

No. 12-60031

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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D.R. HORTON, INC.,  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.

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**PETITIONER/CROSS-RESPONDENT D.R. HORTON, INC.’S  
MOTION FOR RECONSIDERATION**

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Petitioner/Cross-Respondent D.R. Horton, Inc. (“D.R. Horton”) respectfully moves this Court to reconsider its order dated February 25, 2013, which granted the motion of Service Employees International Union (“SEIU”) for leave to file a supplemental *amicus* brief relating to Craig Becker’s recess appointment to the National Labor Relations Board (“NLRB”). D.R. Horton indicated to the SEIU that it would oppose the motion, but the Court granted the motion on the next business day after it was filed, before D.R. Horton filed its response.

## Background

On February 8, 2013, the Court directed the parties to file “simultaneous letter briefs” analyzing two limited issues: (1) whether the panel must consider, for jurisdictional or other reasons, whether the recess appointment of Craig Becker<sup>1</sup> was valid, and (2) whether the validity of the appointment should be resolved by the panel even if there is no necessity of doing so. The Court indicated it did *not* want extensive additional briefing. In fact, the Court specifically instructed the parties that their briefs “*should not analyze the merits of the validity of the appointment*” (emphasis added), and it placed a twenty-page limit on the letter briefs to be submitted.

## Argument

On February 22, 2013, the SEIU, although it is not a party in this case and the Court did not invite further *amicus* briefing, moved for leave to file its own letter brief in addition to those filed by the parties. None of the other 16 *amici curiae* in this case submitted a similar brief.

The SEIU’s motion for leave to file its *amicus* letter brief should have been denied. First, the SEIU’s letter brief focuses on the merits of the validity of the President’s attempted recess appointment of its own former Associate General

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<sup>1</sup> Mr. Becker was serving as the Associate General Counsel of the SEIU at the time the President attempted to recess-appoint him to the NLRB. See Press Release, White House, President Obama Announces Recess Appointments to Key Administrative Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions> (last visited Feb. 26, 2013).

Counsel to the NLRB under the “*de facto* officer doctrine,” contrary to the Court’s direction to the parties *not* to analyze the merits. Because D.R. Horton complied with the Court’s direction not to address the merits, the SEIU’s arguments on the merits stand unopposed and un-rebutted, except by the *Noel Canning* decision itself. *See Noel Canning v. NLRB*, No.12-1115, --- F.3d ----, 2013 WL 276024, at \*8-24 (D.C. Cir. Jan. 25, 2013). This is inconsistent with the orderly functioning of our adversarial process and unfair to D.R. Horton and those who share its interests in this case.

In addition, unlike the SEIU, the 16 other *amici curiae* in this case complied with the Court’s preference to keep additional briefing at this junction limited and narrowly focused. Therefore, unlike the SEIU, they did not contradict the Court’s February 8 order by inserting their own arguments on the validity of Mr. Becker’s appointment. The SEIU’s defiance of the Court’s instruction not to address the merits at this time should not be rewarded.

For now, the Court should reconsider its February 25 order and deny the SEIU’s motion. If the Court later decides to address the merits of the constitutional issues surrounding Mr. Becker’s appointment, the Court then can allow the parties to submit supplemental briefing on those issues. Similarly, if the Court later decides to allow supplemental briefing on the merits of the constitutional issues from one *amicus curiae*, it can and should do so for all.

WHEREFORE, D.R. Horton respectfully requests that the Court reconsider its February 25, 2013, order granting the SEIU's motion for leave to file a supplemental *amicus* letter brief and that the Court deny the SEIU's motion. D.R. Horton also seeks any further relief to which it may be entitled.

Respectfully submitted,

by: s/Ron Chapman, Jr.

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### **CERTIFICATE OF SERVICE**

I certify that on this 26<sup>th</sup> day of February, 2013, I caused the foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all parties or their counsel through the CM/ECF system.

s/ Ron Chapman, Jr.  
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Ron Chapman, Jr.

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