

No. 12-60644

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

No. 12-60644

ENTERGY MISSISSIPPI, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/-Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN
ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board believes that oral argument is appropriate in this case. Petitioner/Cross-Respondent Entergy Mississippi, Inc. is challenging the constitutionality of the President's appointment of several members of the Board pursuant to the Recess Appointment Clause. The constitutional challenges that Entergy raises involve a wide range of textual, structural, and historical issues, all of which are addressed in detail in the brief. In addition, the underlying unfair labor practice case involves a determination of whether certain employees are supervisors, which is a substantively complex and factually intensive inquiry. The Board believes that oral argument will assist the Court in its consideration of these issues.

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Entergy Mississippi, Inc. (“Entergy”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order in *Entergy Mississippi, Inc.*, 358 NLRB No. 99 (August 14, 2012).¹ The Board found that Entergy unlawfully insisted to impasse on a permissive subject of bargaining and refused to bargain with the International Brotherhood of Electrical Workers, Local Unions 605 and 985 (“the Unions”). (D&O1996-2000.) The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Entergy filed its petition on August 15, 2012, and the Board filed its cross-application on October 1, 2012. Both were timely; the Act places no time limitations on such filings. The Court has jurisdiction over this proceeding

¹ “D&O” references are to the Board’s August 14, 2012 Decision and Order, reproduced in Entergy’s record excerpts, pp.1996-2000. “DOR” refers to the Board’s December 30, 2011 Decision on Review, pp. 1925-1936 of Entergy’s record excerpts. “RD” refers to the Regional Director’s decision and order; “Supp. RD” refers to the Acting Regional Director’s supplemental decision and order. “Tr.,” “UXI,” and “PXI” refer to the transcript, union exhibits, and Entergy exhibits introduced at the 2003 hearing (designated “I”) and the 2006 hearing (designated “II”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

pursuant to Section 10(e) and (f) of the Act because the underlying unfair labor practices were committed in Mississippi.

As the Board's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act, which provides the Court with jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] of the Board." 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1969). The Board retains authority to resume processing the representation case in a manner consistent with the Court's rulings. 29 U.S.C. § 159(c); *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board possessed a valid quorum when it issued its orders on December 30, 2011 and August 14, 2012.
2. The ultimate issue is whether the Board reasonably found that Entergy violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions as the representatives of the dispatchers. The resolution of this issue turns on a subsidiary one: whether substantial evidence supports the Board's finding that Entergy did not carry its burden of proving that its dispatchers are statutory supervisors excluded from the Act's protection.

STATEMENT OF THE CASE

The Board found that Entergy violated the Act by insisting to impasse on a permissive subject of bargaining, namely that the Unions remove from the agreement any references to dispatchers and instead enter into a separate agreement containing the dispatchers' terms and conditions of employment, and by refusing to bargain with the Unions as the dispatchers' representatives. Entergy does not dispute that it insisted to impasse on a permissive subject of bargaining and that it refused to bargain with the Unions. (D&O1996.) However, Entergy contests the Board's determination that the dispatchers are not supervisors under the Act and are therefore included within the bargaining unit.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Overview of Entergy and Its Relationship with the Union

Entergy is an electric utility company that transmits and distributes power throughout Mississippi. (DOR1925.) Entergy divides its employees into transmission and distribution groups. (*Id.*) Each group has dispatchers and field employees, who work together to maintain and restore power to 14 geographical areas, called networks, throughout Mississippi. (DOR1926). Each group also has operations coordinators (“OCs”), who are admitted supervisors and are primarily responsible for giving field employees their daily assignments.² (DOR1926;Tr.I-31,162-64,418.) On the transmission side, in addition to OCs, substation maintenance supervisors, with the help of a computerized program, also assign field employees work. (Tr.I-368-69.)

The Unions and Entergy have been parties to collective-bargaining agreements since 1939. (DOR1925;Tr.I-12.) During that time, the Unions have represented a bargaining unit that included dispatchers. Entergy now seeks to remove 25 dispatchers from the unit. (Tr.I-14-15.)

² “Field employees” include mechanics, troublemen, linemen, relaymen, switchmen, and substation employees. (DOR1926; Tr.I-32-36.) Field employees usually work outside, throughout the power system.

B. Duties and Responsibilities of Dispatchers

1. Switching

Dispatchers work twelve-hour rotating shifts and play significant roles in handling planned and unplanned outages. They do so by “switching,” which is the sequential opening and closing of electric switches to isolate power for maintenance or repair. (Tr.I-1170.) Switching is essentially the ordered process for restoring electricity to specific power lines that have been interrupted. (Tr.II-107.)

a. Dispatchers use computer programs to locate outages

When performing their switching duties, the dispatchers rely heavily on two computer programs – Supervisory Control and Data Acquisition (“SCADA”) and Automated Mapping and Facilities Management (“AM/FM”). (DOR1926n.3.) SCADA provides dispatchers with data concerning the load, voltage, and amps on breakers and circuits in substations and sends an alarm when a circuit experiences a sudden change in voltage or when a breaker trips. (*Id.*,Tr.I-129-30.) The dispatcher can use SCADA to remotely correct a voltage problem from his desk. (Tr.I-69.) The AM/FM provides dispatchers with a visual map of the transmission and distribution lines throughout Mississippi and pinpoints an outage location or trouble spot. (Tr.I-63,69,129.) It also monitors customers’ calls regarding outages and predicts the device that has malfunctioned in the area. (DOR1926n.3.)

b. Writing switching orders

Using information provided by SCADA and AM/FM, dispatchers draft a switching order -- a written document detailing step-by-step instructions for isolating a problem and restoring power. (DOR1926;Tr.I-75-79,317.) After creating these orders, the dispatchers relay them to field employees for execution. Entergy's Distribution and Transmission Switching, Tagging and Clearance Procedures set forth the requirements that a dispatcher must follow when writing and executing orders. (PXI-4,PXII-12.) These include using "echo" protocol (where field employees repeat each instruction back to the dispatcher), how to prepare a switching order, what the order must contain, and how to communicate the orders. (*Id.*,Tr.I-80.)

c. Types of switching orders

Dispatchers perform three types of switching: planned, contingency, and emergency. (DOR1925.) Planned switching involves a written order, is scheduled in advance, and is often performed for maintenance or construction work. (DOR1925;Tr.I-120.) Emergency and contingency switching are unplanned, with orders written either before or after the event. (Tr.I-93.) Emergency switching occurs when life or property is in danger, and the responding field employee will often act on his own to eliminate any immediate harm. (DOR1925;Tr.I-1516.)

Contingency switching occurs when unexpected nonemergency trouble arises that must be addressed immediately. (DOR1925.)

When performing their switching duties in contingency and emergency scenarios, dispatchers generally learn of a problem by a customer call or SCADA's alarm system. The dispatcher contacts a field employee, who goes to the trouble site and reports to the dispatcher. The dispatcher drafts a switching order, relays that order to the field employee, and using echo protocol, the field employee repeats each switching instruction back to the dispatcher. (DOR1926;Tr.I-80.) In every switching situation, the field employee first reviews the switching order to ensure that it comports with his on-site assessment. (Tr.I-1479, 1486.)

d. Dispatching field employees to trouble spots

In the transmission group, the OCs and substation maintenance supervisors assign field employees their daily work. (Tr.I.-368-89,418). When trouble occurs during normal working hours, the dispatcher calls either the field employee assigned to the affected territory or the area supervisor, who then contacts the field employee. Outside normal working hours, transmission dispatchers must contact the on-call supervisors, who call field employees. (DOR1926;Tr.I-298-99,370-71).

In the distribution group, each network provides the dispatchers with a daily schedule containing a lineup sheet designating employees to act as first responders. (Tr.I-139-40,1004-05,1159,1226.) If trouble arises, the dispatcher sends the

designated employee to the problem location. (Tr.I-139.) Upon arriving at the scene, the field employee contacts the dispatcher, telling him whether additional help is needed and if so, what classifications of workers he needs. (Tr.I-1004.) The parties' collective-bargaining agreement requires the dispatcher to provide the requested assistance. (Tr.I-1150;PXI 7.) Even when responding to multiple trouble locations, the dispatcher follows the order on the pre-determined lineup sheet. (Tr.I-139-40.)

When trouble occurs outside normal working hours, the distribution dispatcher must adhere to a side agreement that sets forth each employee classification and instructs how to call-out that classification for response. (DOR1926;Tr.I-1007,UXI-10.) Each network has different procedures; dispatchers are not permitted to vary from that procedure. (Tr.I-1227-36.) If the dispatcher cannot get anyone to volunteer, he contacts that network's on-call supervisor for assistance. (Tr.I-1239.) When responding to trouble, the dispatcher is trained to start with the greatest number of customers and major accounts, like hospitals and businesses, and gradually work his way down to the individual calls. (Tr.I-1175,1406.)

C. The Unit Clarification Proceeding

On August 11, 2003, Entergy filed a unit-clarification petition contending that its dispatchers were supervisors under Section 2(11) of the Act and seeking to

exclude them from the bargaining unit. (D&O1998.) Following a hearing, the Regional Director denied the petition, and Entergy sought review with the Board. (D&O1998;RD 1-31.) On September 30, 2006, the Board (Chairman Battista, Members Schaumber and Kirsanow) remanded the case to the Region to apply the Board's then-recent decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) ("*Oakwood*"), *Golden Crest Healthcare Ctr.*, 348 NLRB 727 (2006), and *Croft Metals, Inc.*, 348 NLRB 717 (2006), which "specifically address[ed] the meaning of 'assign,' 'responsibly to direct,' and 'independent judgment.'" (September 30, 2006 Order.)

Following another hearing, the Acting Regional Director ("ARD") affirmed the earlier decision. Specifically, the ARD found that the dispatchers did not responsibly direct employees, and even assuming they did, they did not exercise independent judgment in doing so. (DOR1926; Supp.RD18-30.) The ARD also found that dispatchers did not assign employees to a place using independent judgment, nor did they assign employees to a time or significant overall duties. (DOR1926;Supp.RD 10-18.)

On December 30, 2011, after accepting Entergy's request for review, the Board (Chairman Pearce and Member Becker; Member Hayes dissenting) affirmed the ARD's finding that the dispatchers were properly included in the unit. (DOR1925-1933.)

D. The Unfair-Labor-Practice Proceeding

While Entergy's clarification petition was pending, the parties were bargaining over a new agreement. On November 6, 2003, Entergy insisted to impasse on a separate agreement covering dispatchers' terms and conditions of employment. (D&O1998.) The Unions filed unfair-labor-practice charges, alleging that this conduct violated the Act. (D&O1996.)

On November 1, 2006, also while the unit clarification petition was pending, Entergy unilaterally removed the dispatchers from the unit, changed their job title to "distribution operators," increased their salary, converted their pay system to an incentive program, and placed them under new performance evaluation procedures. (D&O1998;Tr.II-30-31,43,307,378,381.) The Unions again filed unfair-labor-practice charges. (D&O1998.)

