U.S. Department of Justice
Civil Division

VIA CM/ECF February 28, 2013

Marcia M. Waldron, Clerk
U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106

RE: *NLRB v. New Vista Nursing & Rehabilitation* (Nos. 11-3440, 12-1027, 12-1936)

Dear Ms. Waldron:

The NLRB respectfully submits this supplemental letter brief regarding *Noel Canning v. NLRB*, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). As we explain, New Vista has forfeited its challenges based on that decision, which in any event lack merit.

A. New Vista's Belated Challenges Are Forfeited. "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited * * * by the failure to make timely assertion of [it] before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 731 (1993). Here, New Vista did not raise in its briefing in this Court or before the Board any of the constitutional challenges addressed in *Noel Canning*. New Vista did not make *any* challenge to Member Becker's 2010 appointment. And its challenge to the January 2012 recess appointments of other members was based solely on the ground that the Senate's "*pro forma* sessions" barred those appointments, an issue not addressed by *Noel Canning*. New Vista Br. 37-48. Because New Vista's briefs did not raise the constitutional contentions addressed in *Noel Canning*, New Vista forfeited

them, and cannot cure that default by a Rule 28(j) letter or supplemental filing tendered long after briefing was completed. *See United States v. Pendleton*, 636 F.3d 78, 83 n.2 (3d Cir. 2011); *United States v. Khorozian*, 333 F.3d 498, 506 n.7 (3d Cir. 2003).

If the new contentions implicated this Court's jurisdiction, the Court would be required to address them. But a claim that a federal officer was appointed unconstitutionally is *not* a jurisdictional challenge. *See Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 US 765, 778 n.8 (2000) (Appointments Clause objection to the False Claims Act was not "a jurisdictional issue that we must resolve"); *Freytag v. CIR*, 501 U.S. 868, 878 (1991) (describing Appointments Clause challenge as "nonjurisdictional"), *accord Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (Appointments Clause claim is "nonjurisdictional" and "not subject to the axiom that jurisdiction may not be waived"); *Evans v. Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (*en banc*) (same).

Not only is this Court not required to address the new constitutional challenges, *see Freytag*, 501 U.S. at 878–880, there is no reason here to excuse New Vista's forfeiture. New Vista could have raised any or all of the issues discussed in *Noel Canning* in its opening brief, and it had every reason to do so. Those constitutional challenges had previously been considered—albeit rejected—in published decisions of other Courts of Appeals. New Vista must bear the consequences of its choice not to raise those challenges in its briefs in this Court. *See, e.g.*, *Intercollegiate Broad. Sys.*, 574 F.3d at 756 (declining to address belatedly raised

Appointments Clause challenge because the party offered "no justification for its delay" and lacked "any reason to depart from our normal forfeiture rule").

B. New Vista's Belated Challenges Lack Merit. The *Noel Canning* decision conflicts with nearly two centuries of Executive Branch practice and the decisions of three other Courts of Appeals, two of them sitting *en banc*. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963). *Noel Canning*'s constitutional conclusions are inconsistent with the constitutional text; they conflict with historical practices and usages which the court did not address; they are at odds with the settled understandings shared by the Executive and Legislative Branches; and they threaten a serious disruption of the separation of powers.

1. The Constitution empowers presidents to make recess appointments during both inter- and intra-session recesses. a. *Noel Canning* holds that the President may make recess appointments only during recesses that are between enumerated sessions of the Senate, *i.e.*, intersession recesses. *Noel Canning*, 2013 WL at *9. That conclusion limits the President's power to recesses that occur after a specific type of Senate adjournment known as an adjournment *sine die*, the long-accepted parliamentary mechanism that terminates a legislative session.[1] It excludes recesses

[1] *See* Henry M. Robert, ROBERT'S RULES OF ORDER REVISED 253 (1915) (explaining that legislative sessions terminate at the time the legislature adjourns "*sine die*"—

that occur during sessions of the Senate, *i.e.*, intrasession recesses, which are far more common, and often longer, in modern Congresses. *See infra* p. 10. This holding has no support in the text of the Recess Appointments Clause, which "does not differentiate between inter- and intrasession recesses." *Evans*, 387 F.3d at 1224. And neither Framing-era dictionaries nor modern ones suggest the distinction.[2]

