No. 12-60031

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON CROSS-PETITIONS FOR REVIEW AND ENFORCEMENT OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, CASE NO. 12-CA-25764

SERVICE EMPLOYEES INTERNATIONAL UNION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Michael Rubin
Peder J. Thoreen
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
mrubin@altshulerberzon.com
Attorneys for Amicus SEIU

Judith A. Scott
Service Employees International Union
1800 Massachusetts Ave. NW
Washington, D.C. 20036
Telephone: (202) 730-7455
Attorney for Amicus SEIU

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, the Service Employees International Union ("SEIU") respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in response to the Court's February 8, 2013, order requesting supplemental briefing. The question raised in that order – whether the Court should consider the validity of NLRB Member Craig Becker's recess appointment – is of great importance to SEIU and its members. SEIU believes that the Court will benefit from the proposed brief's discussion of the potential ramifications of any ruling regarding the validity of Board Member Becker's appointment, as well as its discussion of the *de facto* officer doctrine and how that doctrine protects the acts of government officials from untimely challenges based on technical defects in their appointment.

D.R. Horton, Inc. opposes this motion; the National Labor Relations Board does not.

THE INTEREST OF THE AMICUS CURIAE

SEIU is an international labor union that represents more than 2.2 million employees nationwide in such diverse fields as janitorial services, health services, long-term care, and public employment. As it has previously detailed (*see* Doc. #511982924 (filed Sept. 11, 2012)), SEIU has a strong interest in demonstrating why the Board decision under review was correctly decided and should be upheld. In holding that D.R. Horton's prohibition on joint legal activities violates the National Labor Relations Act, the Board's decision helps protect the fundamental labor law rights of SEIU's members (and countless others) to act in concert with fellow employees for the purpose of mutual aid and protection. For this reason, SEIU has actively participated in this litigation, including by filing amicus briefs in support of the Charging Party and General Counsel's position below and again during the merits briefing in this Court.

SEIU has an equally strong interest in the specific subject of the Court's February 8 request for supplemental briefing, *viz.*, whether the Court should address the validity of NLRB Member Craig Becker's appointment. Of course, SEIU has an interest in the resolution of this question to the extent it could affect the validity of the Board's decision in this case. But beyond that, SEIU and its affiliated local unions bring labor law issues before the Board on a daily basis, and have shaped their representational efforts in light of the decisions issued by that agency. As described in the accompanying letter brief, an adverse ruling regarding the validity of Board Member Becker's appointment may undermine not only the decision in this case, but could throw decades of Board law into doubt.

CONCLUSION

For all of these reasons, *amicus curiae* SEIU respectfully requests that the Court grant it leave to file the accompanying brief.

DATED: February 22, 2013

Respectfully submitted,

/s/ Michael Rubin
Michael Rubin
Counsel for SEIU

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 22, 2013

/s/ Michael Rubin
Michael Rubin

ALTSHULER BERZON LLP
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064
www.altshulerberzon.com

ANNE N. ARKUSH
STEPHEN P. BERZON
ERIC P. BROWN
HAMILTON CANDEE
EVE H. CERVANTEZ
CONNIE K. CHAN
BARBARA J. CHISHOLM
CAROLINE P. CINCOTTA
JEFFREY B. DEMAIN
JAMES M. FINBERG
EILEEN B. GOLDSMITH
SCOTT A. KRONLAND
DANIELLE E. LEONARD
STACEY M. LEYTON
MATTHEW J. MURRAY
PETER D. NUSSBAUM
P. CASEY PITTS
DANIEL T. PURTELL
MICHAEL RUBIN
JENNIFER SUNG
PEDER J. THOREEN
LAURA S. TRICE
JONATHAN WEISSGLASS

FRED H. ALTSHULER
FOUNDING PARTER EMERITUS

RACHEL J. ZWILLINGER
FELLOW

February 22, 2013

Via Electronic Filing

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

Re: *D.R. Horton, Inc. v. NLRB*, Case No. 12-60031
KING, SOUTHWICK, and GRAVES, Circuit Judges

Dear Mr. Cayce:

We submit this letter brief on behalf of SEIU as *amicus* in this appeal, to respond to the questions posed by this Court's February 8, 2013 Order and to support the propositions that the issue of whether the recess appointment of Craig Becker was valid is not a jurisdictional issue, and that it has been waived by petitioner D.R. Horton in this case. It is waived because petitioner did not raise the issue before the Board, because it did not raise the issue at the appropriate time before this Court, and because there are no "extraordinary circumstances" that would justify this Court's allowance of such untimely attacks on the validity of this former governmental official's appointment. 29 U.S.C. § 160(e). Accordingly, the issue need not be resolved by this panel.

