UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, v. RENAISSANCE EQUITY HOLDINGS, LLC, RENAISSANCE EQUITY HOLDINGS, LLCs A through G, d/b/a Flatbush Gardens, Respondents.	No. 12-CV-350 (BMC) **(ECF CASE)**

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that 29 U.S.C. § 153(b) "requires three participating members 'at all times' for the Board to act." 130 S. Ct. at 2640 (quoting § 153(b)). Although a properly constituted Board may delegate its powers to a group of three or more members, *see* § 153(b), the Court held that such a delegee group is powerless if the Board lacks a quorum, even if it had a quorum when the delegation was made. As the Court memorably put it, § 153(b) "does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died." 130 S. Ct. at 2645.

On January 3, 2012, Member Becker's term expired, leaving the Board with two members and without a quorum. On that same day, the Senate met in pro forma session to discharge its constitutional obligation under the 20th Amendment and formally begin the Second Session of the 112th Congress. *See* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."). Indeed, these two events—the vacancy and the convening of the new session of Congress—were not unrelated. There was a vacancy precisely because Member Becker's recess appointment expired upon the formal beginning of the new session of Congress. The *Congressional Record* reflects that "[t]he 3d day of January being the day prescribed by the Constitution of the United States for the annual meeting of the Congress, the 2d session of the 112th Congress convened at 12:01 and 32 seconds p.m., and was called to order." 158 Cong. Rec. S1 (Jan. 3, 2012).[1] The Senate then adjourned less than a minute later until 11:00 a.m. on January 6, 2012. *Id*. *See also* 158 Cong. Rec. S3 (Jan. 6, 2012) (recording that the Senate met at 11:00 a.m.).

[1] All citations herein to the *Congressional Record* are to the daily edition.

On the very next day, January 4, just one day after the Senate began the second session of the 112th Congress, just one day after the Senate adjourned, and just two days before the Senate planned to reconvene, the President purported to give "recess appointments" to three new Board members. The President in no way doubts that the January 3 meeting of the Senate was valid despite its "pro forma" nature. Indeed, the government recognizes the validity of the Senate's January 3rd session in multiple ways: It recognizes that Member Becker's recess appointment expired and a vacancy was created on that date; January 3 begins the intrasession recess the government identifies in its brief; and because the recess appointments were made after the second session of the 112th Congress began, the purported appointments, if valid, would last nearly two years (an intersession appointment made just two days earlier would have expired a year earlier). But although the President recognizes the validity of the January 3 session despite its pro forma nature, the government asserts the President's prerogative to ignore the Senate sessions on January 6, 10, 13, 17, and 20 because of their pro forma nature. This makes no sense. Those sessions were no less pro forma or valid than the January 3 session that the President concedes was valid and no different from the December 23 session in which the Senate passed one of the President's legislative priorities. There is no basis for allowing the President to pick and choose which sessions of the Senate he will acknowledge and which he will ignore.

The government pointedly offers no alternative argument to its unprecedented claim that the President can pick and choose in this manner. The government does not argue that a three-day intrasession adjournment creates a recess, and with good reason. It would contradict nearly a century of executive branch arguments that intrasession recess appointments are valid only if the intrasession recess is of considerable length. A three-day break between meetings, such as occurred between January 3 and 6, has always been regarded as far too short. *Cf.* U.S. Const. art.

I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days . . ."). But having placed all its eggs in one basket and provided no authority for the President's ability to disregard some, but not all, pro forma sessions, it is clear that the purported appointments were invalid, the Board lacks a quorum, and this motion to dismiss must be granted.

ARGUMENT

I. THE BOARD LACKS A QUORUM BECAUSE THE JANUARY 4 APPOINTMENTS ARE UNCONSTITUTIONAL.

Because the "recess appointments" that the President announced on January 4, 2012, are invalid, the Board lacks a quorum and hence lacks the power to petition this Court for injunctive relief under 29 U.S.C. § 160(j) or to make an unfair labor practice finding. *See New Process Steel*, 130 S. Ct. at 2642 n.4 ("The Board may not, of course, itself take any action absent sufficient membership to muster a quorum (three)"); *NLRB v. Talmadge Park*, 608 F.3d 913 (2d Cir. 2010) (denying petition for enforcement of order because Board lacked a quorum); *County Waste of Ulster, LLC v. NLRB*, 385 F. App'x 11, 12 (2d Cir. 2010) ("[T]he two-member panel of the NLRB did not have the authority to enter a decision and order in this case.").[2] For the same reason, this Court lacks jurisdiction. *See* 29 U.S.C. § 160(j). And, in all events, this Court cannot grant relief under § 160(j) absent a finding that the Court of Appeals would likely enforce an unfair labor practice finding by the Board, and the cases cited above make clear that no court would enforce an unfair labor practice finding by a Board that lacks a quorum. *See* Part II-B,

[2] Before *New Process Steel*, the Second Circuit had held in *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *vacated*, 130 S. Ct. 3498 (2010), that two Board members may exercise the Board's authority as a quorum of a delegee group, but the Supreme Court vacated *Snell Island* in light of *New Process Steel*, and the Second Circuit has recognized that "on this point, *Snell Island* yields to *New Process Steel*." *Talmadge Park*, 608 F.3d at 913.

infra.

The government contends that the Senate was continuously in "recess" for 20 days from January 3 to January 23, 2012—even though the Senate never declared itself in recess and, on the contrary, held six formal sessions in that period, on January 3, 6, 10, 13, 17, and 20. The government itself concedes the first of those sessions was valid, despite its "pro forma" nature. The linchpin of government's position is the extravagant claim that the President, not the Senate, gets to "determine whether the Senate is in recess" and the President gets to pick and choose which sessions count. Dkt. 59 at 30. According to the government, even if the Senate determines that it is in session, the President may "look behind the Senate's alleged determination." *Id*. at 29. Exercising this newfound look-behind power, the government contends that while the January 3 session was valid, the "sessions between January 3 and 23, 2012, did not interrupt the Senate's 20-day intrasession recess for [recess appointment] purposes." *Id*. at 20. The government puts all of its eggs in this basket: It advances no argument that the appointments were valid if they occurred in an adjournment spanning only the three days from January 3 to 6. *See* Part I-B, *infra*.