After the Board found that the dispatchers were not supervisors, the General Counsel issued a consolidated complaint alleging that Entergy violated Section 8(a)(5) and (1) of the Act by insisting to impasse over a permissive subject of bargaining and by refusing to negotiate with the Unions regarding the dispatchers' terms and conditions of employment. (D&O1998.)

In its answer, Entergy admitted it refused to bargain and insisted to impasse on permissive subjects of bargaining but denied that its actions were unlawful. (D&O1996.) On May 2, 2012, the General Counsel moved for summary

judgment, and the Board required Entergy to show cause why the motion should not be granted. Entergy responded, asserting the same defenses in its answer.

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 14, 2012, the Board (Chairman Pearce and Members Hayes and Griffin) issued its Decision and Order in the unfair labor practice case, granting summary judgment. The Board found that all representation issues raised by Entergy “were or could have been litigated in the prior representation proceeding,” and that Entergy “does not offer to adduce at a hearing any newly discovered evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.” (D&O1997.)

The Board also found Entergy’s affirmative defenses meritless. Accordingly, the Board found that Entergy unlawfully insisted to impasse over a permissive subject of bargaining -- removing all references to dispatchers from the collective bargaining agreement and addressing their terms and conditions of employment in a separate contract. The Board further found that Entergy unlawfully removed the dispatchers from the unit and refused to recognize and bargain with the Unions as their exclusive bargaining representative. (D&O1998-99.)

The Board ordered Entergy to cease and desist from refusing to recognize and bargain with the Unions as the exclusive collective-bargaining representative

of the dispatchers, from excluding the dispatchers from the unit, and from in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). The Board required Entergy to return the dispatchers to the unit and, upon request, to bargain with the Union as the dispatchers' representative. The Board also ordered Entergy to rescind any unlawful unilateral changes to the dispatchers' terms and conditions of employment and to make the dispatchers whole. Finally, the Board required Entergy to post a remedial notice. (D&O1999-2000.)

SUMMARY OF ARGUMENT

1. As an alternative to its labor law arguments, Entergy contends that the Board did not possess a valid quorum at the time the challenged orders were issued. None of Entergy's constitutional claims has merit. They cannot be squared with the text, purpose, or firmly established historical understanding of the Recess Appointments Clause. Individually and collectively, they conflict with the Clause's basic object of ensuring that the President can fill vacant offices when the Senate is unavailable for advice and consent. If any one of these contentions were adopted by this Court, the result would upset the longstanding balance of constitutional powers between the President and the Senate.

2. After more than 60 years of collective-bargaining where dispatchers were included in the unit, Entergy claimed that they were supervisors, changed

their terms and conditions of employment, unilaterally removed them from the unit, and refused to bargain. To prove the dispatchers are supervisors, Entergy had the burden of presenting specific evidence showing that the dispatchers responsibly directed or assigned employees within the meaning of the Act. The Board properly concluded, however, that Entergy presented only conclusory and contradictory evidence, insufficient to prove its case.

First, Entergy failed to show that the dispatchers are accountable for work done by the field employees, and, therefore, did not prove that they “responsibly direct” field employees under Section 2(11). Entergy’s evidence demonstrates that dispatchers are accountable for their own actions, not the field employees’, and face no adverse consequences for field employees’ poor performance. Rather, the dispatchers and field employees enjoy a collaborative working relationship in the common interest of safely executing a switching order, with each responsible for his own work. Entergy’s repeated assertions that *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001), controls the outcome here ignore the shifts in Board law since that decision.

Entergy also failed to show that dispatchers “assign” work to field employees within the meaning of Section 2(11). As to assigning employees to a “time,” Entergy offered only general and conflicting testimony regarding the dispatcher’s authority to *require* field employees to work past their assigned shift;

in the absence of such evidence, the dispatcher is powerless to exercise the assignment power. The Board likewise rejected Entergy's claim that sending field employees to fix power outages constitutes assignment of significant overall duties, finding it a routine reordering of the field employees' assigned tasks. Finally, substantial evidence supports the Board's finding that while dispatchers assign employees to a place, they do not do so using independent judgment. In giving assignments, dispatchers do not consider an individual employee's skill or experience. Rather, computerized programs, call-out schedules, and assignment sheets control the dispatcher's decision.

ARGUMENT

I. THE BOARD POSSESSED A VALID QUORUM WHEN IT ISSUED THE CHALLENGED ORDERS

As an alternative to its labor law arguments, Entergy urges that the Board lacked a valid quorum of three members when it issued the challenged orders. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2642 (2010). These arguments implicate the Board's composition at two different times. When the Board issued its December 30, 2011 order, it consisted of members Mark Pearce, Brian Hayes, and Craig Becker. *See Members of the NLRB since 1935*, at <http://www.nlr.gov/members-nlr-1935>. Pearce and Hayes are Senate confirmed members on the Board. *Ibid.* Becker was a recess appointee holding a temporary commission that expired on January 3, 2012. *Ibid.* When the Board issued its August 14, 2012, order, it consisted of members Pearce, Hayes, Richard Griffin, and Sharon Block. *Ibid.* The President recess appointed Griffin and Block on January 4, 2012. *Ibid.*

Entergy raises several distinct challenges: (1) that the President's recess appointments of members Block and Griffin were invalid because the Senate was not in recess at the time they were made; (2) that the President lacks the authority to make recess appointments during so-called "intrasession" recesses of the

Senate;³ (3) that the President lacks the authority to make a recess appointment to a vacancy that did not arise during that recess; and (4) that member Becker's recess appointment commission had expired before the Board issued its December 30, 2011 order. These arguments separately and together fundamentally misconceive the meaning and purpose of the Constitution's Recess Appointments Clause.

A. The Recess Appointments Clause Preserves Continuity of Government Operations When the Senate Is Unavailable to Provide Advice and Consent

1. From January 3 until January 23, 2012, a period of nearly three weeks, the Senate was closed for business by the Senate's own order. The Senate referred to that break as "the Senate's recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). Under the terms of its adjournment order, the Senate was unable to provide advice or consent on Presidential nominations. It considered no bills and passed no legislation. No speeches were made, no debates were held, and messages from the President were neither laid before the Senate nor considered. Although the Senate punctuated its 20-day break with periodic "*pro forma* sessions" conducted by a single Senator and lasting for literally seconds, it expressly ordered that "no business" would be conducted even at those times. *Ibid.*

³ Entergy appears to challenge only the recess appointment of Craig Becker on this ground (Br.51), although the case on which it relies, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), held that Block and Griffin's recess appointments were invalid intrasession recess appointments and did not address Becker's appointment.

At the start of this lengthy Senate absence, the term of Board member Craig Becker ended, and the Board's membership fell below the statutorily mandated quorum of three members, leaving the Board unable to fully carry out its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President invoked his constitutional authority under the Recess Appointments Clause to appoint three new members, bringing the Board to full membership.⁴

2. The Recess Appointments Clause provides that the President “shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3. At the Founding, like today, “recess” was used to mean a “[r]emission or suspension of business or procedure,” II Webster, *An American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706); *see also* 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (“remission or suspension of any procedure”).

⁴ Terrence Flynn's nomination had been submitted to the Senate in January 2011. *See* 157 Cong. Rec. S68 (daily ed. Jan. 5, 2011). Block's nomination had been submitted on December 15, 2011, the same day the President withdrew his previous nomination of Becker, after the Senate had delayed action on Becker's full-term nomination for over two years. *See* 155 Cong. Reg. S7277 (daily ed. July 9, 2009); 157 Cong. Reg. S8691 (daily ed. Dec. 15, 2011). Griffin's nomination was submitted that day as well, to fill a seat that had become vacant several months earlier. *See id.*

The Recess Appointments Clause plays a vital role in the constitutional design, by supplying a mechanism for filling vacant offices and maintaining continuity of government operations during periods in which the Senate is unavailable to provide advice and consent. The Framers recognized that “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” but that during periods when the Senate is absent, there would be vacancies that are “necessary for the public service to fill without delay.” *The Federalist No. 67*, at 410 (Hamilton) (Clinton Rossiter ed., 1961). The Clause addresses this public need by “authoriz[ing] the President, singly, to make temporary appointments” in such circumstances. *Ibid.* It thus reflects the Framers’ understanding that the President alone is “perpetually acting for the public,” and so acting even when Congress is not, because the Constitution obligates the President, alone, and at all times, to “take Care that the Laws be faithfully executed.”⁵

Furthermore, the Executive Branch and the Senate have long shared an understanding of the constitutional language that conforms to its ordinary meaning and purpose. In a seminal report issued more than a century ago, the Senate Judiciary Committee carefully examined the constitutional phrase “the Recess of the Senate.” S. Rep. No. 58-4389, at 2 (1905). It explained that the Clause’s “sole

⁵ 4 Elliot’s Debates 135-36 (Archibald Maclaine); U.S. Const. art II, § 3.

purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.” *Ibid.* The report defined the constitutional phrase in explicitly functional terms, concluding that Senate recesses occur “when the Senate is not sitting in regular or extraordinary session,” *i.e.*, periods “when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.” *Ibid.* The Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” *See* Riddick & Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) (“Riddick’s Senate Procedure”).

The Executive Branch’s own firmly established understanding of the Recess Appointments Clause is consistent with the Senate’s understanding. Attorney General Daugherty explained in a 1921 opinion that the relevant inquiry is one about the functional availability of the Senate—“whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” 33 Op. Att’y Gen. 20, 21-22 (1921). Paraphrasing the 1905 Senate report, Daugherty explained:

[T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive

communications from the President or participate as a body in making appointments?

Id. at 25; *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

The meaning of the Recess Appointments Clause is also informed by “the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced.” *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929) (deferring to “[l]ong settled and established practice” in determining whether a particular break was an “adjournment” under the Pocket Veto Clause). Throughout the history of the Republic, Presidents have made thousands of recess appointments. Those appointments have occurred in a variety of circumstances: during intersession and intrasession recesses of the Senate, at the beginning of recesses and in the final days (and hours) of recesses, during recesses of greatly varying lengths, and to fill vacancies that arose during the recesses and those that arose before the recesses.⁶ For example, President George W. Bush recess appointed William Pryor to serve as a court of appeals judge during a 10-day break in the Senate’s business. Hogue, *Intrasession Recess Appointments*, *supra*, at 32. The *en banc* Eleventh Circuit upheld that appointment, *see Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942

⁶ *See, e.g.*, Hogue, *Intrasession Recess Appointments* 28-32 (Apr. 23, 2004) (listing intrasession recess appointments in recesses as short as nine days); Hogue *et al.*, *The Noel Canning Decision and Recess Appointments Made from 1981-2013* (Feb. 4, 2013).

