STANDING

Petitioners have Article III standing because they suffered both statutory and pecuniary injuries when Local 99 and Fry’s took union dues from them without their consent and in violation of their rights under the NLRA. This Court can redress their injuries, and those of similarly-situated employees, by reversing the Board decision below. Petitioners are also “persons aggrieved” entitled to petition this Court for review under 29 U.S.C. § 160(f) because they were the

charging parties below and the Board failed to provide them with any of the relief they requested. *See Oil, Chem. & Atomic Workers*, 694 F.2d at 1294-95; *UAW Local 283 v. Scofield*, 382 U.S. 205 (1965).

In addition, Petitioners also suffered constitutional and due process injuries because their case was adjudicated by individuals who were appointed to the Board in violation of the Appointments Clause of the Constitution. *Cf. Ryder v. United States*, 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members were appointed in violation of the Appointments Clause entitled to injunction); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

## ARGUMENT

### **I. The Board Lacked a Quorum to Issue the Decision and Order on July 10, 2012, Because the Three Members' Recess Appointments Were Unconstitutional.**

#### **A. Standard of Review**

The NLRB “shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate.” 29 U.S.C. § 153(a). The NLRA further provides that “three members of the Board shall, at all times, constitute a quorum of the Board.” 29 U.S.C. § 153(b). In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that the Board lacks authority to

act when its membership falls below the requisite quorum of three Members. *See id.* at 2645. When Member Becker’s term expired on January 3, 2012, the Board was left without its requisite quorum of three Members.<sup>10</sup> Thus, if the President’s January 4, 2012 recess appointments are invalid, the Board had only two duly appointed Members when it issued its July 10, 2012 Decision and Order.

As with all constitutional issues, this Court reviews this challenge to the recess appointments under a de novo standard. *See generally Butera v. Dist. of Columbia*, 235 F.3d 637, 647 (D.C. Cir. 2001) (“On appeal, the court reviews de novo the district court’s legal conclusion that the constitutional rights allegedly violated existed . . . .”). This is especially true here, where the Board recognizes that it has no power to rule on the constitutionality of its own Members’ appointments. *Center for Soc. Change, Inc.*, 358 NLRB No. 24, at \*1 (Mar. 29, 2012); *see also Chamber of Commerce v. NLRB*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1664028, at \*7 n.2 (D.D.C. May 14, 2012) (in case challenging the existence of a quorum under *New Process Steel*, no deference is due the Board because “the question of statutory interpretation presented here both concerns the NLRB’s statutory jurisdiction and does not implicate the agency’s expertise”).

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<sup>10</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>.

**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.**

The President's claim that a Senate recess existed on January 4, 2012 is inconsistent with the Constitution's Recess Appointments Clause, which requires that the Senate actually be in recess when such appointments are made. U.S. Const. art. II, § 2, cl. 3. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (en banc) (a "legitimate Senate recess" must exist in order to uphold a recess appointment); *see also Wright v. United States*, 302 U.S. 583 (1938) (concerning "pocket vetoes" and congressional recesses); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

Here, the Senate was not in recess, and there exists a fundamental constitutional reason why the President lacked authority to override the Senate's determination that it was not in recess. The Constitution is explicit that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Accordingly, the Senate has the sole authority to declare when it is, and is not, in session. Relying on this provision, the Supreme Court has long recognized that

where “[t]he Constitution has prescribed no method of making [a] determination” as to a question of congressional procedure, *Ballin*, 144 U.S. at 6, “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 the house of Congress] to say that some other way would be better, more accurate, or even more just.” *Id.* at 5.

In *Ballin*, a party challenged the legality of certain tax legislation, claiming that Congress enacted it without a valid quorum. The Supreme Court noted that the legislation was an “enrolled bill . . . found in the proper office, . . . authenticated and approved in the customary and legal form.” *Id.* at 3. Citing article I, section 5, clause 3 of the U.S. Constitution regarding each House’s duty to keep records of its proceedings, the Court held that Congress’ official journals “must be assumed to speak the truth” regarding those proceedings, which may not be impeached in any manner. 144 U.S. at 4. Thus, statements in congressional journals are conclusive evidence of the presence of a quorum and the passage of a bill, notwithstanding the possibility of an error in count. *Id.*

The application of *Ballin* to this case is straightforward. When the Senate votes to remain in session for a period of time, and its official records indicate that it was regularly gavelled into session over that period, that is conclusive evidence that the Senate has been in session—and not in recess—for that period. President

Obama is not exempt from the ruling in *Ballin*. 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 by the courts or the Executive Branch. *Id.*; see also *United States v. Smith*, 286 U.S. 6, 35 (1932) (in a dispute over the effect of the Senate’s rules on a nomination, the Supreme Court stated that “[i]t 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.”).