A. The Senate's Pro Forma Sessions Are Sessions for Constitutional Purposes.

A "pro forma" session of the Senate is a session for all constitutional purposes, including for purposes of the Adjournment Clause (Art. I, § 5, cl. 4), the Recess Appointment Clause (Art. II, § 2, cl. 3), and Section 2 of the 20th Amendment. Such a formal session, even if brief and even if no legislation or appointments are taken up, is a session, and certainly cannot be ignored or unilaterally deemed a recess.

The Senate regards its pro forma sessions as sessions, as does the President when it suits his interests. The Senate's determination of the status of its own meetings—and not the President's view—is clearly controlling. "The Constitution commits to the Senate the power to

make its own rules." *United States v. Smith*, 286 U.S. 6, 48 (1932). The Rules Clause provides that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Under the Rules Clause, "all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892). *Ballin* thus forecloses any argument that it might be "more accurate" or "better" from the President's perspective to say a pro forma session is not really a session or is more like an adjournment or recess. The *Ballin* Court rejected the claim that the Act of May 9, 1890, was invalid because the House allegedly lacked a quorum when it passed the law. The Court held that it was up to the House to set its own rules for determining if a quorum exists and thus the House could count for quorum purposes those Representatives who were present but did not vote. *Id.* at 6. Similarly, it is up to the Senate to say when it is in "Session" and when it is "adjourn[ed]." U.S. Const. art. I, § 5 cl. 4. *See* Laurence H. Tribe, *American Constitutional Law* § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself").

The Rules Clause gives the Senate "the authority to determine its own procedural rules, including the what, when, and how of Senate recesses." 158 Cong. Rec. S316 (Feb. 2, 2012) (Sen. Hatch). 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."). The Constitution commits to the Senate and House the power to go into "Session" and the power to "adjourn" (Art. I, § 5, cl. 4),

and when it comes to matters of process "it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the houses of Congress, when acting upon matters within their constitutional authority." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929). *Cf. Nixon v. United States*, 506 U.S. 224 (1993) (rejecting as non-justiciable an impeached judge's effort to second-guess the Senate's procedures and claim that the entire Senate was required to hear the evidence against him when Senate rules allowed a committee to do so).

The government asserts that "[t]he Senate as a body made no determination that it was not in recess," Dkt. 59 at 2, but that is simply false. *See Orders for Tuesday, December 20, 2011 Through Monday, January 23, 2012*, 157 Cong. Rec. S8783 (Dec. 17, 2011). Pursuant to those orders, the Senate "adjourn[ed]" for no more than three days at a time (excluding Sundays) and then "convene[d] for pro forma sessions" after each adjournment. *Id*. Thus, the Senate never declared itself in recess. To the contrary, the Senate specified when it would hold formal meetings, including the December 23 meeting in which the payroll extension was passed, the January 3 meeting required by the 20th Amendment, and the multiple meetings during the period the President would deem them to have been in recess, which were all required by the Adjournment Clause. The government cites the *Congressional Directory* and a Senate website (Dkt. 59 at 23 & n.23), but the *Congressional Record* supplies the official record of the "public proceedings" of the House and Senate. 44 U.S.C. § 903; *see also* U.S. Const. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings"). And the *Congressional Record* reflects that the Senate was in session on *inter alia* January 3 and 6, 2012. *See* 158 Cong. Rec. S1, S3.

Section 2 of 20th Amendment requires Congress to assemble annually "at noon on the 3d

day of January." The Senate fulfilled that requirement this year by going into a brief pro forma session, as it has done in prior years. *See*, *e.g.*, H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) (formal session to be held on January 3, 1980); 152 Cong. Rec. S1 (Jan. 3, 2006); 154 Cong. Rec. S1 (Jan. 3, 2008). As Senator Lee has noted, "[t]he Senate has commonly and without objection used pro forma sessions to fulfill both constitutional requirements [the 20th Amendment and the Adjournment Clause], evidencing a past consensus that such sessions are of constitutional significance." 158 Cong. Rec. S114 (Jan. 26, 2012). The notion that the Senate's pro forma sessions do not count for purposes of the Recess Appointments Clause "thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution." *Id*. Unless one believes Congress has repeatedly violated the 20th Amendment, the Senate was in session on January 3, 2012.

Remarkably, the government itself does not dispute that the Senate was in session on January 3, even though that day's session was no less "pro forma" than the sessions on surrounding days. *See* Dkt. 59 at 1 (stating that the Senate was on "break from January 3 to 23"); *id*. at 5 n.4, 35 n.31. The January 3rd session clocked in at less than a minute, *see* 158 Cong. Rec. S1 (Jan. 3, 2012), and was no more or less formal than the meetings on January 6, 10, 13, 17, and 20. The reason the government wants to treat the January 3rd session differently is obvious: By acknowledging that the Second Session of the 112th Congress convened on January 3 and making the appointment the next day, the President was able to make an intrasession recess appointment that, if valid, would presumably last for *two* years instead of one. *See* U.S. Const. art. II, § 2, cl. 3 (recess appointments "expire at the End of [the Senate's] next Session"); *see also* Morton Rosenberg, *Understanding the Centrality of the Appointments Clause as a Structural Safeguard of Our Scheme of Separated Powers: The Senate's Exclusive and Plenary*