Moreover, analyzing the particular circumstances of this challenge, the Court should recognize that there are substantial policy reasons embodied in the *de facto* officer doctrine, long recognized by the courts, why this Court should not reach out to allow petitioner to challenge the validity of the appointment of a government official as a means of seeking to invalidate past actions taken by that official. The long-settled law of this Court and of the United States Supreme Court makes clear that courts should not generally invalidate past decisions or other official acts based on claims that there was a defect in the decision-maker's title to office, when the challenge was not timely raised before the decision-maker and on review. Given this weighty policy consideration, the rules of waiver should apply with particular vigor here, mandating a finding that the issue of the validity of Becker's appointment has been waived.

In its decision in *Noel Canning v. NLRB,* No. 12-1115 (D.C. Cir. Jan. 25, 2013), a panel of the D.C. Circuit reached the opposite conclusion about other recess appointments, but that conclusion is wrong, and is at odds with every other court to have reached this question. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 102-13 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962) (en banc). Moreover, the panel reached its conclusion without the benefit of briefing by the parties because the novel rationale adopted by the panel had not been advanced by any party.

In any event, this case provides an even stronger case for finding waiver than *Noel Canning*, and, conversely, refusal to acknowledge waiver principles here would be particularly unjustified and disruptive. Although the petitioner in *Noel Canning* did not challenge the validity of the Board Members' appointment before the Board, it did at least raise the issue in a timely manner before the D.C. Circuit, although propounding an interpretation of the President's power that was still far broader than that adopted by the court. In addition, the focused question

litigated in *Noel Canning* – whether the President could make appointments during a period when the Senate was holding pro forma session every three days because the House would not consent to a longer recess – was raised publicly immediately after the appointments at issue in *Noel Canning* were made.[1] In contrast, in this case Petitioner did not challenge Member Becker's appointment before the Board or in this Court at any time prior to the decision in *Noel Canning* and, in fact, no party did so in any case. Moreover, Member Becker's appointment was no different than that of many hundreds of recess appointments to the Board and countless other positions in the federal government made under similarly well-accepted circumstances over many decades, and, like those many others, it provoked no public legal controversy of any kind.

Finally, in *Noel Canning*, the D.C. Circuit addressed the validity of appointments of two Board Members who were still sitting on the Board. Here, Member Becker's service on the Board ended, in the normal course, on January 3, 2012. Therefore there is no prospective function to be served by addressing the validity of his appointment at this time. Thus, even assuming *Noel Canning* was correctly decided – and it was neither correct as to the substantive law nor as to its waiver analysis – this case presents a far more compelling case for waiver. Here, allowing the appointments clause challenge to go forward can be justified solely on some supposed public interest in retrospectively correcting the effects of allegedly defective past governmental appointments by invalidating the acts taken by such governmental actors. As we

[1] See See Melanie Trottman, *Labor Board Swears in Three New Members*, Wall St. J., Jan. 10, 2012, at A3; Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. Times, Jan. 8, 2012, at A19; Lisa Mascaro, *Bypassing Congress, Obama will appoint three to NLRB*, L.A. Times, Jan. 4, 2012, available at http://articles.latimes.com/2012/jan/04/news/la-pn-obama-nlrb-recess-appointments-20120104 . See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012) (*available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf).

will show, that is not, and never has been, recognized as a valid public interest and cannot justify allowing a fully waived claim to go forward at this late date. In sum, the case for waiver here is especially strong, particularly when considered through the prism of the *de facto* officer doctrine.