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

Indeed, 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 Dist. of Columbia*, 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 proceedings are at issue.

Here, by unanimous consent recorded in the Congressional Record, the Senate voted to hold pro forma sessions for the period December 20, 2011 through January 23, 2012. *See* 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The Senate’s schedule provided for a series of pro forma sessions at three and 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).

This should end the matter. The Senate, the sole judge of its own proceedings under *Ballin*, unanimously declared itself to be in session. As the

Senate was not in recess, the President had no power to appoint federal officers without its advice and consent under article II, section 2, clause 2 of the U.S. Constitution. The President may have been displeased that the Senate chose to overlook some of his nominations during this period, but that is its prerogative. And the President certainly had no right to declare unilaterally that the Senate's decision not to take up his appointments for a span of a mere few weeks created a recess.

Indeed, if the President has the power to determine for himself when the Senate is in recess, he can declare it in recess on a whim, during any lunch break, weekend, or even when he believes that the Senators' debate has stalled and they are not working efficiently and effectively as a body. That would clearly violate the Constitution, which makes each congressional chamber the master of its own rules. U.S. Const. art. I, § 5, cl. 2. Because the Senate did not declare itself in recess and there exists no evidence that the House granted permission for such a recess, the Senate was not in recess. Therefore, the President's purported NLRB appointments are invalid.

The situation here 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 to be a constitutional nullity for purposes of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. But the Rulemaking Clause (article I, section 5, clause 2) does not permit such Executive Branch interference in the Senate's internal procedures any more than it would permit 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 short, the President violated 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.**

Article II, section 2, clause 2 of the U.S. Constitution provides the basic framework for federal appointments: the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other officers of the United States, whose Appointments are not herein otherwise provided for.” A joint power of appointment is thereby created. The Constitution provides a limited exception to this joint appointment power: “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. 3.

Taken together, those provisions mean that the President may appoint members of the Board when the Senate is in session, provided that there is advice and consent, but only when the Senate is actually in a recess may he bypass the Senate. Several distinct factors establish the President’s lack of constitutional authority to make the recess appointments challenged here.

1) *The Senate’s pro forma sessions were valid:* Contrary to the President’s

position, the Senate's pro forma sessions were not shams.<sup>11</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>12</sup> Similarly, 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 session that approved the tax cuts on December 23, 2011. 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 the validity of the session. The very definition of a pro forma session, as articulated by the Congressional Research Service ("CRS"), is a "short meeting of the Senate or the House held for the purpose of avoiding a recess of more than three days and

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<sup>11</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 entitled *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 5 (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.F.

<sup>12</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>.

therefore the necessity of obtaining the consent of the other House.”<sup>13</sup> When this happens, there is no recess within the meaning of the Recess Appointments Clause.<sup>14</sup>

A recent report from the CRS recognized that a “pro forma session is not materially different from other Senate sessions.” Christopher M. Davis, Cong. Research Serv., *Certain Questions Related to Pro Forma Sessions of the Senate* (Mar. 12, 2012), *reprinted in* 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012).

“[T]he term pro forma describes the reason for holding the session, it does not distinguish the nature of the session itself.” *Id.* Thus, the sessions are deemed valid for all constitutional and statutory requirements, including the requirements of the Adjournments Clause and for “calculating various required time periods pursuant

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<sup>13</sup> Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 4 (updated Jan. 9, 2012), *available at* <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>.

<sup>14</sup> Senate sessions designated “pro forma” have been used in the 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. *Obama Tempts Fight Over Recess Appointments* (Jan. 4, 2012), <http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments/> (last viewed July 20, 2012).

to expedited procedure statutes.” *Id.*

The Senate’s prediction in its scheduling order of December 17, 2011 that “no business” would occur during its pro forma sessions is irrelevant. How busy the Senate might happen to be is the Senate’s business alone. Moreover, to the extent it is relevant, the Senate was fully capable of considering nominations during pro forma sessions. The CRS report recognized that “[w]hile . . . the Senate has customarily agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction.” *Id.*

The *amicus* briefs filed by Speaker of the House John Boehner and Senator Mitch McConnell and forty-one (41) Senators in *Noel Canning v. NLRB*, Nos. 12-1115 and 12-1153 (D.C. Cir. oral argument Dec. 5, 2012), as also regards the propriety of the President’s appointments, attest to the validity of the pro forma sessions.<sup>15</sup> Speaker Boehner stated that “[t]he term ‘pro forma session’ is a vernacular term with no constitutional significance. Legislative business is conducted in the same manner during ‘pro forma’ session days as it is on any other Legislative Day.” (Boehner Brief 1 n.1). The Speaker added that “[d]uring the December 2011 and January 2012 pro forma sessions at issue in this case, eighty-

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<sup>15</sup> These *amicus* briefs were filed on September 26, 2012, and the Court can take judicial notice of them.

three (83) bills and twenty-four (24) resolutions were introduced. Forty-one (41) reports were filed, and committees met for eight (8) hearings.” (*Id.* at 2-3).

