United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

VIA CM/ECF

February 22, 2013

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: *D.R. Horton, Inc.* v. *NLRB*
No. 12-60031

Dear Mr. Cayce:

The National Labor Relations Board respectfully submits this letter brief in response to the Court's order of February 8, 2013. That order directs the parties to file supplemental letter briefs addressing two questions: (1) "whether the panel must consider, for jurisdictional or other reasons, whether the recess appointment of Craig Becker 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."

For the reasons set forth below, the Court need not and should not address in this case any questions regarding the constitutionality of Member Becker's

appointment. Challenges to the constitutionality of the appointment of agency officials do not implicate this Court's jurisdiction. As a result, this Court has no independent obligation to resolve such questions. And by failing to raise any argument concerning Member Becker's appointment until long after the close of briefing in this appeal, Horton forfeited any claims for relief on such grounds.

Nothing in this case justifies departing from the bedrock rule of appellate procedure that claims not timely raised are forfeited. This Court will have ample opportunity to consider the multiple constitutional and historical contentions addressed by the D.C. Circuit in *Noel Canning* v. *NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013). For example, those arguments are expected to be fully briefed in a case already pending in this Court, *Entergy Mississippi, Inc.* v. *NLRB*, No. 12-60644, in which the petitioner presents a variety of claims challenging the President's recess appointment of Board members. It thus appears that the *Entergy Mississippi* case will permit this Court to decide the myriad issues raised by the D.C. Circuit's *Noel Canning* decision in the ordinary course of the appellate process and with the benefit of full briefing and oral argument. There is, accordingly, no reason to excuse Horton's forfeiture here.

1. A constitutional attack on the appointment of an agency official is "nonjurisdictional" and thus "not subject to the axiom that jurisdiction may not be waived." *Intercollegiate Broadcast Sys.* v. *Copyright Royalty Bd.*, 574 F.3d 748,

755-756 (D.C. Cir. 2009) (holding that a party forfeited an Appointments Clause claim by failing to raise the argument until after the close of regular briefing); *see also Evans* v. *Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (en banc) (constitutional challenge to the recess appointment of an Eleventh Circuit judge was not a jurisdictional question requiring *sua sponte* action by the court); *LaRouche* v. *FEC*, 28 F.3d 137, 139-140 (D.C. Cir. 1994) (rejecting the view that a constitutional challenge to the FEC's membership was jurisdictional and could be raised at any time).

The Supreme Court has explained that, like any other claim that an agency has acted *ultra vires*, the assertion that an appointed official lacked the lawful authority to act is a "nonjurisdictional" objection that goes to the validity of the challenged action. *See Freytag* v. *CIR*, 501 U.S. 868, 878-879 (1991). In *Freytag*, the petitioners urged the Supreme Court to hold that Appointments Clause challenges reflect structural constitutional interests so fundamental that they "cannot be waived" by litigants and "will be heard and decided even where the objecting party deliberately delayed raising the issue until the case was decided against him." Pet. Br., *Freytag*, No. 90-762, 1991 WL 11007938, at *44-*45. The Supreme Court, however, did not accept that characterization, and instead described the petitioners' belated constitutional challenge to the appointment of a Tax Court special trial judge as a "nonjurisdictional" contention that the Court had

the "discretion," but not the obligation, to decide. 501 U.S. at 878-879. *See also Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) ("[N]or is the validity of *qui tam* suits under [the Appointments Clause] a jurisdictional issue that we must resolve here."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (district court erred in treating an alleged defect in the appointment of an agency examiner as a jurisdictional question that could be raised for the first time on judicial review).

Accordingly, the courts of appeals have repeatedly refused to decide appointment-related claims—including constitutional claims—that were not timely asserted. In *Intercollegiate Broadcast System*, for example, the D.C. Circuit declined to address an untimely Appointments Clause claim in an appeal from a final determination of the Copyright Royalty Board, an administrative tribunal within the Library of Congress. After the close of regular briefing, one of the parties belatedly claimed that the Board's decision was void under the Appointments Clause because Congress had unconstitutionally vested the power to appoint the Board members in the Librarian of Congress. *See* 574 F.3d at 755-756. The D.C. Circuit concluded that it "need not resolve the dispute" because the Appointments Clause claim was "untimely" and there was no reason "to depart from our normal forfeiture rule." *Id*. at 755-756. Likewise, in *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008), the Federal Circuit refused to entertain an untimely

constitutional claim that the Patent Office administrative judges whose decision was under review had not been validly appointed by the head of an Executive department. *Id*. at 1378-1381. And in *NLRB* v. *Newton-New Haven Co.*, 506 F.2d 1035 (2d Cir. 1974), the Second Circuit refused to grant relief on an untimely claim that a Board decision was invalid due to the participation of staff attorneys on the Board panel, notwithstanding that the court of appeals had previously accepted the same argument in a case in which it was timely asserted. *See id*. at 1038.[1]