Confirmation Power Trumps Presidential Intrasession Recess Appointments 1 (Feb. 21, 2012) (presented at the American Enterprise Institute) ("The result" of the President's purported authority would be "to install the appointees in their respective offices for almost two years.").[3] An appointment made just two days earlier, before the beginning of the new session, would have lasted a full year less. Thus, by one obvious measure, these appointments are the most aggressive recess appointments imaginable—not only do they rest on the claim of an unprecedented power to disregard the Senate's view of whether it is in session or in recess, but it employs that authority to assert a recess appointment of the maximum possible constitutional length. [4]

But the government cannot have its cake and eat it too. If, as the government contends, a pro forma meeting does not interrupt a recess, it does not get to say that the Senate's January 3 meeting started a new session so it can stretch the life of its appointments by an extra year. If the January 3 meeting was sufficiently substantive and meaningful to discharge the Senate's constitutional obligation under the 20th Amendment and to allow the President to claim an extra

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[3] *Available at* http://www.aei.org/files/2012/02/20/-understanding-the-centrality-of-the-appointments-clause-as-a-structural-safeguard-of-our-scheme-of-separated-powers_115323486564.pdf.

[4] Indeed, the absurdity of a recess appointment lasting nearly two years calls into question the validity of intrasession recess appointments. *See infra* at 18 n.10, 21. As long as recess appointments are confined to intersession recesses, then the Clause's specification that the resulting commission "shall expire at the end of [the Senate's] next session" makes ample sense. As William Rawle put it: "The appointments made, and commissions issued during the recess of the senate, are in force only to the end of the ensuing session." William Rawle, *A View of the Constitution of the United States* (1829 2d ed.), *reprinted in* IV *The Founders' Constitution* 115. But while it makes perfect sense for the Senate to have a full session to consider an appointment made during the recess, it makes no sense whatsoever for the Senate to have two full sessions to consider an appointment made during a brief break. Indeed, if the government were correct that a very brief intrasession break were sufficient to trigger the Clause's reference to a recess then there is no reason the Clause's reference to a session should encompass an entire congressional session, but rather would logically apply only until the next break of comparable length.

year for his recess appointees, then there is no reason for treating the January 6 (or 10, 13, 17, or 20) sessions any differently. There is simply no basis for allowing the President not only to override the Senate's own determination of when it is in recess or in session, but to do so selectively to maximize his ability to circumvent the Senate's advice and consent function by cherry-picking dates to get full two-year terms for recess appointees.

The government's assertion that pro forma sessions do not count would render the Senate in violation not only of its obligations under the 20th Amendment, but also its constitutional duty to the House under the Adjournment Clause. That Clause provides that "[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. The Senate has "commonly and without objection" used pro forma sessions to satisfy this Clause. 158 Cong. Rec. S114 (Jan. 26, 2012) (Sen. Lee). *See also* Office of Legal Counsel Memorandum at 18 (Jan. 6, 2012) ("OLC memo"). But the Senate did not request, and the House did not agree to, an adjournment of more than three days in the period at issue. *See* 158 Cong. Rec. S24 (Jan. 23, 2012) (Sen. Grassley) ("No concurrent resolution authorizing an adjournment was passed by both chambers."). Thus, if the Senate had adjourned within that period for more than three days at a time, that would have been a constitutional violation. *See id*. ("The President's erroneous belief that he can determine whether the Senate was in session would place us in the position of acting unconstitutionally. If he is right, we recessed for more than 3 days without the consent of the other body.").

The government suggests that this Court "need not decide" whether the Senate is in breach of its constitutional obligations to the House because the Senate may be in session for purposes of the Adjournment Clause but not for purposes of the recess appointment process. Dkt. 59 at 34. This is truly remarkable. Not only does the President assert the power to pick and

choose which pro forma sessions count—January 3 yes, but January 6 no—it also asserts that the Senate may be in session for one constitutional provision, but in recess for another. That is nonsense. The Senate is either in session, or it is not; and pro forma sessions are either constitutionally valid (for purposes of the 20th Amendment, Adjournment Clause, *and* the Recess Appointments Clause) or they are not. The obvious and consistent answer is that the Senate has the authority to determine whether it is in session or in recess and its determination governs for purposes of all three constitutional provisions.

Although the Justice Department now defends the President's assertion that he can ignore pro forma sessions and declare for himself that the Senate is in recess, that position conflicts with the Department's representation to the Supreme Court in *New Process Steel*. Then-Solicitor General Kagan told the Court, in response to an Order from the Court, that the case had not become moot because the Board had regained a quorum based on a recent recess appointment.

> 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.

Letter from Elena Kagan to William K. Suter, Clerk of the Supreme Court 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (Apr. 26, 2010) ("Kagan Letter") (attached as Exhibit 1). The government attempts to dismiss General Kagan's representation to the Supreme Court as a mere "passing reference" in "a letter principally addressed to other subjects." Dkt. 59 at 37. But General Kagan's letter was in direct response to the Supreme Court's order asking the parties to address what effect the recess appointments had on the proper disposition of the case. The government's letter took the position 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 not a mere "passing reference" but an integral part of the argument that the dispute was not moot because it could recur. Having persuaded the Court that the dispute 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 Department is poorly positioned to abandon that representation. In all events, the future Justice surely 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.

While past practice and past representations to the courts support the conclusion that pro forma sessions prevent recess appointments, the President's January 4 appointments are wholly unprecedented. *See* Written Testimony of Sen. Michael Lee, *President Obama's Unprecedented "Recess" Appointments: Hearing Before the House Comm. on Oversight & Gov't Reform*, 112th Cong., at 4 (Feb. 1, 2012) ("No president has ever unilaterally appointed an executive officer during a recess of less than three days. Neither, to my knowledge, has a president of either party ever asserted the power to determine for himself when the Senate is or is not in session for purposes of the Recess Appointments Clause.") ("Sen. Lee Testimony") (attached as Exhibit 2). The fact that no President for the first 222 years of this Nation's history ever claimed the power to say when the Senate is, and is not, in session is powerful evidence that the 43 prior occupants of the Oval Office did not think the power existed. "That prolonged reticence would be amazing" if such a presidential prerogative had not been "understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). Like congressional powers, presidential powers, if they exist, tend to be used. *Cf. id.*; *Printz v. United States*, 521 U.S. 898, 905 (1997) (If "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.").

Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), which provides the accepted "framework for assessing whether executive actions are authorized," *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006),[5] explained that:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.[4] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown, 343 U.S. at 637-638 (Jackson, J., concurring). Here, the asserted ability of the President to say the Senate was continuously in recess from January 3 to January 23 is "power at its lowest ebb" and "must be scrutinized with caution" because it is "incompatible" with the Senate's determination that it was in session six times during that period.

The government relies (Dkt. 59 at 31) on *United States v. Smith*, 286 U.S. 6 (1932), but that case actually supports Respondents as it confirms that the President and the Senate must respect the constitutional formalities employed by each other. In *Smith*, the Court considered whether George Otis Smith was appointed to the Federal Power Commission. On December 20, 1930, the Senate voted to confirm Smith and then adjourned to January 5, 1931. On December 22, 1930, the Secretary of the Senate formally notified the President of the confirmation, and the President that same day signed and had delivered to Smith a commission appointing him to office. On January 5, 1931, the first day the Senate was again in session after the confirmation

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[5] Justice Jackson's analysis is not limited to the President's conduct of foreign policy. Indeed, *Youngstown* itself involved a domestic action—the President's order to the Secretary of Commerce to seize and operate American steel mills in the face of a work stoppage. And in his footnote 4 to the passage quoted above, Justice Jackson cited the example of *Humphrey's Executor*, in which "President Roosevelt's effort to remove a Federal Trade Commissioner was found to be contrary to the policy of Congress and impinging upon an area of congressional control, and so his removal power was cut down accordingly." 343 U.S. at 638 n.4.

vote, the Senate reconsidered Smith's nomination and asked the President to return the resolution of confirmation. The President refused on the ground he had already appointed Smith.

The Court held that Smith was validly appointed despite the Senate's reconsideration of its consent to the nomination. Writing for the Court, Justice Brandeis noted 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." *Id*. at 35. And Justice Brandeis rejected the notion that the Senate could retract a confirmation after formal notification to the President and appointment, explaining that "[t]he uncertainty and confusion which would be engendered by such a construction repel its adoption." *Id*. at 36. Similarly, when the Senate declares that it is in session, the President must honor that formality. To allow the President to deem the Senate in recess on a day that the Senate regards itself as in session, and on that basis make a recess appointment he could not otherwise make, would sow great "uncertainty and confusion" over the duties of the Senate and the President as to the nomination, confirmation, and appointment of executive officers.

The government argues that the January 4 appointments are valid recess appointments because "the Senate was not open for the business of giving its advice and consent." Dkt. 59 at 24. But this argument falters for at least three reasons. First, the recess appointment power exists only when the Senate is *in recess*, not when it is in session but has indicated that it does not plan to take up any substantive business. *Id*. The constitutional standard looks to whether the Senate is in recess, not to whether it plans to act on the President's nominees. The logic of the government's position would seem to be that the President could declare a recess if the Senate made clear it was going to focus on legislative business and not take up executive branch

nominees, or even more to the point if the Senate made clear that it planned to take no action on any pending nominees in retaliation for an abuse of presidential prerogative. The Senate's advice and consent role manifestly includes the power to withhold consent. The President cannot circumvent that role by converting the Senate's determination that it is in session but not planning to take up any business into his own determination the Senate is in recess. The rule that is both faithful to the Constitution and administrable is the rule that the Senate is in "Session," U.S. Const. art. I, § 5, cl. 4, when it declares itself to be in session.[6]

Second, the Senate is capable of conducting business at pro forma sessions, and its indication that it does not plan to take up substantive business is just a prediction, not something that estops it from doing so, let alone renders it in recess. Indeed, less than two weeks before the President's January 4 recess appointments, when the Senate was meeting in pro forma session pursuant to the same Orders that authorized the sessions on January 3 and January 6, Congress passed an important piece of legislation, the Temporary Payroll Tax Cut Continuation Act of 2011. *See* 157 Cong. Rec. S8789 (Dec. 23, 2011) (passing H.R. 3765). The President signed the bill into law without expressing any qualms about whether the Senate had been in session. In August 2011, the Senate passed another urgent measure, the Airport and Airway Extension Act

[6] The government's reliance (Dkt. 59 at 19-20) on a 1905 Senate Judiciary Committee Report is sorely misplaced because the burden of that report was to *reject* President Theodore Roosevelt's declaration of a "constructive recess" between the First and Second Sessions of the 58th Congress. *See* Sen. Rep. No. 4389, 58th Cong., 3rd Sess. 2 (1905). The current President likewise had no power to declare a "constructive recess" on the second day of the Second Session of the 112th Congress. *See also* Sen. Lee Testimony at 7. Moreover, it is particularly misleading and ahistorical to rely on that resolution to suggest a practical test for *intra*session recesses because the Senate took action in response to improper *inter*session appointments at a time when the Attorney General had officially opined that the recess appointment power was limited to *inter*session appointees, a position that was only abandoned nearly two decades later and only with assurances that it would not extend to short *intra*session recesses. *See infra* at 18 n.10; Rosenberg, *supra*, at 10.

of 2011, during a pro forma session. *See* 157 Cong. Rec. S5297 (Aug. 5, 2011).[7] These events confirm that "[d]uring the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent." 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee).