Similarly, Senator McConnell *et alia* defended the validity of the Senate’s pro forma sessions, pointing out that twice in 2011 the Senate passed legislation in such sessions. (McConnell Brief 25-26, citing passage of the Airport & Airway Extension Act of 2011, 157 Cong. Rec. S5297 (Aug. 5, 2011), and the Temporary Payroll Tax Cut Continuation Act of 2011, 157 Cong. Rec. S8789 (Dec. 23, 2011)). Indeed, it is illustrative that only six days after the Senate’s December 17, 2011 scheduling order predicted that “no business” would be conducted, the Senate passed the payroll tax cut legislation. Thus, any assertion that the Senate was “incapable” of considering the President’s nominations during its pro forma sessions is fanciful.

*2) If the President is correct, then Congress has violated the Constitution:*

The President’s unilateral declaration that the Senate was in a lengthy recess, notwithstanding the regular pro forma sessions, would, if true, render the Senate in breach of the Constitution’s article I, section 5, clause 4 and the 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 despite its holding of this constitutionally-mandated session the day before is untenable. Indeed, it is even less tenable to argue that the Senate can be in session for purposes of some constitutional provisions, like the Adjournments Clause or the Twentieth Amendment, but simultaneously in recess for purposes of the Recess Appointments Clause.

3) *The President's Administration has taken a contrary position:* The rationale used by the President to support these recess appointments conflicts with representations made by his Justice Department to the Supreme Court in *New Process Steel*. Then-Solicitor General Kagan told the Court that the case did not become moot once the Board regained a quorum via new recess appointees.

Although a President may fill [Board] vacancies through the use of his recess appointment power, as the President did on March 27 of this year, the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007.<sup>16</sup>

The Solicitor General's representation to the Supreme Court was not a mere

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<sup>16</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>. ("Kagan Letter").

passing reference. The representation was in direct response to the Supreme Court's order asking the parties to address what affect certain new recess appointments had on the proper disposition of the case. The Solicitor General's letter posited that the recess appointments did not render the case moot. The discussion of the prospect that pro forma sessions could be used once again to deprive the Board of a quorum was an integral part of the argument that the dispute was not moot because it could recur. Having persuaded the Court that the dispute in *New Process Steel* was not moot, and prophetically explaining that the Board "may face the prospect of being reduced to two members in the future," Kagan Letter at 3-4, the Justice Department is poorly positioned to abandon that representation. In any event, future-Justice Kagan got the matter correct: "the Senate may act to foreclose [the recess appointment] option by declining to recess for more than two or three days at a time." *Id.* at 3. That is precisely what the Senate did here.

4) *The Founders viewed the recess appointments power narrowly*: The Recess Appointments Clause is a *limited* exception to the normal appointment rules, which 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 a political dispute with the Senate.<sup>17</sup>

Although past Presidents have used their recess appointments power even during relatively short recesses,<sup>18</sup> President Obama's recess appointments here, 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

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<sup>17</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 to protest 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>18</sup> See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* (Jan. 9, 2012), available at <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>.

recess appointments to be made during an intra-session recess, the recess should be of a substantial duration, at least more than ten days. 33 U.S. Op. Att’y Gen. 20 (1921). No such break occurred in the present circumstances, because the Senate was regularly gaveled into session, and during one of its pro forma sessions it enacted important tax legislation.

Several Founders viewed the recess appointments power as limited, to include Edmund Randolph, the nation’s first Attorney General and influential member of the Constitutional Convention.<sup>19</sup> In response to a question from Thomas Jefferson about recess appointments powers, Randolph warned that the Recess Appointments Clause had to be “interpreted strictly” because it represented “an exception to the general participation of the Senate.”<sup>20</sup>

Similarly, Alexander Hamilton referred to the recess appointments 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

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<sup>19</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), <http://judiciary.house.gov/hearings/Hearings%202012/Turley%2002152012.pdf>.

<sup>20</sup> *Id.*

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, which occurred during the nation’s horse and buggy days. That is not the case here, however, where the Senate was in session and fully capable of acting on the NLRB nominations if it chose to do so.

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 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 by a confirmed Board member on December 16, 2004, Flynn was named to a Board seat vacated by a confirmed Board member on August 27, 2010, and Griffin was named to a Board seat that was vacated by a confirmed Board Member on August 27, 2011.<sup>21</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 occurs “during the Recess of the Senate,” such as through death or resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose many months before the purported Senate recess. As they did not “happen” during any recess, the appointments were unlawful.