Under both § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), and the rules of appellate procedure, the appointments clause challenge by petitioner is waived, absent some "extraordinary circumstance," or exceptional reason not to apply waiver rules. The answer to the Court's first question thus turns on whether there is some extraordinary reason presented in the facts of this case *not* to apply these rules. There are none.

Craig Becker served on the National Labor Relations Board from April 5, 2010 to January 3, 2012, having received a recess appointment from the President under circumstances not materially different from those of countless federal officials who have served in an official capacity over many decades. The validity of his appointment, like those of thousands of other public officials, has been called into question only after the D.C. Circuit's decision in *Noel Canning*.[2] But like the thousands of decisions made by these public officials, and the many more

[2] The precise scope of the recess appointment clause has been disputed since the Washington administration, and the widely prevailing view of appointments made under the circumstances of former-Member Becker has been that they have been valid. Until *Noel Canning*, no court has held to the contrary despite vast numbers of such appointments being made over the past two centuries. *See* E. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo Law Review (2005) (tracing history of the debate over the meaning of the recess appointment clause since founding and concluding that positions adopted in *Noel Canning* are unjustified). Since 1981 alone, there are over 300 recess appointments that are invalid under the reasoning of *Noel Canning*, and 350 more that could well be invalid, including invalid appointments to such critical government offices as the Secretaries of State, of the Navy and of Energy, members of government agencies including the Federal Reserve, the SEC, the FCC, the (continued. . .)

thousands of decisions made by officials appointed by these recess-appointed decision-makers, and the still many more decisions that relied on these many decisions, NLRB decisions in which former-Member Becker took part remain valid as a general matter no matter one's views on the scope of the President's recess power. If timely challenges to those decisions are not timely raised in reviewing courts – which was certainly not the case here – nothing about the no-longer-serving decision-makers' appointment should allow challenges to the past actions they had taken while in office. Were it otherwise there would be no end to challenges to settled rulings and administrative actions.

The *de facto* officer doctrine holds "that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto,* and binding upon the public" even if it is later determined that the officer's appointment was invalid. *McDowell v. United States*, 159 U.S. 596, 602 (1895). *See also, e.g., Ryder v. U.S.*, 515 U.S. 177 (1995). The doctrine has ancient roots in the common law, *see State v. Carroll*, 38 Conn. 449 (1871) (discussing history of doctrine), and is foundational because "of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claims to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government." *Ryder,* 515 U.S. at 180 (quoting 63A Am.Jur.2d, Public Officers and Employees §578, pp. 1080-1081 (1984)). *See also, e.g., id.*, 515 U.S. at 180 (discussing the application of the doctrine in Supreme Court cases); *U.S. v. Royer*, 268 U.S. 394 (1925) (applying the doctrine); *Ex Parte Ward*, 173 U.S. 452 (1899) (applying the doctrine to hold that a recess-appointed judge was a *de facto* officer). *See also United States v.*

FTC and the FERC, and members of three different courts of appeals, including this Court. CONG. RESEARCH SERV., *The Noel Canning Decision and Recess Appointments Made from 1981-2013* 4-28 (2013).

Jones, 185 F.3d 459, 462-63 (5th Cir. 1999) (relying on Louisiana's *de facto* doctrine); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 493 (5th Cir. 2005); *DuVernay v. United States*, 394 F.2d 979, 983 n.6 (5th Cir. 1968) (citing, *inter alia*, *Ex parte Ward*, 173 U.S. 452 (1899)); *EEOC v. Sears, Roebuck & Co.*, 1980 U.S. Dist. LEXIS 11097, at *10-*11 (N.D. Ga. Mar. 14, 1980).

There is no dispute that former-Member Becker was an officer *de facto*, "not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly," whose acts are therefore valid, even assuming there was a defect in his appointment. *Hussey v. Smith*, 99 U.S. 20, 24 (1878). Becker was, after all, appointed by the President during a senatorial recess, served his full term as an official member of the Board with full pay and privileges of his office, and the validity of his appointment was not challenged at any point during his service.

Courts have identified interests that in certain situations outweigh the strong interests in orderly public administration, repose and public reliance upon the law that animate the *de facto* officer doctrine. But the procedural history of *D.R. Horton* does not implicate these or any other countervailing interests.