[1] *See also FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 706-707 (D.C. Cir. 1996) (constitutional defect in composition of FEC is an affirmative defense to an enforcement action and may be forfeited if not timely asserted); *Robertson* v. *FEC*, 45 F.3d 486, 489-490 (D.C. Cir. 1995) (plaintiff was estopped from asserting Appointments Clause claim because argument was not raised until after plaintiff had benefited from statutory scheme); *LaRouche*, 28 F.3d at 139-140 (constitutional challenge to the FEC's membership was waived because it was presented for the first time in reply brief); *In re Alappat*, 33 F.3d 1526, 1546 (Fed. Cir. 1994) (en banc) ("Precedent precludes us from holding that the composition of the agency's board is illegal where none of the parties has raised the issue.") (Archer, C.J., concurring in part and dissenting in part); *In re Weichert*, 370 F.2d 927, 936 (CCPA 1967) (refusing to address a forfeited challenge to the composition of the Patent Office Board of Appeals, observing: "It is our function as a court to decide disputed issues, not to create them.").

In a decision predating *Freytag* and *Stevens*, the Ninth Circuit treated a challenge to the recess appointment of an Article III judge as jurisdictional. *See United States* v. *Woodley*, 751 F.2d 1008, 1009 n.2 (9th Cir. 1985) (en banc). *Compare United States* v. *Allocco*, 305 F.2d 704, 706-708 & n.8 (2d Cir. 1962) (treating the decision whether to entertain a similar claim as discretionary). Since that time, however, the Supreme Court has both clarified that constitutional appointments challenges are "nonjurisdictional," *Freytag*, 501 U.S. at 878; *see also*

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This body of authority makes clear that a constitutional challenge to the appointment of an administrative officer is not a jurisdictional question. A true jurisdictional error "'can never be forfeited or waived'" because "'it involves a court's power to hear a case'" in the first place. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). For that reason, every federal court has "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Ibid*. But a federal court has no similar, independent obligation to determine whether every agency official who participated in a challenged administrative order was validly appointed. *Cf*. *Stevens*, 529 U.S. at 778 n.8 (declining to decide whether *qui tam* statutes violate the Appointments Clause because the petitioner did not assert that argument); *SoundExchange, Inc.* v. *Librarian of Congress*, 571 F.3d 1220, 1226-1227 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (noting existence of an Appointments Clause issue but not deciding it because neither party raised an objection). That is because, unlike an error of Article III standing or statutory subject-matter jurisdiction, an alleged defect in the appointment of an agency official does not affect a federal court's power to enter a

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Stevens, 529 U.S. at 778 n.8, and underscored the narrow range of questions that are properly denominated "jurisdictional," *see, e.g., Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011) ("[W]e have tried in recent cases to bring some discipline to the use of this term.").

binding judgment. *See Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011) (emphasizing that "a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction").

Likewise, any infirmity in Member Becker's appointment would not affect the suitability of the Board's order for judicial review. *Cf.* 29 U.S.C. 160(f) (authorizing courts of appeals to entertain petitions for review of "a final order of the Board"). There is no doubt that the decision constitutes an official "order" of the Board: it formally declares that Horton violated the NLRA and directs the company to take a range of remedial actions. Nor is there any dispute that that the order is "final" for purposes of this Court's jurisdiction. *See U.S. Dept. of Justice* v. *FLRA*, 727 F.2d 481, 493 (5th Cir. 1984) (explaining that the "touchstone of finality" for judicial review of agency action is "the imposition of an obligation, the denial of a right, or the fixing of a legal relationship"). Any claim that Member Becker's appointment was unconstitutional in some respect would not implicate the form or finality of the Board's order, but rather its legal validity: such a claim would assert, in substance, that the Board entered a final order without the lawful authority to do so. *Cf.* 5 U.S.C. 706(2)(C) (authorizing courts to set aside final agency action that is "in excess of statutory jurisdiction, authority, or limitations").

Such arguments have no bearing on this Court's jurisdiction under 29 U.S.C. 160(f), and the Court has no independent obligation to address them.

2. There is no compelling reason for the Court to decide the validity of Member Becker's appointment in this case. The D.C. Circuit's decision in *Noel Canning* discusses several constitutional claims, including that the Recess Appointments Clause authorizes appointments only during intersession recesses of the Senate and that the Clause only allows the President to fill vacancies that first arise during such a recess. Horton failed to raise either of those claims in its briefs in this Court. Horton has therefore forfeited any claim that the Board's order should be set aside on such grounds. *See United States* v. *Olano*, 507 U.S. 725, 731 (1993); *see also, e.g.*, *United States* v. *Whitfield*, 590 F.3d 325, 370-371 (5th Cir. 2009); *Proctor & Gamble Co.* v. *Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument."). Although no categorical bar prevents the Court from resolving defaulted claims of appointment error, *see Freytag*, 501 U.S. at 878-880; *Willy* v. *Administrative Review Board*, 423 F.3d 483, 490 n.20 (5th Cir. 2005), there is no reason for the Court to excuse Horton's forfeiture here.