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<sup>21</sup> *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

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. Allocco*, 305 F.2d 704, 708-14 (2d Cir. 1962) (endorsing the “happen to exist” construction); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), other authorities disagree.<sup>22</sup>

As stated 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 Constitution 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.

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<sup>22</sup> See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *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).

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>23</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 appointments power, they did not grant the President the broad power to fill any vacancies that “may happen to exist” during a recess.

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate’s advice and consent: 1) Congress may authorize the appointment of inferior officers by other governmental

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<sup>23</sup> Here, for example, recess appointee Block was appointed in place of a prior recess appointee, Member Becker, who was himself appointed in place of a prior recess appointee, Dennis Walsh. *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

branches;<sup>24</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 appointments preferred by the Founders, they must be narrowly construed. Rappaport, 52 UCLA L. Rev. at 1501-46.

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, a prominent delegate to the Constitutional Convention, wrote that such vacancies arise in "a case of necessity only; as where the Officer has died, or resigned during the recess."<sup>25</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 Constitution*, Story focused on the causal nature of the word "happen," and

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<sup>24</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>25</sup> Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti *et al.* ed., 1990).

whether a newly created post could count as a “vacancy.”<sup>26</sup> *See also* Rappaport, 52 UCLA L. Rev. at 1518-37.

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

**E. The President’s Attempt to Fill Vacancies Without the Advice and Consent of the Senate Was Unconstitutional Because the Recess Appointments Clause Only Covers Inter-session Recesses.**

The challenged recess appointments are invalid for an additional reason: the Recess Appointments Clause only allows for vacancies to be filled during an *inter-session* recess, and that did not occur here, as the Senate was not between

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<sup>26</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*, 387 F.3d at 1232 (Barkett, J., dissenting).

sessions on January 4, 2012.

Art. II, Section 2, Clause 3 states that the “[t]he President shall have Power to fill up all Vacancies that may happen during *the* Recess of the Senate” (emphasis added). It does not say during “*any*” recess of the Senate.

An inter-session recess is a recess between the two annual sessions of Congress. An intra-session recess is a recess that occurs during the congressional session.<sup>27</sup> As recently as 1901, Attorney General Philander Knox opined that the Constitution did not allow for intra-session recess appointments.<sup>28</sup>

The Constitution uses the term “adjournment” to refer both to inter-session and intra-session recesses. When the Constitution uses the term “the recess,” it

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<sup>27</sup> The “word ‘session’ refers to the period between the reconvening of the Senate after a sine die [*i.e.*, indefinite] adjournment and the next sine die adjournment.” Henry B. Hogue, Cong. Research Service, RS 21308, *Recess Appointments: Frequently Asked Questions* (Jan. 9, 2012), at 1, available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP\W%3B%20P%20%20%20%0A>).

<sup>28</sup> *Appointments of Officers – Holiday Recesses*, 23 Op. Att’y Gen. 599, 604 (1901) (“The conclusion is irresistible to me that the President is not authorized to appoint an [officer] during the current [intra-session] adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate.”) Indeed, up until that time, no President attempted to make an intra-session recess appointment, except “a limited number . . . during the troubled presidency of Andrew Johnson.” Rappaport, 52 UCLA L. Rev. at 1572. But even for those few appointments, “the Johnson Administration issued no written opinions that argued for the constitutionality of intrasession recess appointments.” *Id.*

refers only to the inter-session recess. Rappaport, 52 UCLA L. Rev. at 1547-73. For the Founders, “recess” corresponded to breaks between sessions, a meaning adopted from the Massachusetts Constitution. By contrast, one meaning of “adjournment” at the time the Constitution was drafted was “any break during or between sessions.” *Id.* This differentiation between “recess” and “adjournment” also makes sense of various constitutional clauses that use those terms. Allowing recess appointments for all adjournments, no matter when they occur and for how short a duration, would permit the President to recess-appoint for a one-day or one-hour break.

Moreover, if intra-session recess appointments are allowed, then such appointments last for longer periods, possibly twice as long, as for inter-session recess appointments, based on the Constitution’s language that recess appointments “shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. Thus, allowing recess appointments for such intra-session breaks makes no sense, because it gives the President power to unilaterally appoint federal officers for even longer periods of time than he would otherwise be allowed under the Recess Appointments Clause. Such a reading undermines the checks and balances built into the appointments process because it provides incentives to the President to bypass the Senate whenever possible.

For these reasons, the Court should rule that intra-session adjournments do not qualify as recesses under the Recess Appointments Clause, and the President's attempted NLRB appointments are invalid because they did not occur during an inter-session recess.

