No. 12-1445

In the Supreme Court of the United States

DAYCON PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's case was decided by a three-member panel of the National Labor Relations Board. One member of the panel, Craig Becker, was a recess appointee. The questions presented are:

1. Whether petitioner forfeited any challenge to Becker's appointment based on the Recess Appointments Clause (U.S. Const. Art. II, § 2, Cl. 3) by failing to raise the issue at any point before the court of appeals released the mandate of its decision.

2. Whether the President's appointment of Becker, which was made during an intra-session recess of the Senate to fill a position that had become vacant before that recess, was consistent with the Recess Appointments Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 494 Fed. Appx. 97. The opinions of the National Labor Relations Board (Pet. App. 4a-13a) and the administrative law judge (Pet. App. 13a-62a) are reported at 357 N.L.R.B. No. 92.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2012. A petition for rehearing was denied on January 14, 2013 (Pet. App. 63a-66a). On March 25, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 13, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Board (Board or NLRB) is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq*. The Board consists of five members who serve five-year terms and are appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(a). Three members constitute a quorum, 29 U.S.C. 153(b), and when three positions on the Board become vacant, it cannot adjudicate cases involving alleged unfair labor practices, see *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640-2645 (2010).

On March 26, 2010, during the Second Session of the 111th Congress, the Senate adjourned for a 17-day recess. 156 Cong. Rec. S2180 (daily ed.). At the time, the Board had only two members. See *New Process Steel*, 130 S. Ct. at 2639. On March 27, 2010, the President invoked his authority under the Recess Appointments Clause (U.S. Const. Art. II, § 2, Cl. 3) and appointed two members of the Board, including Craig Becker. See *New Process Steel*, 130 S. Ct. at 2639. As relevant here, between August 28, 2011, and January 3, 2012, the Board comprised two members who had been confirmed by the Senate and Becker, who was serving by virtue of his recess appointment. See NLRB, *Members of the NLRB Since 1935*, www.nlrb.gov/members-nlrb-1935 (last visited Sept. 18, 2013).

2. Petitioner is a manufacturer and distributor of janitorial, maintenance, and hardware supplies. Pet. App. 15a. In September 2010, the Board's Acting General Counsel issued a complaint alleging that petitioner had committed unfair labor practices in March 2010 (when it improperly subcontracted certain repair work), in April 2010 (when it prematurely cut off bargaining

with a union), and in July 2010 (when it refused to reinstate various striking workers who had unconditionally offered to return to work). *Id.* at 14a. After a hearing, an administrative law judge (ALJ) concluded that petitioner had committed the alleged violations. *Id.* at 57a.

Petitioner filed exceptions with the Board, but in a decision dated September 21, 2011, the Board affirmed the ALJ's ruling (with slight modifications) and ordered various remedies. Pet. App. 4a-13a.[1] Petitioner did not raise any objection to Becker's involvement in the decision.

3. Petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its order. Pet. App. 2a. Once again, petitioner raised no objection to Becker's participation in the proceeding before the Board; petitioner's arguments were confined to issues of labor law and procedural rulings. See Pet. Second Corrected C.A. Br. 21-62; Pet. C.A. Reply Br. 1-28.

In an unpublished decision issued on November 6, 2012, the court of appeals rejected petitioner's arguments and granted the Board's cross-application for enforcement. Pet. App. 1a-3a. The court held that the Board's factual findings were supported by substantial evidence and that the Board did not abuse its discretion with respect to any of petitioner's procedural challenges. *Id.* at 2a.

Petitioner filed a petition for rehearing and rehearing en banc, which again raised no objection to Becker's participation in the proceeding before the Board. See Pet. C.A. Pet. for Reh'g 4-15. On January 14, 2013, the

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[1] Board Member Hayes dissented from some of the modifications. Pet. App. 5a n.1, 6a n.2.

court of appeals denied the rehearing petition. Pet. App. 63a-66a. The court issued its mandate on January 23, 2013. 11-1342 Docket entry (Jan. 23, 2013).