(2005), and the Senate later confirmed Judge Pryor to the post.⁷ Indeed, Congress has generally acquiesced in these historical exercises of recess appointment power, including by authorizing the payment of recess appointees, including those who were appointed to vacancies that arose before the recess and those appointed during intrasession recesses. *See infra* at n.20.

In sum, when the Senate breaks from its usual business for such a duration that it is functionally unavailable to provide advice and consent, the Recess Appointments Clause gives the President the power to make temporary appointments to ensure the continuity of government functions. The President's exercise of that power and judicial review of that exercise must be guided by the purpose, historical understandings, and practical construction given to the Clause throughout history.

⁷ Federal Judicial Center, *Biographical Directory of Federal Judges: William Holcombe Pryor, Jr.*, at <http://www.fjc.gov/servlet/nGetInfo?jid=3050&cid=999&ctype=na&instate=na>.

B. The Senate Was In Recess When the President Appointed Members Block and Griffin

1. The President properly determined that the Senate’s 20-day break in January 2012 fits squarely within the traditional understanding of the Recess Appointments Clause. The Senate had ordered that it would not conduct business during this entire period. The relevant text of the order provided:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).⁸ The President made the recess appointments of Block and Griffin on January 4, a day on which the Senate was not holding a *pro forma* session.

By providing that “no business” could be conducted for 20 consecutive days, even during the intermittent *pro forma* sessions, this Senate order created a break from usual Senate business. The *pro forma* sessions were thus nothing like regular working Senate sessions. Instead, they were (as the name implies) mere

⁸ This order also provided for an earlier period of extended Senate absence punctuated by *pro forma* sessions for the final weeks of the first Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the second Session of the 112th Congress began, by operation of the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; *infra* p.29-30. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

formalities whose principal function was to allow the Senate to cease all business. Moreover, because it could conduct “no business” under its order, the Senate was unavailable to provide advice or consent as part of the ordinary appointments process during this period.⁹ The 20-day break from business in January 2012 thus constituted a recess under the ordinary, well-established meaning discussed above.

Consistent with the President’s understanding, the Senate *itself* specifically and repeatedly referred to its break from business as a “recess” and arranged its affairs during the break based on that understanding. For example, at the same time it adopted the order that it would conduct no business during that period, the Senate made special arrangements for certain matters to continue during “the Senate’s recess.” *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that “notwithstanding the Senate’s recess, committees be authorized to report legislative and executive matters”); *see also ibid.* (allowing for appointments “notwithstanding the upcoming recess or adjournment”). The President was entitled to rely on these unequivocal indications from the Senate in determining that there was a “Recess of the Senate,” *i.e.*, that the Senate was not available to provide advice and consent and the President thus was empowered by the

⁹ Under Senate procedures, because the order was adopted by unanimous consent of the Senate, recalling the Senate to conduct business would have required unanimous consent as well. Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008).

Constitution to make recess appointments. *Cf. United States v. Smith*, 286 U.S. 6, 35-36 (1932) (“It is essential to the orderly conduct of public business . . . that each branch be able to rely upon definite and formal notice of action by another”).

The Senate has taken similar steps before long recesses without *pro forma* sessions,¹⁰ which further indicates that the Senate viewed its January 2012 break as another recess.

2. a. Entergy’s challenge to the recess appointments relies entirely on the Senate’s scheduling of periodic “*pro forma* sessions” in its December 17 order. Br.50. Those sessions did not alter the continuity or basic character of what the Senate itself termed “the Senate’s recess”: they did not transform the break into a series of periods such that the non-*pro forma* days were not even recesses, or somehow remove the 20-day period from the scope of the Recess Appointments Clause. The *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done. By the terms of the Senate’s adjournment order, “no business [was] to be done” during the *pro forma* sessions as well as in between them. They thus preserve, rather than alter, the essential character of the 20-day January 2012 break as a single, extended recess of the Senate.

¹⁰ *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

Historically, when the Senate wanted to take a break from regular business over an extended period of time, the two Houses of Congress would pass a concurrent resolution of adjournment authorizing the Senate to cease business over that time. *See Brown, supra*, at 8-9. Since 2007, however, the Senate has begun to hold *pro forma* sessions during breaks when there traditionally would have been a concurrent adjournment resolution, like the winter and summer holidays. *See Sessions of Congress, Congressional Directory for the 112th Congress* 536-38 (2011) (“*Congressional Directory*”). These periodic *pro forma* sessions allow the Senate to break without a resolution of adjournment but still claim compliance with the requirement in the Adjournment Clause, art. I, § 5, cl. 4, that neither House adjourn for more than three days without concurrence of the other. Whatever the efficacy of the *pro-forma-session* device for that purpose, it does not affect application of the Recess Appointments Clause. *See infra* at pp.27-29.

The fact that the Senate sought to facilitate its 20-day break from business by using one procedural mechanism (*pro forma* sessions) rather than another (concurrent adjournment resolution) makes no difference under the Recess Appointments Clause. For that constitutional purpose, adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions, because both are designed to enable the Senate to cease business for an extended and continuous period, thereby enabling Senators to

return to their respective States without concern that business could be conducted in their absence, which means that the Senate is unavailable during that period to provide advice and consent. That one Senator comes to the Senate Chamber to gavel in and out the *pro forma* sessions, with no other Senator needing to attend and “no business [to be] conducted,” does not change the fact that the Senate as a body is in “Recess” as the term has long been understood.

b. To buttress its contention that the Senate’s three-week break from business in January 2012 was not a recess, Entergy asserts that the Senate “*unanimously* declared itself to be *in session*,” Br.50, and that the “Senate’s interpretation of whether it was, or was not, in recess is to be afforded *great weight* and *extreme deference*,” Br.46. That claim is factually and legally erroneous. As explained above, the Senate here declared that its January break in business was “the Senate’s recess.” *See* 157 Cong. Rec. S8783. Indeed, Entergy fails to acknowledge that the Senate held no *pro forma* session on January 4, 2012, the day the President made the recess appointments, and that the Senate held only five fleeting *pro forma* sessions of less than one minute each during the entire period between January 3, 2012, and January 23, 2012. 128 Cong. Rec. S8783. Nor does Entergy explain how these *pro forma* sessions allowed the Senate to conduct business, including the business of providing advice and consent, during this period. In any event, an officer of the Legislative Branch itself has recognized

that Congress does not have sole authority to determine whether there is a recess within the meaning of the Recess Appointments Clause, because that question implicates the President's Article II powers. *In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (“the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate”) (quoting 33 Op. Att’y Gen. 20 (1921)). Entergy’s reliance (Br.47) on the Rules of Proceedings Clause, Art. I, § 5, cl. 2, is also mistaken. That Clause gives Congress authority only to establish rules governing the Senate’s “*internal matters*” and “only empowers Congress to bind itself.” *See also INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983).

Entergy cites in passing two other constitutional provisions, Br.47, but neither of them is relevant here. Entergy misconceives the relevance of the Adjournment Clause, which provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” Art. I, § 5, cl. 4. The Adjournment Clause relates primarily to the internal operations of the Legislative Branch, by furnishing each House of Congress with the power to ensure the simultaneous presence of the other so that they can

together conduct legislative business.¹¹ We may assume *arguendo* that, insofar as the matter concerns solely the interaction of the two Houses, Congress could have some leeway to determine whether a particular practice, like the purely “*pro forma* sessions” here, comports with the Clause. And each respective House has the ability to respond to, or overlook, any potential violation of the Clause by the other.¹²

The question presented here, however, concerns the power of the President under Article II—specifically, whether he reasonably determined that the Senate was in recess thereby permitting him to exercise his recess appointment authority. That question is answered by the plain meaning of the Recess Appointments Clause and the Senate’s own actions, including its explicit order that it would conduct “no business” during its January break, and its characterization of that

¹¹ See Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790) *reprinted in* 17 THE PAPERS OF THOMAS JEFFERSON 195-96 (Julian Boyd, ed. 1965) (explaining the Adjournment Clause was “necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will”).

¹² The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. See Riddick’s Senate Procedure at 15.

break as “the Senate’s recess.” This Court need not and should not reach out to determine whether the Senate complied with the Adjournment Clause.¹³

Entergy also erroneously invokes the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. The Senate held a *pro forma* session on January 3 in an effort to satisfy what it believed to be the requirements of that Amendment. Whether that effort was successful is not at issue here. The January 3 *pro forma* session was not necessary to begin the second session of the 112th Congress because absent a law appointing a different date, the congressional Session begins at noon on January 3. To hold otherwise would vitiate the Twentieth Amendment’s requirement that the starting date of the annual Session may be changed only “by law,” a requirement that entails presentment to

¹³ To resolve the issue of whether the Senate complied with the Adjournment Clause, the Court would need to decide not only whether the Senate “adjourn[ed] for more than three days” within the meaning of that Clause, but whether it did so “without the Consent” of the House. Art. I, § 5, cl. 4. Given that the Senate was unavailable to do business between January 3 and 23, 2012, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The question of consent by the other House would ordinarily be an issue for resolution between the two Houses, not for the courts. And even if the question were judicially cognizable, its answer would be unclear. The House was aware of the Senate’s adjournment order, but rather than objecting to that order, the House adopted a corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period. *See* H. Res. 493, 112th Cong. (2011).

the President of a bill changing the date, rather than unilateral action of Congress or one of its Houses. *See, e.g.*, Pub. L. No. 79-289 (1945). Thus, whatever the significance of the *pro forma* session for purposes of the Senate's own responsibilities under the Twentieth Amendment, the new Session began by operation of the Twentieth Amendment at noon on January 3 and the period of recess that the Senate had ordered commenced at that point and continued until January 23.¹⁴

Entergy also adverts to the fact that the Senate passed legislation on December 23, 2011, during the period in which the Senate was holding *pro forma* sessions during the first Session of the 112th Congress. Br.46. But the Senate was able to do so only through unanimous consent agreement, which overrode its previous unanimous consent order that no business would be conducted. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Entergy does not suggest that the Senate overrode its unanimous consent order for no business to be conducted throughout its 20-day break from January 3 to January 23, 2012, as would have been required for the Senate to pass legislation or conduct business during that break.

¹⁴ *See supra* n.8. Congress has occasionally failed to assemble a quorum on the day set for the beginning of Congress's annual meeting. *See, e.g.*, 6 Annals of Cong. 1517 (1796); 8 Annals of Cong. 2189 (1798); 8 Annals of Cong. 2417-18 (1798).

That the Senate retained the ability to recall itself to conduct business in this highly restricted manner provides no basis for distinguishing the January 2012 recess from many other indisputable recesses of the Senate. Concurrent resolutions of adjournment typically allow the leadership of the House and Senate to reconvene either or both Houses before the end of a recess if it turns out that the public interest warrants it.¹⁵ In that setting, the mere possibility that Senate leadership might recall the Senate to conduct business during a recess does not mean that the Senate is “capable of conducting business” as to render the President unable to make recess appointments. If it were otherwise, then President Bush’s appointment of Judge Pryor in 2004 would have been invalid: prior to the recess in which that appointment was made, the Senate had adjourned pursuant to a resolution that expressly provided for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004); *see Evans*, 387 F.3d 1220 (upholding Pryor’s recess appointment).