**F. 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 issued an Opinion ("OLC Opinion") purporting to justify the President's recess appointments.<sup>29</sup> The OLC Opinion stated that "the President is [] vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate."<sup>30</sup> It then expressed the view that the Senate is in recess whenever the President determines that it is "unavailable . . . to 'receive communications from the President or participate as a body in making appointments.'"<sup>31</sup> Key to this conclusion is the assertion that "Congress's provision for pro forma sessions . . . does not have the

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<sup>29</sup> *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 5 (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

<sup>30</sup> OLC Opinion at 1, quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921).

<sup>31</sup> OLC Opinion at 1; *see also id.* at 4, 9, 15.

legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause and that the President may properly conclude that the Senate is unavailable for the overall duration of the recess.”<sup>32</sup>

The OLC Opinion is wrong for numerous reasons. For example, the OLC Opinion gives short shrift to *Ballin* and the Senate’s determination that it was in session, and contravenes 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 ongoing 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>33</sup> In making this declaration, the Executive Branch’s OLC Opinion grievously

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<sup>32</sup> OLC Opinion at 9.

<sup>33</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). Congress has also used pro forma sessions to satisfy the Twentieth Amendment’s requirement that it meet at noon every 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 Jan. 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. (continued...)

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. 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 consent the Senate passed important tax legislation during a pro forma session. 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 is 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>34</sup> The validity of the President's January 4 recess appointments thus depends on his judgment

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<sup>33</sup>(...continued)

2446 (1991) (pro forma session to be held on Jan. 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (pro forma session to be held on Jan. 3, 2006). 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.

<sup>34</sup> As noted earlier, the Solicitor General also recognizes that the Senate can foreclose the President's recess appointments authority by choosing to remain in session. Kagan Letter at 3.

that the Senate unsuccessfully exercised its power. But, as one Senator said 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).

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*, 501 U.S. at 884.

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.

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. 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.

## **II. The NLRB Erred in Holding That Fry’s and Local 99 Could Continue to Deduct Dues Even after Employees Resigned Their Union Memberships or Revoked Their Dues Check-off Authorizations.**

### **A. Standard of Review**

This Court “does not function simply as the Board’s enforcement arm. It is [the Court’s] responsibility to examine carefully both the Board’s findings and its reasoning.” *International Union of Elec., Elec. Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994), quoting *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980); see also *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). On questions of law, Board decisions may be upheld only if

they are consistent with the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Although some deference is mandated by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), this Court carefully examines the Board's findings and reasoning, and takes into account anything in the record that fairly detracts from the weight of the evidence the Board used to support its decision. *Schaeff Inc. v. NLRB*, 113 F.3d 264, 266 (D.C. Cir. 1997).

Importantly here, the Board's interpretation of § 302(c)(4) of the LMRA—which governs when dues check-offs may be made irrevocable—is entitled to no deference. Congress did not give the Board jurisdiction over that statute, but instead committed its enforcement to the federal courts. *See* 29 U.S.C. § 186(e). As the Board itself has candidly admitted: “The statute does not authorize the Board to order parties to cease and desist from violating § 302, to enjoin violations of § 302, or to convict individuals for criminal violations of § 302. Thus, the Board does not have authority to enforce § 302.” *BASF Wynadotte Corp.*, 274 NLRB 978 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986); *see also National Fuel Corp.*, 308 NLRB 841, 843 (1992) (“The Board has no authority to enforce Section 302”); *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Mem'l Hosp. Corp.*, 862 F.2d 606, 608 (6th Cir. 1988), *vacated*, 492 U.S. 914 (1989) (§ 302 independent from NLRA and not preempted by it).

**B. The Board Erred in Holding That Resignation From Union Membership Does Not Indicate a Desire to Cease Paying Union Dues at the Earliest Possible Opportunity.**

It is common sense that individuals who resign from an organization no longer wish to pay dues to it. For example, when an individual sends a letter to a civic organization, country club, church or health club stating “I hereby resign my membership,” it must be assumed that this person wants to discontinue paying dues to that organization as quickly as possible.

Yet here, the Board irrationally presumes that employees who resigned their membership in Local 99 did not wish to stop the deduction of union dues from their paychecks. [App. \_\_\_, ALJD]. This conclusion must be reversed as a clear violation of the NLRA’s right to refrain, 29 U.S.C. §157.

Local 99 argued below that it is possible that employees may resign to get out of union membership restrictions, such as being fined for crossing a picket line, while still wanting to financially support the union’s collective bargaining activities. But this argument defies common sense. If anything, that an employee may resign in order to defy the union’s strike order only suggests that he does not want to support the union’s bargaining tactics. Any other interpretation is unreasonable. For example, if “Mr. Smith” resigns from his health club, can anyone realistically claim that he wants to continue paying membership dues?