4. On January 25, 2013, two days after the mandate in this case issued, the D.C. Circuit decided *Noel Canning* v. *NLRB*, 705 F.3d 490 (2013), cert. granted, No. 12-1281 (June 24, 2013). In *Noel Canning*, the court of appeals held that three appointments that the President made to the Board in January 2012 had not complied with the Recess Appointments Clause for two reasons. *Id*. at 498-499. First, the court held that the President's recess-appointment power does not exist during intra-session recesses of the Senate. *Id.* at 499-507. Second, the court held that the President may make recess appointments to fill only positions that first become vacant during the same recess in which the President acts. *Id.* at 507-514. Although Board Member Becker's March 2010 recess appointment was not challenged in *Noel Canning*, either of the constitutional holdings in that case would, if sustained by this Court, also render Becker's appointment invalid.

On February 21, 2013, petitioner filed a motion asking the court of appeals to recall its mandate so that petitioner could challenge Becker's appointment. The court of appeals denied that motion without comment on March 14, 2013.

ARGUMENT

In this Court, petitioner contends (Pet. 6-11) that Board Member Becker's appointment was inconsistent with the Recess Appointments Clause on two different grounds. Both of those grounds are at issue in a case already pending before this Court (albeit with respect to different appointments): *NLRB* v. *Noel Canning*, cert. granted, No. 12-1281 (June 24, 2013). In petition-

er's case, however, the constitutional challenge was never passed upon by the court of appeals and was not raised by petitioner at any point before the court of appeals issued its mandate. Petitioner's constitutional challenge has accordingly been forfeited, and there is no basis for this Court to grant review or to hold this petition pending its decision in *Noel Canning*.

1. Petitioner contends (Pet. 6-11) that the President's authority under the Recess Appointments Clause cannot be exercised during intra-session recesses of the Senate, and that it may be invoked to fill a vacancy only if that vacancy first arose during the recess in which the President makes an appointment. As the Board has explained in its opening brief in *Noel Canning*, there is no merit to petitioner's constitutional arguments, although the circuits are divided with respect to both questions. See NLRB Br. at 11 & n.4, 12-44, *Noel Canning*, *supra* (No. 12-1281).

2. This case, however, is not an appropriate vehicle for the consideration of those constitutional questions, because petitioner's arguments were neither pressed nor passed upon in the court of appeals. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992).

a. "'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 the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Here, petitioner unquestionably failed to raise its recess-appointment

challenge in a timely manner, and it has accordingly forfeited its opportunity to do so.[2]

b. Petitioner's failure to raise a recess-appointment challenge in a timely fashion cannot be excused on the theory that such challenges are "jurisdictional" and thus exempt from ordinary principles of forfeiture. Cf. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (noting that challenges to a court's subject-matter jurisdiction cannot be forfeited or waived). This Court has already held that Appointments Clause objections are not jurisdictional. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000); see *Freytag* v. *Commissioner*, 501 U.S. 868, 872, 878-879 (1991) (describing an Appointments Clause challenge as "nonjurisdictional," though choosing to address it after it had been squarely raised in, and addressed by, the court of appeals); *id.* at 893-894 (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."). Several courts of appeals have found that a litigant may waive or forfeit a challenge to an appointment on Recess Appointments Clause or

[2] Petitioner first raised its constitutional objection in a motion to recall the mandate that was filed nearly one month after the court of appeals' decision in *Noel Canning*. See p. 4, *supra*. But petitioner does not—and could not plausibly—suggest that the court of appeals abused its discretion in failing to recall its mandate. See *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998) (explaining that the power to recall the mandate is "one of last resort, to be held in reserve against grave, unforeseen contingencies" in light of "the profound interests in repose attaching to the mandate of a court of appeals") (internal quotation marks and citation omitted).