By the same token, the mere possibility that between January 3 and January 23 the Senate *could* have superseded its adjournment order by unanimous consent and conducted business does not change the fact that the Senate was in recess over that period, and likewise did not prevent the President from exercising his constitutional recess appointments authority. In fact, overriding a unanimous

¹⁵ *See generally* Brown *et al.*, *House Practice* § 10, at 9 (2011).

consent agreement (as would have been necessary in this case to disrupt the recess) may be more difficult than a simple recall—the latter can be done at the instigation of Senate leadership, while the former can be blocked by a single Senator.

3. Entergy’s position is further undermined by serious separation-of-powers concerns. The Supreme Court has condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Allowing the use of “*pro forma* sessions” to disable the President from exercising his constitutionally enumerated authority to make recess appointments would do precisely that.

First, Entergy’s position would frustrate the constitutional design by creating prolonged vacuums of appointment authority in which nobody could fill vacancies that are “necessary for the public service to fill without delay.” *Federalist No. 67*, at 410.¹⁶ Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods. But since 2007, the Senate has regularly used *pro forma* sessions to allow for extended suspensions of business, thus creating

¹⁶ Although the President may convene the Senate “on extraordinary Occasions,” Art. II, § 3, the adoption of the Recess Appointments Clause shows that the Framers did not regard the President’s convening power as a sufficient solution to the problem of filling vacancies during recesses and such an approach would entail significant expenditures of resources of both time and money that are not necessitated by the recess appointment authority.

significant gaps in appointment authority on Entergy's view.¹⁷ Indeed, on at least five different occasions in the past few years, the Senate has used *pro forma* sessions to facilitate breaks lasting longer than a month. See 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (listing breaks of 31, 34, 43, 46, and 47 days). And Entergy's position would allow the Senate to use the device of *pro forma* sessions to facilitate even longer breaks, and to allow even longer absences of its Members from the Seat of Government, without allowing the President to exercise his Recess Appointments Clause authority.

Second, Entergy's position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the Senate to make a choice: *either* remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to provide advice and consent; *or* "suspen[d] . . . business," II Webster, *supra*, at 51, and allow its members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This understanding of the Senate's constitutional alternatives is evidenced by, and has contributed to, past

¹⁷ See generally *Congressional Directory*, *supra*, at 536-38; Jeff VanDam, Note, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 N.W.U. L. Rev. 374-78 (2012).

compromises between the President and the Senate over recess appointments.¹⁸

Under Entergy's view, however, the Senate would have had little, if any, incentive to so compromise, because it could always divest the President of his recess appointment power through the simple expedient of punctuating extended recesses of the Senate as a body, and the extended absence of its Members, with fleeting *pro forma* sessions attended by a single Member.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 even arguably purported to be in session for Recess Appointments Clause purposes, while being actually dispersed and functionally conducting no business and unavailable to provide advice and consent. That historical record "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, the Senate's "prolonged reticence" to assert that the President's recess appointment power could be so easily nullified by "*pro forma* sessions" would be "amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). In contrast, a ruling in the government's favor would maintain the extant balance of powers between the

¹⁸ For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004.

Senate and the President. The Senate, as always, retains its ability to stay in town to conduct business, including being available for advice and consent, thereby removing the condition for the President's recess appointment power.

C. The President's Constitutional Recess Appointment Authority Is not Limited to Intersession Recesses

This Court should likewise reject Entergy's argument, based on the flawed reasoning in *Noel Canning v. NLRB*, 705 F.3d 490, that the Constitution limits the President's recess appointment authority to *intersession* recesses.¹⁹

In common parlance, when the Senate uses a specific type of adjournment known as an adjournment *sine die*, under long-accepted parliamentary practice that adjournment terminates a legislative session and the ensuing recess between that session and the next session is an *intersession* recess. See Robert, ROBERT'S RULES OF ORDER 148, 155 (1876); *Noel Canning*, 705 F.3d at 22. When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session because the session continues when the legislature reconvenes on the particular day, and the resulting recess between the adjournment and the reconvening is commonly referred to as an *intrasession* recess. In Entergy's view, the President is powerless to make recess appointments during intrasession recesses. Although this argument was recently accepted in

¹⁹ The Board has determined, in consultation with the Solicitor General, to petition the Supreme Court for a writ of *certiorari* to review the *Noel Canning* case. That petition is due April 25, 2013.

Noel Canning, it was squarely rejected by the *en banc* Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005) and should be rejected by this Court as well.

Entergy's position flies in the face of constitutional text and history. Since the 19th century, Presidents have made more than 400 recess appointments during intrasession recesses. *See Hogue, Intrasession Recess Appointments, supra*, 3-4; Hogue, *The Noel Canning Decision, supra*, at 22-28. These intrasession recess appointments include three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See Hogue, Intrasession Recess Appointments, supra*, at 5-31. The practice has continued regularly since Attorney General Daugherty, relying on the Senate's own interpretation of the Clause, confirmed nearly a century ago that intrasession appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); S. Rep. No. 58-4389 (1905). The Legislative Branch itself has acquiesced in the President's power to make intrasession recess appointments.²⁰ Entergy nevertheless urges that every one of these appointments was unconstitutional. This

²⁰ *See, e.g.*, 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the "accepted view" of the Recess Appointments Clause, and interpreting the Pay Act in a consistent manner so as to allow payment to intrasession recess appointees); 41 Op. Att'y Gen. 463, 466-69 (1960) (reasoning that the Pay Act constitutes congressional acquiescence under circumstances in which it permits payment).

Court should reject that contention. *See The Pocket Veto Case*, 279 U.S. at 689 (“[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

1. Entergy’s argument founders at the outset on the text of the Recess Appointments Clause, because that text “does not differentiate expressly between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. As explained, *supra* p.17, the plain meaning of the term “recess,” both at the Framing and today, means a “period of cessation from usual work.” 13 Oxford English Dictionary, *supra*, at 322-23. That definition does not differentiate between recesses that are between sessions of the Senate and those that are within sessions. Consistent with that understanding, the Senate *itself* described the period at issue here as part of “the Senate’s recess.” 157 Cong. Rec. S8783.

Furthermore, at the time of the Framing, the term “the Recess of the Senate” would have naturally been understood to encompass both intrasession and intersession recesses. The British Parliament, whose practices formed the basis for American legislative practice, used the term “recess” to encompass both kinds of breaks. *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (2d ed. 1812) (describing a “recess by adjournment” as one occurring during an ongoing session). Indeed, the Oxford English Dictionary, in defining the word “recess,” provides a usage example from Parliament in 1621 that refers to an

intrasession recess. See 13 *Oxford English Dictionary*, *supra*, at 322-23 (citing 3 H.L. Jour. 61 (1621)); 3 H.L. Jour. 74 (1621) (providing for an *intrasession* adjournment).

Founding-era legislative practice in the United States conformed to the Parliamentary understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States “in the recess of Congress” (Arts. IX & X). The only time Congress did so was for a scheduled *intrasession* recess.²¹ And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”²²

State legislatures employed the same usage. The Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes “in the recess” of the legislature. See Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during legislative recesses that were not preceded by *sine die* adjournment or its equivalent and that were therefore *intrasession* recesses

²¹ See 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (1928 ed.); 27 *id.* at 555-56. The scheduled recess was *intrasession* because new congressional terms began annually in November, see ARTICLES OF CONFEDERATION of 1781, art. V, but Congress had adjourned only until October 30.

²² See, e.g., Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York “during the recess”), reprinted in 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION 76; 3 *id.* at 191 (recounting a 1787 speech by Luther Martin discussing matters that occurred “during the recess”); see also 2 *id.* at 128.

in common parlance.²³ And in 1775, the New York legislature appointed a “Committee of Safety” to act “during the recess” of the legislature; the referenced recess was a 14-day intrasession one.²⁴

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause. The Clause allowed state governors to “make Temporary Appointments” of Senators “if Vacancies happen . . . during *the Recess* of the Legislature of any State.” Art. I, § 3, cl. 2 (emphasis added). Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted the commission without objection.²⁵ The absence of objection is telling, for the Senate has a long history of ousting members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See*

²³ *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (1852 ed.) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF VT. 164 (1874 ed.) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF VT. 235 (1924 ed.) (recessing from April 16, 1781 to June 13, 1781). In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, sec. 9; Vt. Const. of 1777, ch. II, sec. VII.

²⁴ 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

²⁵ *See* 8 ANNALS OF CONG. 2197 (Dec. 19, 1798) (appointment); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess).

generally Butler & Wolf, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES: 1793-1990 (1995).

This interpretation also best serves the purpose of the Recess Appointments Clause. *See supra* p.18. The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the need to fill vacancies is just as great. Intrasession recesses often last longer than intersession ones. *See Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken “zero-day intersession recesses” as well as “intrasession recesses lasting months”). And in modern Senate practice, intrasession recesses account for more of the Senate’s absences than intersession recesses. *See Congressional Directory, supra*, at 530-37. Indeed, construing the Recess Appointments Clause to encompass intrasession recesses accords with the common functional definition of “the Recess of the Senate” long employed by the Senate and the President. *See supra* p.18-20.

Entergy’s position, by contrast, would apparently empower the Senate unilaterally to eliminate the President’s recess appointment authority even when the Senate is unavailable to advise and consent, simply by recasting an adjournment *sine die* as an equally long intrasession adjournment. For example, the 82nd Congress’s second session ended on July 7 when Congress adjourned *sine die*, and the President could make appointments from then until January 3, when

the next session of Congress began. *Congressional Directory, supra*, at 529. If the Senate had adjourned from July 7 to a date immediately before the next congressional session (say, January 2), the break would have been essentially identical, but it would have constituted an intrasession recess, during which the President would have been powerless, under Entergy's theory, to make recess appointments. The Framers could hardly have intended such a result. Rather, the Framers must have intended the Senate's practical unavailability to control in that hypothetical setting, despite the Senate's efforts to elevate form over substance in the manner of adjourning and reconvening.

Finally, the longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further supports the government's interpretation. The Supreme Court has stressed that "[t]raditional ways of conducting government give meaning to the Constitution," and "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted); *The Pocket Veto Case*, 279 U.S. at 689.

Instead of giving "great weight" to this vast and settled body of practice, the *Noel Canning* court looked to the fact that no intrasession recess appointment had been documented before 1867. 705 F.3d at 501-03. But until the Civil War, there

were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See Congressional Directory, supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th century. *See id.* at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of intrasession recesses beyond three days. In any event, the Supreme Court has indicated “that a practice of at least twenty years duration . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.” *The Pocket Veto Case*, 279 U.S. at 690 (internal quotations marks and citation omitted). The practice of intrasession recess appointments stretches back at least *ninety* years, and is entitled to “great regard.”