Even if “Mr. Smith” believes that his former health club provides a beneficial service to his neighborhood and society in general, the only logical assumption to be gleaned from his resignation is that he wishes to cease all financial support as quickly as possible. Indeed, no reasonable person would believe that someone who resigns his health club membership still wants his paycheck docked for mandatory contributions to that entity from which he just resigned.

In reality, unions like Local 99 refuse to honor employee resignations as dues check-off revocations because this trap-for-the-unwary serves the union’s financial self-interests. But padding union coffers is not a legitimate reason for burdening employees’ statutory right under § 7 of the Act to right to refrain from supporting a union. *Cf. Shea v. Int’l Ass’n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) (holding that a union’s “unduly cumbersome annual objection requirement . . . serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers who would not willingly pay more than the portion allocable to activities germane to collective bargaining”).

Similarly, the Board’s presumption that employees who resign their membership want to keep paying dues is not only irrational, but contrary to the NLRA’s paramount policy of protecting employees’ right under § 7 of the Act to support or refrain from supporting unions. *See Pattern Makers v. NLRB*, 473 U.S.

95 (1985).

In *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), the Board announced a general rule in support of the NLRA's strong policy favoring voluntary unionism: where an employee executes a dues check-off authorization in a Right to Work state, his or her resignation from union membership automatically extinguishes any further obligation to pay dues, notwithstanding any irrevocability language in the check-off authorization itself.

[W]e will construe language relating to a checkoff authorization's irrevocability – i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement – as pertaining only to the method by which dues payments will be made so long as dues payments are properly owing. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis.

*Id.* at 328-29. This policy promotes employees' free choice to join or refrain.

In *Lockheed Space*, the Board recognized one narrow exception to this general rule: where the check-off authorization explicitly obligates the employee to pay union dues even when he or she is not a union member, the check-off authorization remains in force, notwithstanding an employee's resignation, *but only for the agreed-upon period of irrevocability*.

Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be

required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union *during the entire agreed-upon period of irrevocability*, even if the employee states he or she has had a change of heart and wants to revoke the authorization.

*Id.* at 329 (emphasis added).

Under *Lockheed Space*, therefore, an employee's resignation in a Right to Work state puts the union on notice that it must cease collecting that employee's dues upon the expiration of the irrevocability period specified in the check-off authorization. This is the only proper reading of the NLRA's statutory policy favoring voluntary unionism. *Pattern Makers v. NLRB*, 473 U.S. 95 (1985) (policy of federal labor law is "voluntary unionism"); *Lockheed Space*, 302 NLRB at 327-30 & 329 n.27 ("we now construe the authorization in the light of the statutory policies that we have identified as relevant").

Arizona is a Right to Work state, where there is no legal obligation to join a union or pay union dues. Employees who signed dues check-off authorizations but then resigned from Local 99 could still be bound to pay dues, but *only* for the duration of the "agreed-upon period of irrevocability." 302 NLRB at 329. Here, Local 99 and Fry's should have ceased collecting dues from Petitioners and all other resignees as soon as their period of irrevocability ended, *i.e.*, once the

collective bargaining agreement expired.

The ALJ confused distinct issues when he held that language in Local 99's check-off card stating that it "is not contingent upon any present or future membership in the Union" meant that the card could never be revoked by means of a resignation letter. [App. \_\_\_, ALJD at 4]. This language may mean that the card's irrevocability period cannot be vitiated by resignation from membership, but a resignation nevertheless operates as a request that the check-off authorization be revoked as soon as the irrevocability period ends. *Lockheed Space*, 302 NLRB at 328-29. *Lockheed Space* recognizes that a resignation from membership *does* operate to revoke a check-off authorization, and that language stating that the authorization is "not contingent on membership" only controls *when* that dues revocation will become effective. *Id.*

Here, Local 99's check-off authorization was revocable as a matter of law between October 25, 2008 and November 12, 2009, due to the expiration of the collective bargaining agreement. *See* LMRA § 302(c)(4); Section II(C), *infra*. Accordingly, the union and Fry's should have ceased deducting dues from employees who had resigned their membership during or prior to these dates, once their irrevocability period had expired. The union and Fry's failure to do so violated employees' right to refrain from union membership under § 7 of the Act.

The Board's refusal to recognize this contravenes not only the holdings of *Lockheed Space* and *Pattern Makers*, but also common sense, which dictates that employees who resign from a union are also expressing their desire to end their financial support as quickly as possible.

In short, Petitioners and other employees' resignations should be deemed effective as dues check-off revocations, given the fact that they work in a Right to Work state and their "agreed upon period of irrevocability" ended with the expiration of the collective bargaining agreement in October 2008. This policy is the only one that protects employees' rights to voluntary unionism and free choice.