To confine the Clause to certain recesses but not others, *Noel Canning* looked to the Clause's reference to "*the* Recess" of the Senate. *Noel Canning*, 2013 WL at *8 (emphasis added). The court reasoned that the definite article "suggests specificity." *Ibid.* But as the *en banc* Eleventh Circuit explained, the word "the" can also—as it does here—refer generically to a particular *class* of things, *e.g.*, "the pen is mightier than the sword," rather than a *particular* thing, *e.g.*, "the pen is on the table." *Evans*, 387 F.3d at 1224-25 (citing dictionary usages). And far from being a purely modern usage, the Constitution itself elsewhere uses "the" in precisely this manner. For example, the Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days "during *the Session* of Congress." Art. I,

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literally "without [a] day" specified for reconvening). Accordingly, when a legislature merely adjourns to a particular day, that adjournment does not end the session and the recess is an intrasession one. *See infra* p. 10. (In the absence of *sine die* adjournment, a session ends at the time when other legal authority requires the next session to commence. *See* Robert, *supra*, at 253-54; NLRB Br. 37-38.)

[2] *See id.* at 1224-25; II N. Webster, *An American Dictionary of the English Language* 51 (1828) (defining "recess" as a "[r]emission or suspension of business or procedure"); 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (same); 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (defining "recess" as "period of cessation from usual work," and citing sources from 1642, 1671, and 1706).

§ 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to "the Session" cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President "in *the Absence* of the Vice President," Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather than one in particular.

The fact that the Clause uses the singular "Recess" rather than the plural "Recesses," *Noel Canning*, 2013 WL at *8, *10, is equally inapposite. The Senate has always been constitutionally required to have at least two enumerated sessions per Congress, *see* Art. I, sec. 4; Amend. XX, and in the 18th and 19th Centuries, the Senate regularly had at least three or four enumerated sessions. *See generally* Congressional Directory for the 112th Congress 522-26 (2011) (hereinafter "Congressional Directory"). Thus, even under the D.C. Circuit's interpretation, the Senate will always have two or more "Recesses" during each Congress. The fact that the Clause refers to "the Recess" of the Senate, rather than "the Recesses" of the Senate, therefore cannot mean that the Framers meant to confine it to one particular recess. And, indeed, *Noel Canning*, itself, ultimately does not interpret "the Recess" to refer to a particular intersession recess. Instead, the court chose to treat the phrase as referring generically to all intersession recesses, thus reading "the Recess" as referring to a class of recesses, not to a particular one. Once that Rubicon is crossed, "the" provides no textual basis for drawing a constitutional line between a restrictive class of recesses (all intersession ones) and a broader class (all recesses).

b. Evidence from the Framing Era, which the D.C. Circuit did not address, demonstrates that "the Recess" was historically understood to refer to intrasession recesses as well as intersession ones. The British Parliament, whose practices formed the model for legislative practice in the United States, had long used the term "recess" to encompass intrasession breaks. *See, e.g.*, Thomas Jefferson, A MANUAL OF PARLIAMENTARY PRACTICE § LI (2d ed. 1812). That point alone undermines Noel Canning's conclusion that the Framers would have naturally understood "the Recess" to refer only to intersession breaks. Moreover, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States "in the recess of Congress" (Arts. IX & X). The only time Congress did so was for a scheduled *intra*session recess.[3] And when the Constitutional Convention, during the development of the Constitution itself, adjourned for what amounted to a short intrasession recess, delegates referred to that adjournment as "the recess."[4]

During the Founding Era, numerous States also used "the recess" to refer to intrasession recesses. For example, the Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes "in the recess" of the legislature.

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[3] *See* 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. The scheduled recess was intrasession because new congressional terms began annually in November, *see* Articles of Confederation of 1781, art. V, but Congress had adjourned only until October 30.

[4] *See, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York "during the recess" due to a broken carriage), *reprinted in* 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76; 3 Farrand, *supra*, at 191 (recounting a 1787 speech by Luther Martin in which he discusses matters that occurred "during the recess" of the Convention); *see also* 2 Farrand, *supra*, at 128.

See Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during legislative recesses that were not preceded by *sine die* adjournment or its equivalent and that were therefore intrasession.[5] *See* note 1, *supra.* And in 1775, the New York legislature appointed a "Committee of Safety" to act "during the recess" of the legislature; the referenced recess was a 14-day intrasession one.[6] *Noel Canning* does not address any of these historical examples.[7]

Noel Canning's holding is also at odds with historical practice under the Senate Vacancies Clause. The Clause originally allowed state governors to "make Temporary Appointments" of Senators "if Vacancies happen * * * during *the Recess* of the Legislature of any State." Art. I, § 3, cl. 2 (emphasis added). Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted the commission without objection.[8] The absence of

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[5] *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (recessing from April 16, 1781 to June 13, 1781). In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, sec. 9; Vt. Const. of 1777, ch. II, sec. VII.