2. *Noel Canning* failed to take proper account of any of the above points, and instead employed a flawed textual and historical analysis. In examining the Clause’s text, *Noel Canning* reasoned that the Clause’s reference to “*the* Recess of the Senate” confines the Clause to intersession recesses because use of “the” “suggests specificity.” 705 F.3d at 500 (emphasis added). But the word “the” can also refer generically to a *class* of things, *e.g.*, “The pen is mightier than the sword,” rather than a specific thing, *e.g.*, “The pen is on the table.” *See Evans*, 387 F.3d at 1224-25. In context and in light of the historical usages described above, it is obvious that the Framers used the word “the” in its former sense, as referring to

all periods during which the Senate is unavailable to provide advice and consent, rather than a *specific* one.

Contrary to *Noel Canning*'s suggestion, 705 F.3d at 505, this usage is not solely a modern one. The Constitution itself elsewhere uses "the" to refer to a class of things. For example, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* pp.37-39. The fact that the Clause uses the singular "Recess" rather than the plural "Recesses," *Noel Canning*, 705 F.3d at 499-500, 503, is equally inapposite. The Senate has always at least two—and sometimes more—intersession recesses per Congress. *See generally Congressional Directory, supra*, at 522-26.

Noel Canning also concluded that the Constitution treats a "recess" and a "session" as mutually exclusive, so that the Senate cannot have a recess during a session. *See* 705 F.3d at 500-01. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that recess appointments expire at the end of the Senate's "next" session, and viewed this provision as conclusive evidence of the Framers' intent to limit the recess appointment power to breaks between enumerated congressional sessions. *Ibid.* But the Framers' provision of a

specified termination point for recess appointments says nothing about whether a recess can occur within an enumerated session. As shown above, intrasession recesses were a recognized legislative practice at the time of the Framing. If the Framers meant to exclude them from the reach of the Recess Appointments Clause, they would hardly have expressed that intent in such an oblique manner, through a provision setting the termination date for the appointments. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

Looking elsewhere in the Constitution, *Noel Canning* noted that it sometimes uses the verb “adjourn” or the noun “adjournment,” rather than “recess,” and inferred that the term “recess” must have a meaning narrower than “adjournment.” *Noel Canning*, 705 F.3d at 500. But that reasoning presumes that the Constitution uses both the words “adjournment” and “recess” to refer to periods of adjournment. In fact, to the extent that these terms were distinguished from one another in the Constitution, the Framers used “adjournment” to refer to the “*act* of adjourning,” 1 Oxford English Dictionary, *supra*, at 157 (emphasis added), and used “recess” to refer to the “*period* of cessation from usual work,” 13 Oxford English Dictionary, *supra*, at 322 (emphasis added). *See, e.g.*, Art. I, § 7, cl. 2 (Pocket Veto Clause) (“unless the Congress by their Adjournment prevent its

Return, in which Case it shall not be a Law”).²⁶ This usage was commonplace in the Framing Era. When the Continental Congress convened a committee “during the recess,” it did so under an intrasession “adjournment.” 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. And Thomas Jefferson described intrasession breaks of the British Parliament as “recess by adjournment.” Jefferson, *supra*, § LI. Moreover, to the extent that “adjournment” was used at the time to refer to breaks in legislative business, rather than to the act of adjourning, it was used interchangeably with “recess,” not in any broader sense. For instance, George Washington used the terms “recess” and “adjournment” in the same paragraph to refer to the same 10-day break in the Constitutional Convention. Letter from Washington to Jay, *supra*.

In all events, the government’s position is consistent with the possibility that “recess” may be narrower than “adjournment,” and with the conclusion that the Recess Appointments Clause does not apply to the period following all adjournments. The Adjournment Clause makes clear that the action of taking even an extremely short break counts as an “adjournment,” *see* Art. I, § 5, cl. 4 (recognizing that breaks of less than three days are still “adjourn[ments]”), but the

²⁶ That understanding is reinforced by the fact that, at the time of the Framing, the word “recess” was generally not used as a verb, as that function was instead performed by the word “adjourn.” *See* Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, at <http://lawlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1/>.

Executive has long understood that such short breaks that are not of sufficient duration to genuinely render the Senate unavailable to provide advice and consent do not trigger the President's authority under the Recess Appointments Clause. 33 Op. Att'y Gen. at 22. (Here, as explained, the relevant recess lasted twenty days, and it is undisputed that a recess of such length is of sufficient duration to trigger the President's recess appointment power. *See supra* at pp.21-22.)

Noel Canning also relied on a flawed historical analysis to support its conclusion. It pointed to a provision of the North Carolina constitution that does not use the same language as the Recess Appointments Clause. *See* 703 F.3d at 501 (citing N.C. Const. of 1776, art. XX). And it cited *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819), for the proposition that this provision was interpreted to not apply to intrasession recesses. *Ibid.* But *Beard* was decided on unrelated procedural grounds, and the language on which *Noel Canning* relied came from a single judge's summary of the defendant's argument. *See ibid.* Finally, there is no basis for *Noel Canning*'s speculation that Presidents would use intrasession recess appointments to evade the Senate's advice-and-consent role. *See* 705 F.3d at 503. Despite the long-held understanding that Presidents may make intrasession recess appointments, Presidents routinely seek Senate confirmation for nominations to fill vacancies, and they have a strong incentive to do so, because recess appointments are only temporary.

D. The President May Fill All Vacancies during the Senate’s Recess, not Just Vacancies that Arise during that Recess

Entergy’s theory that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeals, two of them sitting *en banc*. See *Evans*, 387 F.3d at 1226-27 (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir.1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). The recent contrary decision of the *Noel Canning* court is erroneous.

1. The Recess Appointments Clause states that “[t]he President shall have Power to fill up all Vacancies *that may happen* during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist during a recess, including those that arose beforehand. He pointed out that “happen” is an ambiguous term, which could be read to mean “happen to occur,” but “may mean, also * * * ‘happen to exist.’” 1 Op. Att’y Gen. 631, 632 (1823). He explained that the “exist” interpretation rather than the “occur” interpretation is more consonant with the Clause’s purpose of “keep[ing] these offices filled,” *id.*, and the President’s constitutional duty to take care of public business. Accordingly, “all vacancies which * * * *happen to exist* at a time when the Senate

cannot be consulted as to filling them, may be temporarily filled.” *Id.* at 633 (emphasis added).

Attorney General Wirt’s interpretation fits the durational nature of vacancies. While the event that *causes* a vacancy, such as a death or resignation, may “happen” at a single moment, the resulting vacancy itself continues to “happen” until the vacancy is filled. *Accord* Johnson, *supra*, at 2122 (defining “vacancy” in 1755 as the “[s]tate of a post or employment when it is unsupplied”); *see* 12 Op. Att’y Gen. 32, 34-35 (1866). That durational usage accords with common parlance. For example, it would be conventional to say that World War II “happened” during the 1940s, even though the war began on September 1, 1939. And the durational sense of “happen” is all the more appropriate when asking if one durational event (a vacancy) happens in relation to another (a recess). Thus, although some eighteenth-century dictionaries defined “happen” with a variant of “come to pass,” *Noel Canning*, 705 F.3d at 507, as applied to a durational event like a vacancy, that definition is consistent with Attorney General Wirt’s interpretation.

For nearly two centuries, the Executive Branch has followed the opinion provided by Attorney General Wirt to our fifth President, himself one of the Founding Fathers, and Congress has consistently acquiesced. *See Allocco*, 305 F.2d at 713-14. As noted above, such a longstanding and uncontroverted

interpretation is entitled to “great weight” in “determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.” *The Pocket Veto Case*, 279 U.S. at 688-90.

This interpretation is also consistent with Executive Branch practice reaching back to the first Administration. President Washington made at least two recess appointments that would have run afoul of the rule adopted in *Noel Canning*. In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by an April 1792 statute.²⁷ Under *Noel Canning*’s interpretation, the vacancy did not “happen” during the recess because it arose when the statute was enacted, and was then filled up during a later recess after at least one intervening session. And in October 1796, Washington recess appointed William Clarke to be the United States Attorney for Kentucky, even though the position had gone unfilled for nearly four years.²⁸

President Washington’s immediate successor, John Adams, expressed the same

²⁷ 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793); 1 Stat. 246. Scot’s appointment was occasioned by Joseph Wright’s death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in as Engraver, and even if he had been, it would have also been during the same recess that Scot was appointed (in which case Wright’s commission would have run afoul of *Noel Canning*). See 17 Am. J. Numismatics 12 (Jul. 1883); Fabian, JOSEPH WRIGHT, AMERICAN ARTIST, 1756-1793, at 61 (1985).

²⁸ Dep’t of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979).

understanding as the government does today²⁹ (as did apparently the fourth President, James Madison, and possibly also the third, Thomas Jefferson³⁰).

This long-settled interpretation is also more consistent with the purpose of the Recess Appointments Clause. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, in the 18th century the President might not even have *learned* of such a vacancy until after the Senate's recess began. *See* 1 Op. Att'y Gen. at 632; 18 Op. Att'y Gen. 525, 527 (1832). If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died abroad, the Framers could not have intended for those offices to remain vacant for months during a recess merely because news of the death during the session had not reached the Nation's capital until after the Senate was already in recess. In other words, "[i]f the [P]resident needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it

²⁹ *See* Letter from John Adams to James McHenry (April 16, 1799), *reprinted in* 8 THE WORKS OF JOHN ADAMS ("ADAMS WORKS") 632-33 (1853); Letter from James McHenry to Alexander Hamilton (April 26, 1799), *reprinted in* 23 THE PAPERS OF ALEXANDER HAMILTON 69-71 (H.C. Syrett ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, at 647-48.

³⁰ *Hartnett, Recess Appointments of Article II Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 391-401 (2005).

must be filled now.” Herz, *Abandoning Recess Appointments?*, 26 *Cardozo L. Rev.* 443, 445-46 (2005).

2. Entergy’s position also creates serious textual difficulties. If, as Entergy urges, the phrase “during the Recess of the Senate” were read to modify the term “happen” and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and would be unavailable to limit the *time* when the President may exercise his “Power to fill up” those vacancies through granting commissions. As a result, Entergy’s reading would mean that the President would retain his power to fill the vacancy that arose during the recess *even after the Senate returns from a recess*, an interpretation that cannot possibly be correct. *See* 12 Op. Att’y Gen. at 38-39 (criticizing the “happen to arise” interpretation for this reason). The government’s interpretation does not suffer from this defect. It allows for “during the Recess of the Senate” to delimit the President’s “Power to fill up” all “Vacancies.” *See* 18 Op. Att’y Gen. at 528.