Indeed, until its Rule 28(j) letter filed on January 29, 2013, Horton had never previously suggested that Member Becker's recess appointment was invalid on *any* ground—not before the ALJ, not before the Board, not on motion for

reconsideration, and not in its opening or reply briefs in this Court. Horton's briefs principally challenged the Board's ruling on the merits. Horton also argued that the Board lacked a quorum because Member Becker's recess appointment had *expired* before the date of the Board's decision. *See* Horton Opening Br. 59-61. But Horton never raised any claim that the President's recess appointment of Member Becker was invalid *ab initio*. To the contrary, Horton recited the fact of Member Becker's recess appointment in March 2010 without suggesting any constitutional infirmity. *See id*. at 59. Not until the D.C. Circuit issued its decision in *Noel Canning*, more than three months after Horton filed its reply brief, did Horton first attempt to inject into this case constitutional claims challenging the President's recess appointment power.

A letter filed long after the close of briefing is plainly insufficient to present new claims for this Court's resolution, let alone to compel the Court to decide significant constitutional questions. *See United States* v. *Scroggins*, 599 F.3d 433, 447 n.8 (5th Cir. 2010) (Rule 28(j) letter was "too little and too late to raise [an] issue properly"); *Proctor & Gamble*, 376 F.3d at 499 n.1; *cf.* Fed. R. App. P. 28(a)(9) (appellant's opening brief "must contain * * * appellant's contentions and the reasons for them"). Horton had every reason and opportunity to mount a timely challenge to the validity of Member Becker's recess appointment if it wished. The potential legal grounds on which Horton might have asserted such

claims are the same constitutional arguments that had already been considered and rejected in published decisions by three courts of appeals. *See 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). If Horton had wished to raise such claims to challenge Member Becker's appointment, therefore, nothing prevented it from doing so. Instead, Horton chose to forgo asserting constitutional claims that, until *Noel Canning*, had been repeatedly and consistently rejected, and instead focused its briefs on the merits of the Board's decision.

Under these circumstances, there is no reason to depart from the bedrock rule of appellate procedure that claims not timely asserted are forfeited. *See Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944))). This case does not implicate the constitutional role of the Article III courts: this is not a case, for example, in which a criminal defendant's prison sentence has been affirmed by a judicial panel that included a non-Article III judge, *Nguyen* v. *United States*, 539 U.S. 69 (2003), or in which the

Article III status of two federal courts has been called into doubt, *see Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Rather, it is a routine petition for review of an administrative order in which the petitioner has not raised any constitutional appointments-related claim at any stage of the proceedings.

3. It would also disserve the Court and the public to address the significant constitutional questions raised by the D.C. Circuit's *Noel Canning* decision in this case without the benefit of oral argument and on the basis of inevitably compressed supplemental briefing. *Cf. Intercollegiate Broadcast Sys.*, 574 F.3d at 755-756 (declining to decide an untimely Appointments Clause claim because "the potential for far-reaching consequences counsels against resolving the [constitutional] question on this record").

The government strongly disagrees with *Noel Canning*, which casts aside more than a century and a half of settled practice by the political branches under the Recess Appointments Clause and rejects the contrary views of every other court of appeals to address the same issues. *Compare Evans*, 387 F.3d at 1222-1227; *Woodley*, 751 F.2d at 1009-1014; *Allocco*, 305 F.2d at 708-715. This Court has not previously addressed the myriad constitutional questions raised by *Noel Canning*. It would make little sense to attempt to resolve those issues in the context of this case.

There is at least one case already pending in this Court in which the petitioner's opening brief squarely raises those constitutional claims. *See Entergy Mississippi, Inc.* v. *NLRB*, No. 12-60644. It thus appears that the Court will have the opportunity to consider the questions raised by *Noel Canning* in the ordinary course of the appellate process and with the benefit of full briefing and oral argument. There is, accordingly, no reason to excuse Horton's forfeiture here.

In sum, the validity of Member Becker's appointment is not a jurisdictional question that this Court is compelled to decide, and Horton has failed to offer "any reason to depart from [the] normal forfeiture rule." *Intercollegiate Broadcast System*, 574 F.3d at 756. The Court should therefore decline to address any belated claims challenging the validity of Member Becker's appointment and, instead, resolve this appeal on the basis of the issues timely presented in the parties' principal briefs.[2]

[2] At the Court's direction, this letter brief does not address the validity of Member Becker's recess appointment on the merits, nor does it attempt to catalogue the multiple errors of constitutional law and history in the D.C. Circuit's *Noel Canning* decision. But if the Court decides to excuse Horton's forfeiture and address those questions in this case, the Board respectfully requests a full opportunity to present briefing and argument on the merits of the constitutional issues, including significant historical evidence of the contemporary understanding of the Recess Appointments Clause that was not before the D.C. Circuit in *Noel Canning*. The Board's presentation on the merits would also explain why, under the *de facto* officer doctrine, the Board's decision would not properly be subject to vacatur even if Member Becker's appointment were somehow deficient. For the

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Respectfully submitted,

/s/ Linda Dreeben

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reasons we have explained, however, there is no reason for the Court to address any of these issues in this case.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INCORPORATED	*	
	*	
Petitioner/Cross-Respondent	*	No. 12-60031
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-25764
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC
this 22nd day of February, 2013