**C. The Board Erred in Holding That Dues Check-off Authorizations Are Not Automatically Revocable During a Contract Hiatus Period.**

The Board summarily affirmed the ALJ's holding that Petitioners and other employees could not revoke their check-off authorizations during the contract hiatus, even by letters expressly stating a desire to revoke. [App. \_\_, NLRB Decision]. This decision is plain and reversible error, as it is in direct contravention of § 302(c)(4) of the LMRA.

Sections 302(a)(1) and (2) prohibit employers from paying any "money or other thing of value" to unions that represent their employees. 29 U.S.C. §§ 186(a)(1) and (a)(2). Section 302(b)(1) reciprocally prohibits unions from

receiving any money or thing of value from an employer. 29 U.S.C. § 186(b)(1).

Section 302(c) states nine exemptions to these prohibitions, including an exemption for deduction of membership dues:

The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, *or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . . .*

29 U.S.C. § 186(c)(4) (emphasis added).

Despite the unambiguous language of § 302(c)(4), the Board in *Frito Lay*, 243 NLRB 137 (1979), interpreted this statute to not permit employees to revoke check-off authorizations at will after the termination of their collective bargaining agreement. Without discussion, the Board reaffirmed that position in this case. [App. \_\_, Board Decision].

The Board's interpretation of § 302(c)(4), which is entitled to no judicial deference, fails because it ignores the word "beyond" in the phrase "beyond the termination date of the applicable collective agreement." "Beyond" means "on or to the farther side of," "at a greater distance than" and "in a degree or amount

surpassing.” *Merriam-Websters Online Dictionary*.<sup>35</sup> Thus, when Congress wrote that “a written assignment . . . shall not be irrevocable . . . *beyond* the termination date of the applicable collective agreement,” (§ 302(c)(4) (emphasis added), it clearly meant that check-offs shall be revocable after that termination date.

The Board, however, attempts to replace the word “beyond” in the statute with the word “at.” It twice states in *Frito Lay* that § 302(c)(4) permits revocation only “at the termination of any applicable collective agreement[s].” 243 NLRB at 138 (repeated twice).<sup>36</sup> Of course, “at” and “beyond” have entirely different meanings. “At” refers to a fixed point,<sup>37</sup> while “beyond” refers to things after a fixed point. The Board’s attempt, through sleight-of-hand, to replace “beyond” with “at” in § 302(c)(4) must be rejected.

In *Frito Lay*, dissenting Member Murphy correctly recognized that “as a matter of law, under the clear mandate of the proviso to Section 302(c)(4) of the

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<sup>35</sup> <http://www.merriam-webster.com/dictionary/beyond>.

<sup>36</sup> Local 99 ignores the word “beyond”, appearing in § 302(c)(4), in its check-off authorization card, which states that “[t]his authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or *until the termination date* of the agreement between the Employer and Local 99.” [App. \_\_\_] (emphasis added).

<sup>37</sup> “At” is “used as a function word to indicate presence or occurrence in, on, or near, <staying at a hotel> <at a party> <sick at heart>.” *Merriam-Websters Online Dictionary*.

Act, a dues check-off authorization is revocable when a collective-bargaining agreement is not in effect.” 243 NLRB at 139. She also correctly recognized that this is not a difficult issue of statutory construction.

No legal exegesis looking for vague implications of the language used or for some veiled legislative intent is necessary here, for the language [of § 302(c)(4)] is clear on its face that once the contract terminates the authorization is revocable. And this rather obvious conclusion is in accord with past Board decisions on the matter.

*Id.* at 140 (citations omitted) (Member Murphy dissenting).

The Board’s interpretation of § 302(c)(4) is entitled to no deference from this Court. *See* Section II(A), *supra*. Given that the Board’s interpretation is at odds with the statute’s unambiguous language, it must be rejected. The Court should rule, in accordance with Member Murphy’s dissent in *Frito Lay*, that § 302(c)(4) provides that a dues check-off is revocable at any time “beyond the termination date of the applicable collective agreement,” and that the refusal of Fry’s and Local 99 to accept the revocations in this case violates §§ 8(a) and (b) of the Act. *See generally Atlanta Printing Specialties*, 215 NLRB 237 (1974), *enforced*, 523 F.2d 783 (5th Cir. 1975) (federal law gives employees two separate opportunities to revoke their check-off authorizations).

Here, employees’ check-off authorizations became revocable at will once the contract expired, *i.e.*, from October 25, 2008 to November 12, 2009. *See, e.g.*,

*Murtha v. Pet Dairy Prod. Co.*, 314 S.W.2d 185, 189-90 (Tenn. App. 1957) (authorizations were revocable at will during the period where an old agreement was extended day-to-day until a new agreement was reached). Although *Murtha* is not a Board case, it was cited approvingly by the Fifth Circuit in *Atlanta Printing Specialities*, 523 F.2d at 788, because it properly reflects the principle of “voluntary unionism” embedded in the NLRA.