Appointments Clause grounds. See *NLRB* v. *RELCO Locomotives, Inc.*, No. 12-2111, 2013 WL 4420775, at *26-*28 (8th Cir. Aug. 20, 2013) (Recess Appointments Clause); *GGNSC Springfield LLC* v. *NLRB*, 721 F.3d 403, 406-407 (6th Cir. 2013) (same); *Evans* v. *Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (en banc) (same), cert. denied, 544 U.S. 942 (2005); *Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.*, 574 F.3d 748, 755-756 (D.C. Cir. 2009) (Appointments Clause); *In re DBC*, 545 F.3d 1373, 1377-1381 (Fed. Cir. 2008) (same), cert. denied, 558 U.S. 816 (2009); *Willy* v. *Administrative Review Bd.*, 423 F.3d 483, 490 & n.20 (5th Cir. 2005) (same).[3]

Nothing about the NLRB context, or about the agency-adjudication context more generally, warrants a departure from that principle. Truly "jurisdictional" challenges go to a *court's* jurisdiction. See *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011) (emphasizing that because of the "drastic" consequences and prejudice that can flow from calling something jurisdictional, "a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity"). Thus, several courts of appeals have properly found that challenges to the appointments of Board members, or of other agencies' members, are not jurisdictional in that sense. See *RELCO Locomotives*, 2013 WL 4420775, at

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[3] In a footnote in *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), the Ninth Circuit described a challenge to a district judge's recess appointment as "jurisdictional." *Id.* at 1009 n.2. But that decision predated *Stevens* and *Freytag*, as well as more recent cases explaining the narrow range of questions that are properly denominated "jurisdictional" in the relevant sense. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). Thus, *Woodley* likely does not reflect the conclusion the Ninth Circuit would reach if presented with the question today.

*26-*28 (NLRB); *GGNSC Springfield*, 721 F.3d at 406-407 (same); *Intercollegiate*, 574 F.3d at 775-776 (Copyright Royalty Board); *In re DBC*, 545 F.3d at 1377-1381 (Board of Patent Appeals and Interferences); *Willy*, 423 F.3d at 490 & n.20 (Administrative Review Board).[4]

c. The Third Circuit recently departed from that consensus in *NLRB* v. *New Vista Nursing & Rehabilitation*, 719 F.3d 203 (2013), petition for reh'g pending (filed July 1, 2013; further consideration stayed July 15, 2013), holding that a recess-appointment challenge was "jurisdictional" to the extent it claimed the Board lacked a quorum to issue the order under review. *Id.* at 210-213. But that analysis was based on the beliefs that (1) anything implicating an agency's authority to act implicates its "jurisdiction," and (2) appellate courts are obligated to police agency "jurisdiction" in the same, sua sponte, way that they police the jurisdiction of lower federal courts. *Ibid.* Those beliefs are inconsistent with this Court's subsequent decision in *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013). In *City of Arlington*, the Court rejected "a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts." *Id.* at 1868; see *id.* at 1869 (explaining that, because the question in a challenge to agency action "is always whether the agency has gone beyond what Congress

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[4] The Eighth Circuit has further held that if a challenge to a Board member's appointment is not raised before the Board itself, a court of appeals is barred by 29 U.S.C. 160(e) from considering that challenge. *RELCO Locomotives*, 2013 WL 4420775 at *28-*31. That conflicts with the D.C. Circuit's statutory analysis (see NLRB Br. at 4 n.1, *Noel Canning*, *supra*), but the difference between the two circuits is of no moment here, because petitioner failed to raise its recess-appointment objection before the Board and the court of appeals.

has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional'"). In any event, the Board has filed a rehearing petition in *New Vista*, with respect to which the Third Circuit has stayed further action pending this Court's decision in *Noel Canning*. As a result, quite aside from the flaws in the Third Circuit's analysis, there is no ripe conflict among the circuits on the issue. There is accordingly no need for this Court to address it at this point.

d. Because petitioner has forfeited its challenge to Becker's recess appointment, there is no warrant for its suggestion that the petition should be held pending this Court's decision in *Noel Canning*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2013