The principal circumstance in which the *de facto* officer doctrine has been overcome is when a litigant timely makes a direct challenge to the decision-maker deciding his case. "One who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed incurred." *Ryder*, 515 U.S. at 182-183 (emphasis added) (declining to apply doctrine and distinguishing cases applying doctrine on the ground that

"petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case."). Thus, in this case, had D.R. Horton challenged Becker's appointment when the case was before him, and also raised the challenge in its notice of appeal and opening brief, the issue would be properly before this Court. But because it did neither of these things, under both NLRA section 10(e), 29 U.S.C. §160(e), and the ordinary rules of appellate procedure, the challenge has been waived.

Permitting a challenge directly before the decision-maker, and thereafter preserving that challenge in a timely manner on direct review, serves two purposes that justify less than full application of the *de facto* officer doctrine: Ensuring that individuals have a mechanism to vindicate their personal interest in having their case heard by a legitimate government official, *see, e.g., FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828, 828 n.6 (D.C. Cir. 1993); and incentivizing individuals to challenge the qualifications of a government officer and thereby clarify whether an officer is improperly appointed and should not be allowed to continue in office. *Ryder*, 515 U.S. at 183. Neither interest is implicated here where petitioner failed to challenge the validity of Member Becker's appointment until long after the Board issued its decision and the case had been fully briefed in this Court, and belatedly made a challenge only a full year after Member Becker had left his office.

D.R. Horton had every opportunity to challenge Becker's appointment when it appeared before the Board, and declined to do so. D.R. Horton also had every opportunity to make the challenge before this Court at the appropriate time (and to make whatever argument it could muster to excuse its failure to timely raise the matter before the Board). The fact of Becker's recess appointment was well known at all relevant times, and the *de facto* officers doctrine for obvious reasons operates with especial force when a litigant willingly subjects itself to the

decision-maker's jurisdiction and never complains about his appointment to office until after it loses its case. "The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion of Harlan, J.).

Finally, the interest in allowing challenges that would clarify the prospective validity of an appointment so that an officer can be removed if he was not properly appointed is not implicated here. Becker is no longer on the Board.

In terms of "fairness" to the petitioner, *all* that D.R. Horton can offer is a plea that it would be harsh to apply the jurisdictional rule that no challenge to an NLRB decision that has not been raised before the Board can be raised on appeal, and harsh to apply this Court's waiver rules. But that is the precise plea offered by every losing party who fails to make a claim when faced with a procedural bar. It does not constitute "extraordinary circumstances" and it fails to account for the critical role doctrines of repose play in our system of laws.

To distinguish its case from any other case of waiver, D.R. Horton can add only an abstract claim that it is not proper to continue to treat as valid Board decisions in which former-Member Becker participated, because of the asserted defect in his appointment. But the point of the *de facto* officer doctrine is that such after-the-fact challenges to the validity of a governmental action are impermissible, because Becker's decision is, at the least, *de facto* legitimate. Indeed, the very same claim could be made today about the thousands of decisions of decision-makers throughout the government over the past two centuries whom assertedly were not validly serving under the reasoning of *Noel Canning,* or for any other reason. It is the office

of the *de facto* officer doctrine to bar such claims, for it stands for the proposition that the public interest lies in understanding these decisions as valid and not subject to any jurisdictional or other exceptional challenge, and that to the contrary there is great potential harm in treating these decisions in any other way.

The need for a rule of repose in the service of orderly governmental administration is particularly compelling in this case. Because there is no time limit under the National Labor Relations Act within which a party must seek review of a Board order in a court of appeals, failure to apply the *de facto* officer doctrine (and related doctrines of repose) would be particularly destructive, and would lead to an exception that virtually swallows the rule. *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289 (D.C. Cir. 1982) ("there is *no* time limit within which petitions for review of NLRB decisions must be brought") (emphasis original). Indeed, in these circumstances – including where the challenge was raised only long after former-Member Becker had left the Board – the argument that waiver can be overcome by some "need to correct" past government actions that were undertaken by officers holding a supposed invalid appointment would have chaotic effects and would lead to the reopening a huge number of settled cases, administrative actions, and even precedent.