[6] 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

[7] *Noel Canning* cites *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819), involving a recess appointments provision in North Carolina's Revolutionary-era constitution. But the case was decided on unrelated procedural grounds, and the language relied on by the D.C. Circuit came from a single judge's summary of the defendant's argument. *See id.*

[8] *See* 8 Annals of Cong. 2197 (Dec. 19, 1798) (noting that Franklin Davenport, "appointed a Senator by the Executive of the State of New Jersey, in the recess of the

objection is telling, for the Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See generally* Butler & Wolf, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES: 1793-1990 (1995).

c. The longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further reinforces the understanding that the Recess Appointments Clause permits intrasession recess appointments. "[T]raditional ways of conducting government give meaning to the Constitution," and "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. *See* Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, at 22-28 (2013). Indeed, this practice has continued regularly since Attorney General Daugherty, relying on the Senate Judiciary Committee's own interpretation of "recess," confirmed nearly a century ago that such appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); S. Rep. No. 58-4389 (1905). Subsequent Executive precedent

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Legislature * * * took his seat in the Senate"); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess between November 8, 1798 and January 16, 1799).

has repeatedly followed this conclusion, and the Legislative Branch has acquiesced.[9]

Noel Canning dismissed this long history because no intrasession recess appointment had been documented before 1867. 2013 WL at *10-11. But until the Civil War, there were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See* Congressional Directory, *supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th Century. *See id.* at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of such intrasession recesses themselves, not an "assumed" absence, *Noel Canning*, 2013 WL at *11, of the power to make such appointments.

d. *Noel Canning*'s interpretation also fails to honor the Recess Appointment Clause's purposes. The Clause ensures that the President may fill vacant offices when the Senate is unavailable to offer advice and consent on nominations, while freeing the Senate from having "to be continually in session for the appointment of officers." The Federalist No. 67, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *see also* NLRB Br. 41-42. The Clause also enables the President to meet his continuous constitutional responsibility to "take Care that the Laws be faithfully executed." *See id.*

The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the need to fill vacancies is

[9] *See, e.g.*, 20 Op. O.L.C. 124, 161 (1996); *Appointments—Recess Appointments*, 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the "accepted view" of the Recess Appointment Clause, and interpreting the Pay Act in a consistent manner).

just as great—indeed, even greater. Intrasession recesses often last longer than intersession ones. S*ee Evans*, 387 F.3d at 1226 & n.10. And in modern Senate practice, intrasession recesses account for more of the Senate's absences than intersession recesses. *See* Congressional Directory, *supra* at 530-37. There is no justification for a rule that would divest the President of his constitutional power to fill vacant offices for most of the time the Senate is in recess, but allow the President to fill an office during a brief intersession recess.

To make matters worse, under *Noel Canning*, whether the President may act depends on how the Senate frames its adjournment, empowering the Senate unilaterally to eliminate the President's recess appointment authority even when it is unavailable to advise and consent. If the Senate adopts a resolution adjourning *sine die* (that is, without a day for return to continue that session), the adjournment ends the Senate's enumerated session, and the ensuing recess is an *inter*session one lasting until the start date set by law for the next session—usually January 3. *See* NLRB Br. 37-38; U.S. Const., Amend. XX, § 2. If the Senate adjourns for the same period, but the resolution instead specifies a return date for that session that is immediately before the next session (say, January 2), the adjournment does not end the session, and the recess is *intra*session. *Noel Canning* allows recess appointments in the first case (if vacancies arise during the recess, *see infra*) but not in the second, even though the Senate's unavailability for advice and consent is identical in both.