Third, the government's position would seem to lead to the absurd conclusion that the President can make "recess" appointments when the Senate adjourns for the weekend, overnight, or perhaps the afternoon. That is a position that the government has never embraced, including in this litigation. *See infra* at 18-20.

Finally, it bears emphasis that the President himself sought to justify his January 4 appointments, not on the ground that the Senate was *unavailable* to confirm his nominees, but on the ground that the Senate was *unwilling* to do so, saying "I refuse to take no for an answer." Remarks by the President on the Economy (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy.[8] The government's proposed "not open for business" test provides a convenient excuse when the President does not want to go through the advice and consent process. Indeed, the President's resort to this procedure to circumvent the Senate and to "refuse to take no for an answer" makes plain the asserted power's threat to the framers' deliberate design to reject proposals to vest the appointment power exclusively in the President and instead "require[e] the joint participation of the President and the Senate . . . to ensure public accountability for both the making of a bad appointment and the rejection of a

[7] If the Senate was not actually in session on the days it passed those measures, it would seem to follow that the resulting laws are nullities, which we do not understand to be the government's position.

[8] The President was referring specifically to his January 4 appointment of Richard Cordray as head of the Consumer Financial Protection Bureau.

good one." *Edmond v. United States*, 520 U.S. 651, 660 (1997); *see generally The Federalist No. 76*, at 456 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (explaining the rejection of granting the President "the absolute power of appointment").

The government's view that the President can simply ignore the Senate's pro forma sessions for recess appointment purposes is incompatible both with the framers' rejection of an absolute and sole power of presidential appointment and with the modest and auxiliary nature of the recess appointment power. It would cause the rule (appointment with advice and consent) to be swallowed by the exception (recess appointment). While the appointment power itself generated substantial debate during the constitutional convention, the recess appointment power was greeted with a collective yawn fitting its subsidiary and auxiliary role. *See* Rosenberg, *supra*, at 3. As Alexander Hamilton wrote, appointment following Senate confirmation is "the general mode of appointing officers of the United States," while recess appointment is "nothing more than a supplement to the other, for the purpose of establishing an auxiliary method." *The Federalist No. 67*, at 409 (Clinton Rossiter ed. 1961). The framers, no less than more modern Congresses, did not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). But if the government is correct, then the auxiliary and seemingly modest recess power is elephantine indeed. It would allow the President to unilaterally appoint a principal officer for nearly two years—a period roughly equivalent to that which the average Senate-confirmed officer serves, *see* Matthew Dull & Patrick S. Roberts, *Continuity, Cooperation, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 Presidential Studies Q. 432, 436 (2009) (median length of service of PAS appointees is 2.5 years)—and treat the advise and consent power of Senate as purely optional. *See* 158 Cong. Rec. S316 (Feb. 2, 2012) (Sen. Hatch) ("[I]f the President alone can define a recess, he can make

recess appointments during every weekend or lunch break. The exception would swallow the rule . . .”). The government’s expansive view of the recess appointment power is consistent with its startling view that the Senate has only a “limited role in the appointments process” (Dkt. 59 at 26 n.25) but wholly inconsistent with the framers’ intent and the Constitution’s design.[9]

The government argues that the President’s view of whether the Senate is in recess should be given deference because the recess appointment power is found in Article II and thus is a presidential power. Dkt. 59 at 30. But the recess power refers to “the Recess *of the Senate*.” And the Senate is obviously the body that gets to determine whether it is in session or in recess. The idea that the location of that phrase in Article II means the President gets to override the Senate’s determination that it in session makes as much sense as saying he gets to dictate what constitutes “the Advice and Consent of the Senate” or dictate the content of “Offenses against the United States” because those terms also appear in Article II. *See* Art. II, § 2, cl. 1-2. Surely, the President would not concede that Congress, and not he, should be deferred to when it comes to his veto power because it is described in Article I. *See* Art. I, § 7, cl. 2-3. It is a bedrock principle of our Constitution that it provides a system of checks and balances and divides powers among the branches to better secure liberty. For that reason, it is not surprising to find references to presidential powers in Article I, *see* Art. I, § 7, cl. 2-3 (veto power), and to congressional powers in Article II, *see* Art. II, § 2, cl. 2 (“Congress may by law vest the appointment of such inferior offices”), and Article III, *see* Art. III, § 3 cl. 2 (“Congress shall have Power to declare the Punishment of Treason”). There is no question but that the Senate has the power to

[9] Recognizing a presidential power to say when the Senate is in recess could have implications beyond the Recess Appointment Clause. For example, it would seem to expand the President’s pocket veto power, which exists only when Congress is adjourned. *See* U.S. Const. art. I, § 7, cl. 2 (bill passed by Congress but not signed or returned by the President becomes law ten days after its presentment “unless the Congress by their Adjournment prevents its Return”).

determine when it is in session, and the President cannot simply disregard that when its suits his purposes. That is especially true where he relies on the validity of other pro forma sessions to obtain favorable legislation or to attempt to extend the length of a purported recess appointment. It is the Senate, not the President, that deserves deference here. The President has the sole power to decide whether to make a recess appointment (and whom to appoint), but the Senate has the exclusive power to determine whether it is in session.

B. Recess Appointments May Not Be Made During a Three-Day Intrasession Adjournment.

Because the Senate adjourned just after noon on January 3, 2012, and went back into session on 11:00 a.m. on January 6, 2012, the hiatus at issue here lasted slightly less than three days. Indeed, these appointments came only a day after the constitutionally-compelled January 3 session and only two days before the Senate formally reconvened on January 6. The government does not argue that the President has the power to make a recess appointment during that brief break. Dkt. 59 at 17 n.16. *See also* OLC memo at 9 n.13. That was wise, because the Department of Justice's own precedents, judicial authority, and history stand against recess appointments during three-day adjournments.