Noel Canning contended that the government’s interpretation renders the words “that may happen” superfluous. *See* 705 F.3d at 507. But in the Framing era, the words “that may happen” could be appended to the word “vacancies” without signifying an apparent additional meaning. *See, e.g.*, George Washington, General Order to the Continental Army, Jan. 1, 1776 (“The General will, upon any Vacancies that may happen, receive recommendations, and give them proper

consideration[.]”). In any event, the government’s reading does not necessarily render any words superfluous. Without the phrase “that may happen,” the Clause could be read to enable the President to fill up known future vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing “that may happen” as the Executive has long read it confines the President to filling up vacancies in existence at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed the “happen to arise” interpretation. *See* 705 F.3d at 508-509. Randolph’s opinion has been thoroughly repudiated by a long line of Attorney General opinions dating back to 1823. *See Allocco*, 305 F.2d at 713. Indeed, as noted above, even George Washington, to whom Randolph gave his advice, departed from it on more than one occasion. At most, Randolph’s opinion shows an early “difference of opinion,” Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, *supra*, at 647, regarding an ambiguous constitutional provision. Any such early differences were resolved by Attorney General Wirt’s 1823 opinion, which has been adhered to consistently for nearly two hundred years.

Noel Canning also dismissed Congress’s longstanding acquiescence in the Executive Branch’s interpretation as a departure from a position supposedly

expressed in an 1863 statute. *See* 705 F.3d at 509. But far from rejecting the Executive’s interpretation, the 1863 statute acknowledged it. *See* 16 Op. Att’y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1948, 54 Stat. 751.

Finally, *Noel Canning* attempted to minimize the damaging consequences of its decision by suggesting that Congress could more broadly provide for “acting” officials. *See* 705 F.3d at 511. The very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an “acting” capacity. Moreover, some positions (*e.g.*, Article III judgeships) cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions for an extended period of time, such as Cabinet level positions or positions on boards designed to be politically balanced.³¹

³¹ Even if the Recess Appointments Clause were confined to vacancies that arise during a recess, this Court would nevertheless be required to uphold the Board’s orders. The recess appointments of Craig Becker (the only recess appointee at the time of the December 2011 order) and Richard Griffin (the only recess appointee on the panel that issued the August 2012 order) both met that purported requirement. Becker’s seat was previously held by Dennis Walsh, an earlier recess appointee whose term ended “at the end” of the Senate’s session on December 31,

E. Member Becker's Term Ended on January 3, 2012

Finally, Entergy raises a purported argument in the alternative that the Board lacked a properly constituted quorum when it issued the December 30, 2011, order because Board Member Becker's recess appointment commission had expired on December 17, 2011. Br.52-53. That claim is baseless. Because Member Becker was appointed during the second Session of the 111th Congress (in March 2010), *see Members of the NLRB since 1935, supra*, his term expired under the terms of the Recess Appointments Clause "at the End" of the Senate's "next Session," *i.e.*, the first Session of the 112th Congress. Art II, § 2, cl. 3.

The Legislative and Executive Branches uniformly understand that Session, and thus Becker's term, to have ended at noon on January 3, 2012. *See* Senate of the United States, Executive Calendar (Jan. 3, 2012), *available at*

http://www.senate.gov/legislative/LIS/executive_calendar/2012/01_03_2012.pdf

(indicating that the First Session "adjourned January 3, 2012"); *Entergy*

2007. *See Members of the NLRB, supra; Congressional Directory, supra*, at 537. That vacancy thus arose during the intersession recess beginning on December 31. *See* 18 Op. Att'y Gen. at 529-30 (explaining that when a recess appointee's commission terminates at the end of the Senate's session "[t]he vacancy follow[s] the adjournment"). Griffin was appointed to a seat that had become vacant on August 27, 2011, during an intrasession recess. *See Noel Canning*, 705 F.3d at 512. Even under the "arise" interpretation, the Recess Appointments Clause plainly provides that so long as a vacancy arose "during the Recess of the Senate," the President possesses the power to fill it. Although *Noel Canning* concluded that the President's recess appointment power is limited to the *same* recess in which the vacancy arose, *id.* at 514, nothing in the text of the Clause imposes such a limitation.

Mississippi Inc., 358 NLRB No. 99, slip op. at 1 (2012) (explaining that Becker continued to exercise his authority as a Member of the NLRB until noon on January 3, 2012). *See also Noel Canning*, 705 F.3d at 512 (holding that the “seat formerly occupied by Member Becker became vacant at the ‘End’ of the Senate's session on January 3, 2012”).

That result is based on the longstanding practice of Congress. As explained, Congress terminates its enumerated Sessions by adjourning *sine die*. *See supra* p.35. Absent adjournment *sine die* on an earlier date, an enumerated Session of Congress, and thus the Sessions of the Senate and the House, ends automatically with the commencement of the next session, which by default is noon on January 3 unless Congress by law sets a different date. *See* U.S. Const., amend. XX, § 2; *House Practice, supra*, § 13, at 11.

Entergy’s suggestion (Br.53) that this result is in tension with the government’s view regarding the effect of the Senate’s *pro forma* sessions is mistaken. The adjournment of the Senate to a series of *pro forma* sessions does not affect congressional practice of ending an enumerated Session only through adjournment *sine die* or through the commencement of the subsequent Session. At the end of 2007, the Senate held *pro forma* sessions at the end of the 2d Session of the 110th Congress, and when it adjourned the *pro forma* session on December 31, it expressly did so *sine die*, pursuant to a concurrent resolution. *See* 153 Cong.

Rec. 36,508 (Dec. 31, 2007); *see also Noel Canning*, 705 F.3d at 512-13. There is good reason for this result: it is crucial that Congress express unambiguously when its enumerated Session has ended, because the termination of a Session also signals the end of recess appointees' terms. The mere commencement of a series of *pro forma* sessions, however, has not been understood to terminate a session, and is ill-suited to that purpose.

II. THE BOARD REASONABLY FOUND THAT ENTERGY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN ABOUT THE DISPATCHERS IN THE UNIT

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) prohibits an employer from refusing to bargain collectively with the representative of its employees.³² Moreover, an employer also violates those provisions by conditioning agreement, and bargaining to impasse, on the union's acceptance of a permissive subject of bargaining, e.g., topics other than wages, hours, and other terms and conditions of employment. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. BASF, Wyandotte Corp.*, 798 F.2d 849, 853 (5th Cir. 1986).

³² A violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] statutory rights," is "derivative" of a violation of Section 8(a)(5) of the Act. *See Met. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Entergy admits its refusal to bargain, but asserts that it acted lawfully because its dispatchers are statutory supervisors excluded from the Act. But if substantial evidence supports the Board's finding that Entergy did not carry its burden of proving that the dispatchers are supervisors, then Entergy's refusal to bargain and its insistence to impasse on a permissive topic of bargaining violated the Act, and the Board is entitled to enforcement of its order.

A. Applicable Principles and Standard of Review

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes "any individual employed as a supervisor" from the definition of the term "employee." In turn, Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term supervisor as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Supreme Court explained that individuals are statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the

interest of the employer.”” *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted).

It is settled that the burden of demonstrating Section 2(11) supervisory status rests with the party asserting it. *Ky. River*, 532 U.S. at 711-12. To meet this burden, Entergy must support its claim with specific examples, based on record evidence. *See Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). In contrast, conclusory or generalized testimony is insufficient to establish “independent judgment” or any other element necessary for a supervisor finding. *See Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) (“*Frenchtown*”) (“General testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony.”). Any lack of record evidence will be construed against Entergy, the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999).

In enacting Section 2(11), Congress sought to distinguish between the truly supervisory personnel vested with “genuine management prerogatives” and lower-level workers – such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees” – who enjoy the Act’s protections even though they perform “minor supervisory duties.”” *NLRB v. Bell Aerospace Co.*, 416 U.S.

267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Accordingly, as the Supreme Court cautioned, the Board guards against construing supervisory status too broadly “because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Oakwood*, 348 NLRB 686, 688 (2006); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

This Court gives “particular deference” to the Board’s findings concerning “the aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor’ under Section 2(11) of the Act.” *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1276 (5th Cir. 1986) (citation omitted). Such deference is necessary “because of the infinite and subtle gradations of authority which determine who, as a practical matter, falls within the statutory definition of supervisor.” *Id.* Thus, this Court “‘repeatedly decline[s]’ to merely second guess Board determinations regarding supervisory status.” *NLRB v. Adco Elec., Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (internal citation omitted).

This Court will uphold a finding of supervisory status if it is supported by substantial evidence on the record considered as a whole. *Id.* at 1115-16. Substantial evidence is “‘more than a scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.’” *Id.* at 1115 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

B. Entergy Failed To Prove Dispatchers' Supervisory Status

The Board reasonably determined (DOR 1925) that Entergy's inconsistent and conclusory evidence did not demonstrate that dispatchers responsibly direct or assign field employees. *See Oil, Chem. & Atomic Workers Int'l Union*, 445 F.2d at 243 (employer required to present "evidence of actual supervisory authority visibly translated into tangible examples").

As an initial matter, Entergy's repeated exhortation (Br. 16-23 &n.6) that this Court's precedent and others' dictate the dispatchers' supervisory status is factually and legally erroneous. First, supervisory status is necessarily an intensely fact-specific inquiry, as job duties vary from one position to another. Accordingly, contrary to Entergy's suggestion (Br. 23 n.24), there are no job classifications that are *per se* excluded from the Act's protections.³³ *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 990 (D.C. Cir. 2001).

Importantly, all of Entergy's cases, with the exception of *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001), were decided before the Supreme Court's decision in *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706, 713-19

³³ Contrary to Entergy's suggestion (Br. 14-15), the Board did not make a *per se* classification of dispatcher's job status in either *Big Rivers Elec. Corp.*, 266 NLRB 380 (1983) or *Mississippi Power & Light Co.*, 328 NLRB 965 (1999) ("*MPL*"). While the Board recognized commonalities inherent to the dispatcher role, it cautioned that such commonalities allowed for general guidelines only. *MPL*, 328 NLRB at 969. The Board emphasized that "the facts of each case," and not the job classification, guided its decisions. *Id.*

(2001), after which the Board reexamined and clarified its prior interpretations of the Section 2(11) terms “independent judgment,” “assign,” and “responsibly to direct.” See *Oakwood*, 348 NLRB at 689-94; *Croft Metals, Inc.*, 348 NLRB 717, 720-23(2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 728-32 (2006). As the Board explained here, any reversion to pre-*Oakwood* cases is “unwarranted” and “ignore[s] significant doctrinal developments.” (DOR1929.) Indeed, the only circuit court to decide, post-*Oakwood*, whether utility-industry dispatchers are supervisors, agreed with the Board that they were not, explaining that *Oakwood* “undisputedly reflects sound law.” See *Avista Corp. v. NLRB*, No. 11-1397, 2013 WL 499478, at *2 (D.C. Cir. Jan. 18, 2013). As discussed below, applying the *Oakwood* standard, the Board properly determined that Entergy failed to prove its dispatchers are supervisors.