There is no basis for *Noel Canning*'s speculation that Presidents could use

intrasession recess appointments to evade the Senate's advice-and-consent role. The Clause has been consistently used over 400 times to make intrasession recess appointments, and Presidents still seek, and strongly prefer, Senate confirmation. Indeed, they have a strong incentive to do so, because recess appointments are only temporary. The real threat to the separation of powers comes from *Noel Canning*, because it would seemingly allow the Senate to eliminate the President's recess appointment power, by adjourning to a date just before the beginning of the next session instead of adjourning *sine die*, and thereby turning an intersession recess into an intrasession one, where *Noel Canning* prohibits appointments.

e. Comparing the Recess Appointments Clause with the Adjournment Clause, *Noel Canning* surmised that the term "recess" must have some meaning narrower than "adjournment." But during the Framing Era and for some time thereafter, it does not appear that individuals drew the same distinction that *Noel Canning* offered.[10] Indeed,

[10] For instance, Thomas Jefferson's 1801 *Manual of Parliamentary Practice* refers to intrasession breaks as a "recess by adjournment." *Id.* § LI. George Washington used the terms "recess" and "adjournment" in the same paragraph to refer to the same 10-day break. *See* 3 Farrand, *supra*, at 176. When the Continental Congress convened a committee "during the recess," it did so under an intrasession "adjournment." 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. And in the Spring of 1812, Congress debated a proposed intrasession break, with legislators repeatedly using the terms "recess" and "adjournment" when discussing the same proposal. *See, e.g.*, 23 Annals of Cong 211 (April 24, 1812); 24 Annals of Cong 1334-1341 (April 25, 1812). *Noel Canning*'s discussion also failed to appreciate that at the time of the Framing the word "recess" was generally not used as a verb, as that function was instead performed by the word "adjourn." *See* Neal Goldfarb, The Recess Appointments Clause (Part 1), LawNLinguistics.com, Feb. 19, 2013, *at* http://lawnlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1/#more-703.

the Adjournment Clause makes clear that even extremely short breaks count as "adjournments." *See* Art. I, § 5, cl. 4 (recognizing that short breaks of less than three days are still "adjourn[ments]"). By contrast, and consistent with the Senate's own long-held view of the Recess Appointments Clause, *see* NLRB Br. 44-45, the Executive has understood the Recess Appointments Clause as generally excluding those very short breaks, which do not genuinely render the Senate unavailable to provide advice and consent. And contrary to *Noel Canning*'s suggestion, there is nothing novel or objectionable under the Constitution's provisions allocating powers among the Branches about a test that may result in close cases at the margins. *See Morrison v. Olson*, 487 U.S. 654, 670-72 (1988) (applying a test that is "far from clear").

Noel Canning also suggests that the Recess Appointments Clause treats a "recess" and a "session" as mutually exclusive, so that the Senate cannot have a recess during a session. *Noel Canning* derives this supposed dichotomy from the fact that the Clause provides that recess appointments expire at the end of the Senate's "next" session. *See* 2013 WL at *9. But that fact says nothing about whether a "recess" can occur within a session.[11] The Framers had no way of knowing how much time would remain in the session when the President made his appointments, and thus it was perfectly sensible to select the end of the next session as a uniform terminal date. Moreover, some intrasession recesses have extended almost to the end of the

[11] *Accord Wright v. United States*, 302 U.S. 583, 589 (1938) (noting that "the recess of the Senate" was "during the session of Congress").

enumerated session itself, *see, e.g.*, Congressional Directory, *supra*, at 528, 533, 536, demonstrating that the Senate may not have an opportunity before the end of its session to confirm some nominees appointed during an intrasession recess.

f. Since the beginning of Ronald Reagan's first term, Presidents have made no fewer than 329 intrasession recess appointments. *See* Hogue, et al., *supra*, at 4. The total number of intrasession appointments in the country's history includes three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See* Hogue, *supra*, at 5-31. Under *Noel Canning*, every one of these appointments would be unconstitutional. The existence of a "[l]ong settled and established practice" should be a "consideration of great weight in a proper interpretation" of the Constitution's text. *The Pocket Veto Case*, 279 U.S. at 688-90 (internal quotation marks omitted). Yet rather than give "great weight" to this vast and settled body of practice, *Noel Canning* completely discards it. This Court should not follow suit.

2. The President is empowered to fill a vacancy during a recess even if the vacancy arose before the recess. a. The Recess Appointments Clause states that "[t]he President shall have Power to fill up all Vacancies that *may happen* during the Recess of the Senate." Art. II, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist during a recess, including those that arose beforehand. He

pointed out that "happen" is an ambiguous term, which could be read to mean "happen to occur," but "may mean, also * * * 'happen to exist.'" 1 Op. Att'y Gen. 631, 632 (1823). He explained that the "exist" interpretation is the more compelling one in light of the Clause's purpose of "keep[ing] these offices filled," *id.*, and the President's duty to take care of public business. Accordingly, he concluded that "all vacancies which * * * *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled." *Id.* at 633 (emphasis added).