Attorney General Harry Daugherty, in an opinion *expanding* the executive's view of the scope of the recess appointment power, and abandoning the Department's earlier position that only *inter*session recess appointments were valid, advised President Coolidge in 1921 that a recess appointment could be made during a 28-day intrasession adjournment. *See* 33 Op. Att'y Gen. 20 (1921).[10] But he also opined "unhesitatingly" that the power to recess appoint would

[10] In 1901, Attorney General Philander Knox had opined that recess appointments can be made only during *inter*session recesses. *See* 23 Op. Att'y Gen. 599 (1901). Noting that the Recess Appointments Clause speaks of "the Recess of the Senate," General Knox opined that "*the*

not exist in "an adjournment for only 2 instead of 28 days." *Id*. at 24. General Daugherty recognized that any argument in favor of appointments during an *intra*session adjournment necessarily depended on rejecting the absurd position that the President could circumvent the Senate's advice and consent power every time the Senate adjourned for a weekend. Observing that the Constitution permits the Senate to adjourn for up to three days without the House's consent, General Daugherty wrote that "no one, I would venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken. Nor do I think an adjournment of 5 or even 10 days can be said to constitute the recess intended by the Constitution." *Id*. at 25.

More recently, as noted above, Solicitor General Kagan represented to the Supreme Court in the *New Process Steel* case that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period." Kagan Letter at 3. And the Principal Deputy Solicitor General told the Court at oral argument that "I think our office has opined the recess has to be longer than 3 days." Tr. of Oral Arg. at 50, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (N. Katyal).

The Department of Justice also embraced the three-day rule in an appellate brief filed in 2004 in litigation over the validity of the appointment of Judge William Pryor to the Eleventh Circuit during an 11-day *intra*session adjournment. Once again, the government recognized that

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recess means the period after the final adjournment of Congress for the session, and before the next session begins." *Id*. at 601 (emphasis in original). General Knox's position was consistent with earlier executive branch practice, which, with the exception of the impeached Andrew Johnson, confined the recess appointment power to *inter*session recesses. *See* Rosenberg, *supra*, at 9. General Daugherty's 1921 opinion rejected that view and advised that *intrasession* adjournments of sufficient length are also permissible. As a textual matter, however, General Knox had the better of the argument. *See also* Rosenberg, *supra*, at 9-11. This is an independent reason these appointments violate the Constitution.

successful defense of the President's authority to make any *intra*session recess appointments—an argument that faces daunting textual obstacles and has never been embraced by the Supreme Court—critically depends on disclaiming an authority to make recess appointments every time the Senate adjourns for the day. Addressing the argument of *amicus curiae* Senator Ted Kennedy that the Pryor appointment would mean "the President could make recess appointments during any weekend, evening, or even mid-day Senate break," the Justice Department responded that

> the Adjournment Clause of the Constitution (Art. I, § 5, cl. 4) provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." By its terms, that Clause recognizes a *de minimis* exception any "adjournment" of three days or less, from the constitutional rules otherwise applicable to "adjournment." Given the extensive evidence suggesting that "adjournment" and "recess" are constitutionally equivalent (as explained above), and the commonsense notion that overnight, weekend, and perhaps even long-weekend breaks do not affect the continuity of government or other operations, it would make eminent sense, in constructing any *de minimis* exception from otherwise applicable constitutional rules for "recess," to apply the three-day rule explicitly set forth in the Adjournment Clause

Reply Brief for Intervenor United States at 20-21, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (No. 02-16424), 2004 WL 3589822 (Sept. 8, 2004).

There is no case upholding a recess appointment made during an adjournment of less than 11 days—let alone a three-day break. *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (11-day intrasession adjournment); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc) (18-day intersession recess); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) (five-month intersession recess); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367 (C.I.T. 2002) (19-day intersession recess); *Gould v. United States*, 19 Ct. Cl. 593 (Ct. Cl. 1884) (five-month intrasession adjournment). Thus, there is no judicial authority for the January 4 appointments on the assumption that the President was not free simply to disregard the Senate's January 6 session.

Finally, history is not on the President's side. "Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a President made a recess appointment was 11 days, and the shortest intrasession recess during which a President made a recess appointment was 10 days." Henry B. Hogue, Congressional Research Service, RS21308, *Recess Appointments: Frequently Asked Questions* 3 (Jan. 9, 2012) (footnotes omitted) (Attached as Exhibit 3). *See also* OLC memo at 7 & n.9.[11] No President in the modern era has attempted a recess appointment during a three-day adjournment—or any adjournment of less than ten days—and that is not even a power the government asserts here.

In sum, because the Senate was in session—not recess—during the pro forma sessions at issue, the appointments are invalid. The Senate's January 6 session was every bit as valid as the January 3 session that even the government recognizes as valid. Not even the government takes the position that an *intra*session break of that short a duration authorizes a recess appointment. Indeed, the constitutionality of an *intra*session recess appointment of any length is subject to grave doubt. *See supra* notes 4 & 10. Not only does the text strongly support the notion that "*the*" recess of the Senate referred to in the Recess Appointment Clause is the one recess between sessions, and that a recess appointment lasts only as long as the session that immediately follows the recess, *see supra* note 4, but that was the position of the executive branch before General Daugherty's opinion. It was also the practice of Presidents with one anomalous exception for the first 132 years of the Republic. *See* Rosenberg, *supra*, at 9. And it

[11] Records of recess appointments before 1965 are "haphazard." OLC memo at 6 n.8 (quoting a Congressional Research Service analysis).

is an open question in this Circuit.[12] If the Court must reach the question, it should hold that the recess appointment power is limited to *inter*session recesses. But the better course is to reject the sole theory on which the government has defended these unprecedented appointments—its unilateral authority to declare that a Senate session simply does not count. The January 6 session was as constitutionally significant as the January 3 session. The Constitution does not permit the President to make recess appointments during such a brief adjournment, and the government does not argue otherwise. Accordingly, the January 4 appointments to the Board are invalid, and the Board lacks a quorum and lacks authority to petition this Court for injunctive relief.