This risk is not hypothetical: There is a long history of the Board operating with recess appointments, virtually all of which would be invalid under the rationale of *Noel Canning.*[3]

[3] Of the 29 recess appointments to the Board since 1980, 25 of those appointments would have been invalid under the reasoning of *Noel Canning*. *See The Future of the NLRB: What* Noel Canning v. NLRB *Means for Workers, Employers, and Unions," Before the H. Comm. on Educ. & the Workforce, Subcomm. on Health, Employment, Labor & Pensions*, 113th Cong. 5-6 (2013) (statement of N. Elizabeth Reynolds), *available at* http://edworkforce.house.gov/uploadedfiles/reynolds.pdf (last visited Feb. 18, 2013).

Accordingly, creating an exception to the usual rules of repose – including in particular the *de facto* officer doctrine and rules of waiver – when no extraordinary circumstances exist that would justify exceptional treatment would allow parties in long-settled cases that have become part of the fabric of the labor law to come to the courts, petition for review, and challenge the appointment of the Board member as a mechanism for upsetting long-settled rulings.[4] Nor is there any reason to create an exception to this Court's rules that require matters be timely presented so they may be timely resolved in an orderly matter.[5]

---

[4] To illustrate the breadth of disruption that might follow this approach, one need look no further than the recent filings and publications of the United States Chamber of Commerce following the *Noel Canning* decision. In a recent letter accompanying a brief to the NLRB, the Chamber requested that, in light of *Noel Canning*, all citations to NLRB precedents issued by panels on which recess appointees sat should be struck from the Board's brief. Letter accompanying Brief for Chamber of Commerce as Amicus Curiae, p. 2, 24 Hour Fitness USA, Inc. v. Alton J. Sanders, et al. No. 20-CA-35419 (N.L.R.B. Feb. 7, 2013). The Chamber of Commerce "*Recess Appointments Litigation Resource Page*" lists NLRB regional directors appointed by the Board during a period of time dating back to the end of Member Becker's service, and notes that the NLRA provides that appointment of Regional Directors "shall be made by the General Counsel only upon the approval of the Board," suggesting that challenges should be made to the actions of all of these Regional Directors (in almost every major city in the country), relating to the most basic NLRB administrative operations. Chamber of Commerce, *Recess Appointments Litigation Resource Page, available at* http://www.chamberlitigation.com/recess-appointments-litigation-resource-page (last visited Feb. 21, 2013). It is the function of the *de facto* officer doctrine to preempt such wholesale destruction of settled legal rules and governmental actions.

[5] Another important interest that has led courts not to apply the *de facto* officer doctrine is the unique responsibility of reviewing courts to ensure the integrity of Article III courts, exercised through the supervisory powers of superior federal courts over inferior federal courts. In that context, the "strong policy concerning the proper administration of judicial business" has led courts to "disrupt[] the sound appellate process entailed by entertaining objections not raised below" in order to reach out and address certain otherwise untimely claims in order to assure the sound operation of the lower courts. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962). *See also Nguyen v. United States*, 539 U.S. 69, 79 (2003) (permitting untimely challenge to the appointment of judges given the "weighty congressional policy concerning the proper organization of the federal courts"); *id.* at 81 (*citing Zdanok*). This case does not involve this

(continued. . .)

In sum, the question of the validity of Becker's recess appointment is a matter of historical interest only and properly has no bearing on the outcome of this litigation. It raises no jurisdictional issue, and presents no extraordinary circumstances justifying a departure from the ordinary rules of waiver and repose. Accordingly, in considering D.R. Horton's challenge to this NLRB ruling, the panel need *not* consider, for jurisdictional or other reasons, whether the recess appointment of Craig Becker was valid. And, having no need to resolve this question, neither is there any prudential or other reason for the Court to do so. Indeed, prudence, precedent and the sound administration of the government dictate the contrary.

Respectfully submitted,

/s/ Michael Rubin
Michael Rubin

Counsel for SEIU

Court's supervisory power over its inferior courts, and so does not implicate this interest. *See Scruggs v. United States*, 929 F.2d 305, 306 (7th Cir. 1991) ("Judges lack supervisory powers over the behavior of the Executive Branch of the government.").