In short, the Board erred in validating Fry’s and Local 99’s refusal to honor employees’ revocations of their check-off authorizations when the authorizations were revocable at will because the contract had expired. *See generally UFCW Dist. Union One (Big V Supermarkets, Inc.)*, 304 NLRB 952 (1991) (refusal to honor revocation of check-off authorization violated Act where language in check-off authorization did not include limits on its revocation).

### CONCLUSION

The Petition for Review should be granted. The Board’s July 10, 2012 Decision and Order should be vacated because the recess appointments to the NLRB were unconstitutional and, therefore, no lawful quorum existed to issue them. The case should be remanded to the Board for decision by a lawful quorum of Members once they are seated.

Alternatively, if the Court finds that a lawful quorum existed, it should find

that the Board's Decision and Order were erroneous, and reverse and remand them for entry of proper and adequate remedies on behalf of Petitioners and the entire class of similarly-situated discriminatees.

Respectfully submitted,

s/ Glenn M. Taubman

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**CERTIFICATE OF COMPLIANCE REGARDING LENGTH OF BRIEF**

I hereby certify that this brief contains 13,158 words in accordance with the WordPerfect 11 word count, and is therefore in compliance with the type-volume limitations of Fed R. App. P. 32(a)(7)(B) and (C).

s/ Glenn M. Taubman

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Glenn M. Taubman

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2012, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Glenn M. Taubman

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Glenn M. Taubman

# STATUTORY ADDENDUM

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**29 U.S.C. § 157**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**29 U.S.C. § 158****(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer--

\* \* \* \*

**(3)** by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

**29 U.S.C. § 158****(b) Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . . .

**29 U.S.C. § 164****(b) Agreements requiring union membership in violation of State law**

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

**29 U.S. C. § 186**  
**Restrictions on financial transactions**

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
- (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
- (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

- (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of

paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to

money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

## Arizona Constitution

### **Art. 25. Right to work or employment without membership in labor organization**

No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.

**Arizona Revised Statutes  
Title 23, Labor**

**§ 23-1301. Definitions**

In this article, unless the context otherwise requires:

1. "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.
2. "Person" includes a natural person, a corporation, association, company, firm or labor organization.

**§ 23-1302. Prohibition of agreements denying employment because of nonmembership in labor organization**

No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual, or association of any kind enter into an agreement, written or oral, which excludes a person from employment or continuation of employment because of nonmembership in a labor organization.

**§ 23-1303. Illegality of acts or agreements violating article; strike or picketing for illegal purpose**

- A.** Any act or provision in an agreement which is in violation of this article is illegal and void.
- B.** Any strike or picketing to force or induce an employer to make an agreement orally or in writing in violation of this article is for an illegal purpose.

**§ 23-1304. Prohibition of threatened or actual interference with a person, his family or property to compel him to join labor organization, strike or leave employment**

It is unlawful for an employee, labor organization, or officer, agent or member thereof, by any threatened or actual interference with the person, his immediate family or his property, to compel or attempt to compel such person to join a labor organization, to strike against his will or to leave his employment.

**§ 23-1305. Prohibition of conspiracy to induce persons to refuse to work with persons not members of labor organization**

A combination or conspiracy by two or more persons to cause the discharge of any person or to cause him to be denied employment because he is not a member of a labor organization by inducing or attempting to induce any other person to refuse to work with such person, is illegal.

**§ 23-1306. Civil liability of person violating article**

A person who violates any provision of this article, or who enters into an agreement containing a provision declared illegal by this article, or who brings about the discharge of or denial of employment to any person because of nonmembership in a labor organization shall be liable to the person injured as the result of such act or provision and may be sued therefor, and in such action any labor organization, subdivision or local thereof shall be bound by the acts of its duly authorized agents acting within the scope of their authority, and may sue or be sued in its common name.

**§ 23-1307. Injunctive relief from injury resulting from violation of article**

A person injured or threatened with injury by an act declared illegal by this article shall, notwithstanding any other provision of law to the contrary, be entitled to injunctive relief therefrom.

## **United States Constitution**

### **Art. I. The Congress**

#### **Section 5, Clause 2. Rules; Punishment and Expulsion of Members**

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

#### **Section 5, Clause 3. Journal; Publication; Recording of Yeas and Nays**

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

#### **Section 5, Clause 4. Consent of Each House to Adjournment**

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.

### **Art. II. The President**

#### **Section 2, Clause 2. Treaty Making Power; Appointing Power**

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

**Section 2, Clause 3. Recess Appointments**

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.