II. THE CONSITUTIONAL ISSUE CANNOT BE AVOIDED.

A. The Board's Contingent Delegation of Authority to the General Counsel Does Not Take Effect Unless the Board Loses a Quorum.

Petitioner contends that this Court can avoid the constitutional issue by holding that the Board lawfully delegated its authority to petition for Section 10(j) relief in this matter to the Acting General Counsel. Dkt. 59 at 8. The contention is wrong because on Petitioner's view of the world, the delegation was not operative when this 10(j) action was authorized by the Board. Under the express terms of the delegation order, the delegation is operative only when the Board lacks a quorum. *See* NLRB, *Order Contingently Delegating Authority to General Counsel*, 76 Fed. Reg. 69,768, 69,769 (Nov. 9, 2011) ("These delegations *shall become* and remain *effective* during any time at which the Board has fewer than three Members") (emphases added). But the condition precedent for that delegation—the absence of a quorum—does not exist in Petitioner's view. *See* Dkt. 59 at 13-37 (arguing that the Board has a quorum because the January 4

[12] The only recess appointment ever upheld by the Second Circuit was an *inter*session appointment. *Allocco*, 305 F.2d 704. Here, the President decided to appoint during an *intra*session adjournment of the Second Session of the 112th Congress to make the appointments last an extra year.

appointments are valid). It makes no sense for Petitioner to suggest that the Court can avoid deciding whether a quorum exists by relying on a delegation order that delegates authority only if a quorum does not exist. Dkt. 59 at 12. The question Petitioner seeks to avoid has to be decided before the Court can determine whether the delegation is even operative. No constitutional avoidance precedent cited by Petitioner has worked this way. The government's purported belt-and-suspenders approach indicates a remarkable lack of confidence in the validity of the recess appointments, but it does not suffice to make the question of their validity unreviewable.

Moreover, the fact that the delegation is inoperative *based on Petitioner's own view* that the Board has a quorum also gives the lie to Petitioner's suggestion that Respondents are simply trying to disregard Petitioner's representation that the Acting General Counsel independently authorized the Section 10(j) petition. Dkt. 59 at 10-11. Petitioner's own view is that the delegation is *not* operative because the Board has a quorum. As a result, and again by Petitioner's own admission, the Acting General Counsel brought this matter to the Board for their approval before he authorized the filing. *See* Dkt. 29 at 2 ("the Acting General Counsel *and* the Board *each* authorized this 10(j) proceeding") (emphases added). Indeed, he had to do so because under Petitioner's own theory the delegation was inoperative. As a result, Petitioner cannot rely on the Acting General Counsel's supposed independent authority. Under Petitioner's view, that authority could not be invoked here because the condition precedent for the delegation did not exist. By Petitioner's own admission, the Acting General Counsel brought this action only after seeking and obtaining authorization to file the Petition from individuals who are either (a) the Board (under Petitioner's view) or (b) two Board members plus three people who should

have had no role in the process whatsoever (under Respondents' view). There is no avoiding the question of which view is correct.[13]

B. Section 10(j) Relief Is Not Available If the Board Lacked a Quorum.

The second reason the constitutional issue cannot be avoided is that Petitioner cannot satisfy the Second Circuit's standard for Section 10(j) relief if the Board lacks a quorum. That standard expressly turns on the likelihood that the Court of Appeals would enforce a Board finding of an unfair labor practice. As Petitioner itself has made clear, to qualify for Section 10(j) relief, Petitioner must show, *inter alia*, that "there is 'reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals.'" Dkt. No. 4 at 10 (quoting *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980) (Friendly, J.)). If Respondents are correct that the Board lacks a quorum, the probability that the Board will issue an enforceable order in this case is exactly zero. Under *New Process Steel*, a Board without a quorum cannot issue an order finding an unfair labor practice, *see* 130 S. Ct. at 2643 n.4, and the Court of Appeals would not and could not enforce such an order in the absence of a quorum. *See Talmadge Park*, 608 F.3d at 913; *County Waste of Ulster, LLC*, 385 F. App'x at 12.

Only the Board itself may make an unfair labor practice determination. *See* 29 U.S.C. § 160(c) ("If . . . the Board shall be of the opinion that any person named in the complaint has

[13] Respondents believe that there is no reason to look behind Petitioner's representation that the Acting General Counsel independently authorized this 10(j) proceeding for the reasons discussed above. Nonetheless, if this Court disagrees and finds that the Acting General Counsel's "independent" authorization is critical and allows the Court to avoid the recess appointment issue, we respectfully request an opportunity for discovery to explore whether that authorization was truly "independent" and the extent to which the recess appointees—who under Respondents' view of the case had no basis either to participate in the Board's decision or to influence the Acting General Counsel—influenced the decision. To the extent the Acting General Counsel's "independent" decision is dispositive, Petitioner has surely opened the door to this type of discovery by relying on the details of its deliberative process.

engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue" a cease and desist order). Not even Petitioner suggests that the Board could delegate this core adjudicatory power to the General Counsel, and the statute plainly forbids the Board from doing so. Even courts that accept the possibility of delegating a prosecutorial function draw the line at adjudicatory functions like an unfair labor practice determination. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1348 (9th Cir. 2011) ("[T]he Board may not authorize others to adjudicate individual unfair labor practice cases on its behalf.").