For nearly two centuries, the Executive Branch has followed this opinion that Attorney General Wirt provided to the fifth President, himself one of the Founding Fathers, and Congress has consistently acquiesced. *See Allocco*, 305 F.2d at 713-14. Such a longstanding and uncontroverted interpretation is entitled to "great weight" in "determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 688-90. Until *Noel Canning*, every court of appeals to have considered the issue, including the Ninth and Eleventh Circuits *en banc*, endorsed that interpretation. *Evans*, 387 F.3d at 1226-27; *Woodley*, 751 F.2d at 1012-13; *Allocco*, 305 F.2d at 709-15.

This settled interpretation is not only faithful to the text, but makes good practical sense. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, the slowness of long-distance communication in the 18th Century

meant that the President might not even have *learned* of a vacancy that arose while the Senate was in session until after the Senate's recess began. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant for months simply because news of the death did not reach the Nation's capital until after the Senate had recessed.

Attorney General Wirt's interpretation also fits the durational nature of vacancies. While the event that *causes* a vacancy, such as a death or resignation, may "happen" at a single moment, the resulting vacancy itself continues to "happen" until the vacancy is filled. *Accord* Johnson, *supra*, at 2122 (defining "vacancy" in 1755 as the "[s]tate of a post or employment when it is unsupplied").[12] That durational usage accords with common parlance. For example, it would be routine to say that World War II "happened" during the 1940s, even though the war began on September 1, 1939. And the durational sense of "happens" is all the more appropriate when asking if one durational event (a vacancy) happens during another (a recess).

b. *Noel Canning*'s reading of "happen" produces serious textual difficulties of its own. The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate[.]" If the phrase "happen during the Recess of the Senate" is construed to mean "happen to

[12] *See also* Hartnett, *Recess Appointment of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 381-84 (2005) (giving examples of events that "happen" over an extended period).

arise during the Recess of the Senate," as *Noel Canning* reads it, a literal reading of the Clause would mean that *even after the Senate returns from a recess*, the President would retain his power to fill the vacancy while the Senate was back in session, simply because the vacancy first arose while the Senate was on recess. *See* 12 Op. Att'y Gen. 32, 28-39 (1866). When "during the Recess of the Senate" is used to circumscribe the vacancies that may be filled, it becomes unavailable to limit the time when the President may "fill up all Vacancies."[13] In contrast, reading "happen" as meaning "happen to exist" allows "during the Recess of the Senate" to delimit the President's "Power to fill" vacancies. Moreover, contrary to *Noel Canning*'s suggestion, the Executive's interpretation does not render the phrase "that may happen" superfluous. Without that phrase, the Clause could be read to enable the President to fill during a recess known future vacancies, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing "that may happen" as the Executive has long read it, confines the President to vacancies already in existence.

Nor is *Noel Canning*'s interpretation of "happen" compelled by historical usage. The Federalist Papers appear to have used the word "happen" to, among other things, denote a state of existence rather than a singular event.[14] *Noel Canning* cited

[13] The law review article that underpins much of the D.C. Circuit's reasoning acknowledges this problem. *See* Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1538-39 (2005).

[14] *See, e.g.*, The Federalist No. 79, at 473 (Hamilton) (because the President's term is only four years, "it can rarely happen that" a Presidential salary that is adequate at the start of this period "will not continue to be such to the end of it").

eighteenth century dictionaries that defined "happen" with a variant of "come to pass" (sometimes also including an element of chance). But that definition, as applied to a durational event like a vacancy, is entirely consistent with the "happen to exist" interpretation. Indeed, multiple discrete events may "come to pass" that *maintain* a vacancy's existence beyond the event that first created it, such as unexpected matters that occupy the Senate's attention.

Noel Canning put weight on a 1792 opinion from Attorney General Randolph that endorsed the "happen to arise" interpretation. *See* 2013 WL at *18. Not only has that opinion been thoroughly repudiated by a long line of Attorney General opinions dating back to 1823, *see Allocco*, 305 F.2d at 713, but it is not clear that any President ever found the advice wholly persuasive. Even George Washington, to whom Randolph gave his advice, did not act consistently with it in some instances—such as in October 1796 when he recess appointed William Clarke to be the U.S. Attorney for Kentucky, even though the position had been vacant for at least two years.[15] And