1. Dispatchers do not responsibly direct field employees

a. Dispatchers are not accountable

In *Oakwood*, the Board “ascribe[d] a distinct meaning” to the statutory phrase “responsibly to direct.” 348 NLRB at 689. An individual has the authority “responsibly to direct” under Section 2(11) if he “has ‘men under him,’ and . . . decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* at 691 (citations omitted). Direction is responsible only if “the person performing

the oversight [is] accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Id.* at 691-92.

Requiring *accountability* demonstrates that the putative supervisor’s interests are aligned with management such that “the directing employee will have . . . an adversarial relationship with those he is directing” and “will disregard, if necessary, employees’ contrary interests.” *Id.* at 692. This contrasts with an employee who directs others’ work but is not held accountable for their performance: their “interests, in directing other employees, is simply the completion of a certain task.” *Id.*

Although the Board found that Entergy established the dispatcher’s “authority to direct field employees in the step-by-step instructions of a switching order,” the Board found that the dispatchers are not accountable for the field employees’ work. Entergy “presented no evidence that any dispatcher has experienced any material consequences to his terms and conditions of employment, either positive or negative, as a result of his performance in directing field employees.” (D&O1929.)

To the contrary, Entergy’s evidence shows that field employees, not dispatchers, are held accountable, and receive adverse consequences, for the mistakes they make. For example, in March 2006, field employee Ronny Taylor

improperly executed a planned switching order written by dispatcher Mark McCullough. (Tr.II-183-86.) Entergy disciplined Taylor for the error, giving him a week off without pay. (Tr.I-184.) McCullough suffered no adverse consequences. As Distribution Manager John Scott explained, this was “because [McCullough] did not cause the mistake. The problem was the man in the field, operating the wrong device.” (Tr.II-185,PXII 36.) Likewise, in another incident in April 2006, while executing a switching order, two field employees “went ahead of the dispatcher,” incorrectly anticipated the next step, and opened the wrong switch, causing a significant power outage. (Tr.II-193.) Both employees were disciplined: one received a verbal warning, and the other a coaching/counseling. (Tr.II-194;PXII38.) The dispatcher, however, suffered no adverse consequences. Lastly, in July 2006, two field employees operated the wrong device while executing a written switching order, resulting in an outage to a major customer. (Tr.II-189-90,PXII37.) Dispatcher McCullough, who caught and corrected the error, was not disciplined, while the two field employees received oral warnings. (Tr.II-192.)

In contrast, when Entergy disciplines dispatchers, it is for their own work errors, not those of field employees. For example, in April 2002, Transmission Manager Duane Sistrunk gave dispatcher Nix a coaching and counseling for writing an incorrect switching order. (Tr.II-314-15.) An investigation report detailed the mistake and noted that neither Nix nor the field employee discovered

the error. (PXII54.) Sistrunk explained that Nix was not counseled for the field employee's failure to catch the mistake; rather, he disciplined Nix for writing an incorrect switching error. (Tr.II-315.)

The Board properly concluded that the evidence “shows only that dispatchers ‘are accountable for their *own* performance or lack thereof, not the performance of *others*, and consequently is insufficient to establish responsible direction.” (DOR1931 (quoting *Oakwood*, 348 NLRB at 695).) This is consistent with post-*Oakwood* caselaw. See *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011) (assistant managers not supervisors where disciplined for their failings, not their employees’); *NLRB v. Atlantic Paratrans of N.Y.C., Inc.*, 300 F. App’x 54, 57 (2d Cir. 2008) (dispatchers did not responsibly direct drivers where not disciplined if drivers improperly performed their jobs); *Oakwood*, 348 NLRB at 695 (charge nurses do not responsibly direct staff because they are accountable for only their own performance); *Golden Crest Healthcare Ctr.*, 348 NLRB 727,731 (2006) (charge nurses not supervisors where no consequences resulting from their direction of nursing assistants).

b. Entergy failed to show responsible direction

To rebut the facts noted above, Entergy relies on broad references to “numerous examples” of dispatchers being disciplined for field employees’ errors and claims that “the record is replete” with examples of dispatchers correcting

mistakes and being held accountable. These broad references, however, lack any specificity. *See* Br. 27 (string cite to 11 pages of testimony); Br. 28 (string cite to 48 pages of testimony). And, as discussed below, Entergy's two specific examples do not withstand scrutiny.

Entergy's first example (Br. 28) -- that Transmission Manager Duane Sistrunk disciplined a dispatcher allegedly because a field employee opened the wrong switch and knocked out power to four substations -- is unsupported by the record. Contrary to Entergy's claims, the discipline was not for the field employee's performance but the dispatcher's error. During the investigation, the dispatcher admitted that he continued executing the switching order despite noticing the employee's discomfort with the task, which warranted Sistrunk's coaching. Moreover, Sistrunk admittedly did not record the counseling in the dispatcher's personnel file, as Entergy's policy required. This failure to record the discipline, the Board explained (DOR1930n.8), "offsets any adverse consequences that would have befallen the dispatcher" and "indicates that the dispatcher was not held accountable for the field employee's error."

Likewise, Entergy's reliance (Br. 28) on discipline that Distribution Manager Scott gave to dispatcher James Thompson for failing to obtain information necessary to properly close a case ignores Scott's accompanying explanation that he was "holding the dispatcher accountable for getting the

information into the system.” (Tr.II-165.) Thus, Thompson was accountable for failing to perform *his* duty of obtaining all necessary data.

The Board correctly found (DOR1931) that Entergy failed to show that the dispatchers have *ever* been subjected to adverse consequences because a field employee did not perform properly. *See Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012) (“Where a lower level employee performs inadequately, and the purported supervisor is in fact not held accountable, it highly supports a finding that the purported supervisor is not actually at risk of suffering adverse consequences.”).

Although Entergy suggests (Br. 27) that dispatchers are accountable for field employees’ performance because they can correct field employees’ errors, it fails to provide any examples. To the extent dispatchers do troubleshoot field employee work, their corrections are designed to ensure safety, a task inherent to the switching process that does not confer supervisor status. *See McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 937 (9th Cir. 1981) (pilot’s authority to insure the safety of his airplane, pilots, and crew is an “intrinsic part of any pilot’s job” and does not prove supervisory status).

Moreover, the evidence demonstrates that field employees similarly alert dispatchers to errors in the switching orders, further establishing that preventing unsafe situations is a shared responsibility and part of the switching process. For

example, field employee Glen Allen Brooks testified that he “frequent[ly]” encounters orders that are wrong and informs the dispatcher of the error. (Tr.I-1486.) Likewise, field employee Charles Rankin testified that he tells the dispatcher if he disagrees with the order or thinks it is faulty. (Tr.I-1416.) TOC Manager Sistrunk confirmed this collaboration, testifying that a dispatcher will rewrite an order if he agrees with the field employee’s correction. (Tr.I-433.) This shared responsibility for safety is demonstrated by the fact that both the field employee and the dispatcher have the right to halt the switching process if either party spots an error. (Tr.I-1328.)

Entergy faults (Br. 27) the Board for focusing only on disciplinary matters when determining accountability. But Entergy’s evidence primarily involved disciplinary matters. The failure of proof therefore lies with Entergy, not the Board.

Entergy also improperly relies on its Performance Planning and Review system, an evaluation method that rewards dispatchers based on how quickly and safely they restore power. (Tr.II-220,307,440.) However, Entergy unlawfully implemented that program while the unit clarification petition was pending, arguably seeking to make its dispatchers akin to those in this Court’s *Entergy Gulf States* decision. These unlawful changes cannot be used to support supervisory status, and the Board properly refused to consider them. As the Board noted,

“while a unit clarification petition is pending, [an employer] acts at its peril in removing positions from the unit and refusing to bargain with the union.”

(D&O1997 (citing *Bay State Gas Co.*, 253 NLRB 538, 539 (1980)).

Because Entergy failed to establish that dispatchers *responsibly* direct employees, the Board found it “unnecessary” to address whether dispatchers exercise independent judgment in this context. (DOR1931n.9.) Therefore, Entergy’s discussion (Br. 37-40) of independent judgment assumes the faulty premise that it has demonstrated responsible direction. Absent such proof, any discussion regarding independent judgment is irrelevant.

c. *Entergy Gulf States*, and its definition of responsible direction, do not control the outcome

Entergy errs (Br. 16-25) in urging that the Board’s decision conflicts with this Court’s *Entergy Gulf States* decision, which found, relying in part on earlier cases, that dispatchers were supervisors. Contrary to Entergy’s arguments, the legal standard applied in *Entergy Gulf States* to determine whether dispatchers responsibly directed employees and the standard that the Board applied here are not identical. Instead, in this case the Board applied the *Oakwood* standard for responsible direction, which elaborated upon this Court’s discussion in *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir. 1986), of the phrase “responsibly to direct.” *Oakwood*, 348 NLRB at 691. Thus, the Board’s decision does not commit the error of being “inconsistent with governing circuit law” – as this Court faulted

the Board in *Entergy Gulf States*, 253 F.3d at 211 – because this Court has yet to interpret the *Oakwood* definition of responsibly direct.

In *Entergy Gulf States*, the sole issue was whether the electrical-utility dispatchers, known as OCs, “responsibly direct[ed] others with independent judgment.” 253 F.3d at 209. In defining “responsibly direct,” this Court relied on *KDFW-TV*, stating that, “[t]o direct other workers responsibly, a supervisor must be ‘answerable for the discharge of a duty or obligation’ or accountable for the work product of the employees he directs.” *Id.* (quoting *KDFW-TV*, 790 F.2d at 1278). In *Oakwood*, the Board expanded upon this definition, explaining that to be accountable for the work product, not only must the putative supervisor be answerable, but “some adverse consequence may befall [him] . . . if the tasks performed by the employee are not performed properly.” 348 NLRB at 692. *See also Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012.)

In contrast, the *Entergy Gulf States* court did not base its responsibly direct determination on a finding that the OCs suffered adverse consequences for the performance of the employees they directed. Instead, the court focused on other factors not germane to the accountability standard established in *Oakwood*.

Moreover, as noted above, the Board expressly noted (DOR1929) that a reversion to any standard predating *Oakwood* was “unwarranted” and would “ignore significant doctrinal developments.”

As this Court recognizes, “the specific facts” of a case determine supervisory status. *Entergy Gulf States*, 253 F.3d at 210. Here, the Board properly examined the facts of *this* case, applied the relevant *Oakwood* standard, and found that the dispatchers do not responsibly direct the field employees. Contrary to Entergy’s claims (Br. 18), there is no evidence that the job description for dispatchers at Entergy Gulf States in Baton Rouge, Louisiana “accurately reflects” the current job duties of Entergy’s dispatchers. (PXII 9.) Entergy failed to produce a current job description for its dispatchers, effectively hindering any comparison of written job descriptions.