That Section 10(j) relief may not issue absent a quorum on the Board also makes good sense. If the Board cannot find an unfair labor practice and issue a cease and desist order under Section 10(c) because it lacks a quorum, it would make no sense for a court to award temporary relief based on the possibility that an unfair labor practice finding may follow and be enforced by the Court of Appeals. If the probability that the Board will make an enforceable unfair labor practice finding is nil because it lacks a quorum, then the petition for Section 10(j) relief necessarily fails. In short, in applying the standard for Section 10(j) relief, this Court cannot avoid deciding the validity of the January 4 appointments to the Board.[14]

C. The Delegation to the General Counsel Is Invalid.

In all events, Petitioner's purported delegation to the Acting General Counsel is invalid. *First*, by its express terms, the delegation is completely inoperative until the Board loses its quorum. 76 Fed. Reg. at 69,769. That makes the delegation in this case far worse than the one invalidated by the Supreme Court in *New Process Steel*. The delegation here is not a tail that

[14] This is why Petitioner is wrong to suggest that the Court could simply issue injunctive relief now and let the Second Circuit sort out later whether there are any "constitutional infirmities in the Board's composition," on review of a Board unfair labor practice determination. Dkt. 59 at 12 n.10. The Court's equitable power cannot be invoked by the government against a private party to aid an adjudicative process that necessarily will end without any valid adjudication.

"would *continue* to wag after the dog died." *New Process Steel*, 130 S. Ct. at 2645 (emphasis added). It is a tail that *begins* to wag only after the dog is already dead. Notably, the 2007 delegation at issue in *New Process Steel* and *every* delegation of Section 10(j) authority to the General Counsel since enactment of the Taft-Hartley Act in 1947, other than the 2011 delegation at issue here, took effect while the Board had a quorum. *See New Process Steel*, 130 S. Ct. at 2638 (delegation effective on December 28, 2007, two days before the Board lost a quorum) (citing NLRB, Minute of Board Action (Dec. 20, 2007)).[15] Petitioner's reliance (Dkt. 59 at 10 n.9) on footnote four of *New Process Steel*, in which the Court stated that its decision "does not cast doubt on the prior delegations of authority to . . . the general counsel," 130 S. Ct. at 2642 n.4, is misplaced because those "prior delegations," unlike the 2011 delegation, went into effect when the Board had a quorum. The 2011 delegation that Petitioner relies upon is without precedent. No court has considered, much less approved, such a contingent, springing, post-quorum-loss delegation. The cases on which Petitioner relies involved a different question: whether the Board's loss of a quorum *after* a delegation has taken effect invalidates the delegation. *See* Dkt. 59 at 9 n.7.[16]

Second, the delegation of Section 10(j) petition power to the General Counsel is contrary to the intent and purpose of the statute by the Taft-Hartley Act, as reflected in its text. Petitioner

[15] *See also* NLRB, *Statement of Delegation of Certain Powers of National Labor Relations Board to General Counsel of National Labor Relations Board*, 13 Fed. Reg. 654, 654-655 (Feb. 13, 1948); NLRB, *General Counsel Description of Authority and Assignment of Responsibilities*, 15 Fed. Reg. 6,924, 6,924-25 (Oct. 14, 1950); NLRB, *Authority and Assigned Responsibilities of General Counsel*, 20 Fed. Reg. 2,175, 2,175-76 (Apr. 6, 1955); NLRB, *Order Delegating Authority to General Counsel*, 58 Fed. Reg. 64,340, 64,340 (Dec. 6, 1993); NLRB, *Order Delegating Authority to the General Counsel*, 66 Fed. Reg. 65,998, 65,998-99 (Dec. 21, 2001); NLRB, *Order Delegating Authority to the General Counsel*, 67 Fed. Reg. 70,628, 70,628 (Nov. 25, 2002).

[16] Petitioner's statement (Dkt. 59 at 9) that Respondents did not cite or distinguish any of Petitioner's cases is inaccurate. *See* Dkt. 24-1 at 6 n.1.

relies (Dkt. 59 at 8-9 & n.6) on cases that have interpreted Section 3(d) of the Act, 29 U.S.C. § 153(d), as authorizing the Board to delegate its "power" to petition for injunctive relief under Section 10(j) as one of the "duties" given to the General Counsel. But the text of Sections 3 and 10 unambiguously distinguishes between "duties" that are assignable to the General Counsel and "powers" that are reserved to the Board unless otherwise provided in the Act. *See* Dkt. 24-1 at 6-7. That distinction is also supported by the structure of the statute, which explicitly gives the General Counsel an independent power to petition when Congress intended him to have it, *see* 29 U.S.C. § 160(*l*), and by the Act's legislative history, which explains that a significant purpose of Section 10(j) injunctions is to protect Board's adjudicatory and remedial authority, *see* Sen. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947), *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, 414 (1948).

Third, the Board's longstanding practice is contrary to Petitioner's interpretation of the statute. For 57 years, the Board permitted the General Counsel to file 10(j) petitions "only upon approval of the Board." 15 Fed. Reg. at 6,924 (1950); *accord* 20 Fed. Reg. at 2,175 (1955); *see HTH Corp.*, 650 F.3d at 1344 (the 1950 and 1955 directives "set forth what was the Board's standard" practice from 1950 to 2007).[17] That longstanding practice is persuasive evidence that the statute does not permit the delegation of 10(j) authority to the General Counsel. *See New Process Steel*, 130 S. Ct. at 2641-42 ("That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view.").

[17] The General Counsel's own "Section 10(j) Manual User's Guide" continues to require Board approval of Section 10(j) petitions. *See* Office of General Counsel, Electronic Redacted Section 10(j) Manual, § 5.2 (Sept. 2002) (Dkt. 55-1, Ex. D). *See also* Memorandum GC 10-07 at 2, 4 (Sept. 30, 2010) (Dkt. 55-1, Ex. C).

CONCLUSION

The Petition should be dismissed for lack of subject matter jurisdiction or in the alternative for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February, 27, 2012, a copy of the foregoing **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS, with exhibits, and an INDEX OF RESPONDENTS' EXHIBITS** was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure and the Eastern District's Rules on Electronic Service upon the following parties:

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