[15] Dep't of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979). Additionally, in November 1793, President Washington recess appointed Robert Scot to be the first Engraver of the Mint, a position that did not "happen" during the same recess under *Noel Canning*'s interpretation because the position was created by a 1792 statute. 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 1 Stat. 246. Scot's appointment was occasioned by Joseph Wright's death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in that office, and even if he had been, he in any event would have also been appointed during the recess after an intervening

President Washington's immediate successor, John Adams, adopted a view directly contrary to Randolph's (as did apparently the fourth President, James Madison, and possibly also the third President, Thomas Jefferson).[16] Thus, even if President Washington had agreed with Randolph (as the *Noel Canning* court assumed), that would at most show an early "difference of opinion," Letter from John Adams to John McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, *supra*, at 647, regarding an ambiguous constitutional provision. Any such early differences were effectively resolved by Attorney General Wirt's 1823 opinion, which has been adhered to consistently for nearly two hundred years.

c. *Noel Canning* dismisses Congress's longstanding acquiescence in the Executive Branch's interpretation by portraying it as a departure from a position supposedly expressed in an 1863 statute. *See* 2013 WL at *19. But far from rejecting the Executive's interpretation, the 1863 statute acknowledged it. *See Dennis* v. *Luis*, 741 F.2d 628, 636 (3d Cir. 1984) (quoting approvingly from an 1880 Attorney General opinion that noted the 1863 statute "concedes the right of the President to appoint"); 16 Op. Att'y Gen. 522, 531 (1880). The statute merely postponed payment of salary

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session. *See* 17 Am. J. Numismatics 12 (Jul. 1883); Taxay, THE U. S. MINT AND COINAGE: AN ILLUSTRATED HISTORY FROM 1776 TO THE PRESENT 104-05 (1966).

[16] *See* Letter from John Adams to James McHenry (April 16, 1799), *reprinted in* 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES (hereinafter "ADAMS WORKS") 632-33; Letter from James McHenry to Alexander Hamilton (April 26, 1799), *reprinted in* 23 THE PAPERS OF ALEXANDER HAMILTON 69-71 (H.C. Syrett ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, at 647-48; *Hartnett*, *supra*, at 391-401.

to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1948, 54 Stat. 751.

d. It is *Noel Canning*'s approach, not that of the Executive Branch, that threatens the constitutional design. By confining the Clause to vacancies that arise during a recess, *Noel Canning* makes the President's ability to fill offices turn on the happenstance of when the previous holder left office. That approach disserves the purpose of the Clause. "If the [P]resident needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 445-46 (2005) (emphasis added). And *Noel Canning* would allow the Senate to both make itself unavailable to provide advice and consent, and also obstruct the President's discharge of his duty to enforce the laws, by the simple expedient of recessing before acting on a nomination.

Noel Canning suggests that Congress could more broadly provide for "acting" officials. *See* 2013 WL, at *20. If the Framers had thought it sufficient to have the duties of vacant offices performed by subordinate officials, the Recess Appointments Clause would have been unnecessary. Some positions (*e.g.* Article III judgeships) cannot be performed on an acting basis, and it may be unworkable or impractical to rely on acting officials to fill other positions for an extended period of time, such as

Cabinet level positions or positions on boards designed to be politically balanced.

3. The President's recess appointment power is not limited to the same recess in which the vacancy arose. The Recess Appointments Clause provides for the President to fill vacancies by "granting Commissions which shall expire at the End of [the Senate's] next Session." *Noel Canning* construed "next Session" to mean the next session after the recess in which the vacancy arose. *Noel Canning then* concluded that the President may make a recess appointment only during the *same* recess in which the vacancy arose. 2013 WL at *23.

The better reading is that "next Session" refers to the next session after the President fills the vacancy by granting the commission. That reading is long accepted and grammatically compelling. The text ties the expiration of the appointments to the President's act of "granting Commissions," not to the "happen[ing]" of the vacancy. And if "happen" means "happen to exist," "next Session" must refer to the "next Session" after the *filling* of the vacancy, because the vacancy itself can "happen to exist" during more than one Session.

For numerous reasons, the Senate may not act on a nomination by the end of the "next Session" after the vacancy arises. Thus, the Framers had good reason to tie the duration of a recess appointment to the time of appointment, rather than the time the vacancy arose. The text of the Clause does not warrant a contrary interpretation.

Sincerely,

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The NLRB certifies that the electronic copy of the brief filed with the Court in Portable Document Format (PDF) has been scanned for viruses using McAfee VirusScan, version 15.6, and no virus has been detected.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, I caused the foregoing letter brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document will be served on the following counsel through the CM/ECF system:

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