2. Dispatchers lack authority to assign employees

Entergy has failed to show that its dispatchers have the authority to “assign” employees. In *Oakwood*, the Board stated that “assign” under Section 2(11) means “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689-90. Here, after examining each criterion, the Board found (DOR1931-32) that dispatchers did not assign employees with independent judgment.

a. Dispatchers do not “assign” overtime because they cannot require field employees to work past their assigned shift

Supervisory authority is not established “where the putative supervisor has the authority merely to *request* that that a certain action be taken.” *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006). Crucial to a finding of assignment is the putative supervisor’s “power to *require* that these duties be undertaken.” *Mars Home for Youth v. NLRB*, 666 F.3d 850, 855 (3d Cir. 2011) (emphasis added).

There is no dispute that dispatchers can assign overtime to employees, but Entergy failed to show that dispatchers could require employees to work overtime beyond their assigned 8-hour shifts.³⁴ The Board correctly found (DOR1931), Entergy’s evidence to the contrary was “lacking in specificity” and “insufficient” to establish assignment authority. *See Dynasteel Corp. v. NLRB*, 476 F.3d 253, 258 (5th Cir. 2007) (conclusory testimony that “guess[ed]” individual was a supervisor was insufficient); *accord Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971); *Golden Crest Healthcare*, 348 NLRB at 731.

Before the Board, Entergy relied on the testimony of its two undisputed managers, neither of whom could substantiate their claim that dispatchers could

³⁴ Entergy does not dispute that dispatchers cannot require field employees to work emergency call-out overtime, which involves problems that occur “after hours.” (Tr.I-471-72,1015,Tr.II-407.)

require employees to stay past their eight-hour shift. Distribution Dispatch Manager Scott equivocally claimed that the authority existed “for the most part.” (DOR1932;Tr.II-241.) Operations Coordinator McCorkle initially stated that dispatchers cannot require an employee to stay, but then retracted this assertion, claiming dispatchers can hold employees beyond their 8-hour day. (DOR1932;Tr.II-465-66.) Neither Scott nor McCorkle, or any other Entergy witness, could cite any specific instance where a dispatcher had required a field employee to stay against his wishes. (DOR1932.) While McCorkle claimed that a field employee could be disciplined for refusing a dispatcher’s request to stay, he clarified that the field employee’s supervisor, not the dispatcher, imposes the discipline. (DOR1932;Tr.II-467.) His testimony, rather than establishing dispatchers can require field employees accept overtime assignments, “demonstrated that this authority is possessed by the field employee’s own supervisor.” (DOR1932.)

Dispatcher Tony DeLaughter contradicted Scott and McCorkle’s assertions, and testified that he “[does not] have the authority to force [the field employee] to stay.” (Tr.I-1390.) Instead, the dispatcher will “ask them to stay, and they usually do.” (Tr.I-1391.) As the Board cogently explained (DOR1932), “[w]here, as here, putative supervisors have not been notified by management that they are vested with a supervisory power, the Board will decline to find supervisory status.”

Other witnesses confirmed DeLaughter's understanding. Field employee Glen Allen Brooks, Sr., testified that dispatchers could not order him to work overtime. (Tr.I-1495.) Albert May, the Unions' business manager, explained that when a dispatcher asks an employee "to hold over," "it's not like a direct order," and if the field employee declines, the dispatcher "has to get additional people to help him." (Tr.I-1112-13.) Because supervisory status is not proven where the record evidence "is in conflict or otherwise inconclusive," the Board properly concluded (D&O1932) that Entergy's dispatchers lack the authority to require employees work past their assigned shift. *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989). *See Frenchtown*, 683 F.3d at 305 (absence of specific examples of charge nurse assigning aides prevented finding of supervisor status); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (administrator's "general assertions" are insufficient to demonstrate LPN has supervisory authority).

b. Dispatchers do not "assign" significant overall duties

When the Board defined the supervisory authority to "assign" in *Oakwood*, it carefully differentiated between the supervisory ability to instruct employees to perform "significant overall duties" and non-supervisory "ad hoc instruction that the employees perform a discrete task." *Oakwood*, 348 NLRB at 689. Because the evidence shows that assigning trouble orders is merely a temporary reordering of pre-assigned work involving ad hoc instructions to complete discrete tasks, the

Board correctly determined (DOR1932) that dispatchers do not assign significant overall duties to field employees.

The OCs assign the field employees' daily overall tasks; dispatchers do not. Daily assignments include significant tasks, such as working on large construction projects, hooking up residential facilities, executing planned outages, and installing and maintaining equipment such as meters and transformers. (Tr.I-33-36.) Field employees' daily work could also involve assignment to a power outage or trouble location. When trouble occurs, dispatchers reassign field employees from their pre-assigned tasks to work on the problem. The dispatchers are simply reordering the field employee's daily tasks so trouble work is done before routine work. As the Board noted (DOR1932), this ad hoc instruction to reorder the employee's work is in stark contrast to the OC's ability to assign the field employees the significant overall tasks described above. *See Frenchtown*, 683 F.3d at 312 (adjusting the order employees perform "discrete tasks" does not demonstrate assignment authority); *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (relocating and giving temporary assignments to employees was "switching of tasks" and not assignment of significant overall duties).

Entergy argues (Br. 34) that, when executing switching orders to fix an outage, dispatchers ask employees to perform several "distinct tasks" that constitute "significant overall duties," including submitting information, repairing

equipment, and performing steps in a switching order. However, as the Board noted in *Oakwood*, 348 NLRB at 689, “choosing the order in which the employee will perform discrete tasks” is not indicative of the authority to assign. The dispatcher’s instructions during a switching operation, such as what switch to pull and in what order, are ad hoc assignments to perform discrete tasks in a specified order. *See Brusco Tug & Barge, Inc.*, 2012 WL 6673076 at *7, 359 NLRB No. 43, (2012) (tugboat mate’s directions to deckhand regarding where to stand, what tools to use, what lines to release and in what order “exemplify ad hoc assignments that do not rise to the level of supervision”). Contrary to Entergy’s assertions (Br. 34), despite the complexity involved in executing a contingent or emergency switching order, the fact remains that the dispatcher’s assignment of trouble work to field employees is merely a re-ordering of their daily work, including planned outages. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1266 (11th Cir. 1999) (directing others in complex work does not elevate employee to supervisor status).

c. Dispatchers do not “assign” field employees to a place using independent judgment

Substantial evidence supports the Board’s finding that while dispatchers can assign field employees to trouble locations or power outages, they do not do so “using independent judgment.” (DOR1931.) As the Board stated, “[t]he authority to effect an assignment . . . must be independent [free of control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing

data], and the judgment must involve a degree of discretion that rises above ‘routine or clerical.’” *Oakwood*, 348 NLRB at 692-93. A judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id* at 693. For an assignment to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment regarding the individual employee’s skills. *Id.* at 695. *See also Frenchtown*, 683 F.3d at 312 (no independent judgment when redirecting aide).

Here, the Board found that the dispatchers’ reliance on the AM/FM computer program and daily assignment sheets makes the routing of field employees to an outage location a routine task not involving independent judgment. As noted above (pp.5-6), the AM/FM program tells the dispatcher the outage location, the number and type of affected customers, and identifies the field employee assigned to the outage area. (Tr.I-566-69,594,735,1182,1232.) To determine this information, dispatchers must also consult the network’s daily schedule, each network’s call-out list, or call the network’s on-call supervisor, who will assign field employees to the outage. (Tr.I-139,371,1208.) Thus, when assigning work to a field employee, whether within or outside normal business

hours, the dispatcher does not consider that employee's skill set or level of proficiency but instead relies on other sources and company rules.

Unlike the charge nurses in *Oakwood*, 348 NLRB at 695, who matched nurses to patients after considering the nurse's skills and abilities, Entergy's dispatchers have no discretion regarding whom to send to a trouble location because they cannot deviate from the preassigned geographic schedules or the call-out lists. (Tr.I-1012,1226-28,1235.) Dispatcher DeLaughter summed up these constraints by testifying that the call-out list is "the way the network wants their trouble worked on this particular routine day." (Tr.I-1211.) See *Frenchtown*, 683 F.3d at 311-12 (no independent judgment in assigning aides where assignment sheets designate aides' daily duties); *Mars Home for Youth v. NLRB*, 666 F.3d 850, 855 (3d Cir. 2011) (no evidence of independent judgment where reassignment is based on seniority list).

Additionally, after the field employee assesses the trouble location, he tells the dispatcher whether he needs more help, and if so, what job classifications he needs. As OC McCorkle testified, when a field employee requests help, the dispatcher will "get him what he wants." (Tr.II-463.) If the field employee requests more help, the dispatcher must comply or risk violating an agreement between Entergy and the Unions. (Tr.I-1004-12,1150,UXI10,PXI7). Thus, "this evidence suggests that the field employees actually have greater discretion than the

dispatchers because it is the field employees who . . . determine what skills are needed and the number of employees needed to restore power.” (ARD18.)

Contrary to Entergy’s assertions (Br. 41), the Board did not oversimplify the record in finding dispatchers lack independent judgment in assigning employees to trouble locations. Whether the dispatcher is addressing one trouble situation or numerous power outages, he must adhere to the call-out lists and assignment sheets in sending workers, and comply with the field employee’s requests for additional help. If the outages are numerous, the dispatcher follows Entergy’s instructions for prioritizing outages. Dispatcher DeLaughter explained that dispatchers “are trained [] to start with the greatest number of customers . . . you get them on first, and gradually work your way down to the single calls” because “that’s the way we were taught . . . that’s pretty much the way [Entergy] wants things done.” (Tr.II-1175-76,1406.) DeLaughter further testified that while dispatchers generally start with the most widespread outages, management can “overrule” this process and ask for restoration in other areas. (Tr.I-1176.)

Given these specific parameters, the Board properly determined that the dispatchers do not exercise independent judgment in assigning field employee to outage locations. *See Frenchtown*, 683 F.3d at 312 (assignments based on management’s instructions does not demonstrate independent judgment); *NLRB v. Atlantic Paratrans of NYC*, 300 F. App’x 54, 56 (2d Cir. 2008) (dispatchers do not

use “independent judgment” in reassigning drivers based on largely mechanical and geographical considerations).

Entergy broadly claims (Br. 42-43) that “[t]he record contains numerous examples of Dispatchers . . . exercis[ing] judgment based on professional experience to direct Field Employees to more pressing matters or ma[king] determinations as to what problems needed to be corrected.” Once again, Entergy offers only record citations with no elaboration; this conclusory statement is insufficient to establish supervisory authority. *See Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). In any event, the cited testimony simply reveals dispatchers moving field employees among locations to address outages—a process that requires adherence to Entergy’s call-out lists and priority instructions. *See Atlantic Paratrans*, 300 F. App’x at 56 (response to an emergency based on geographical considerations or company policy is not independent judgment). The only example Entergy specifically discusses (Br.43n.35) involved Entergy Louisiana and the dispatchers that work at that location, not Entergy Mississippi. Absent detailed evidence involving dispatchers that actually work at Entergy, the Board properly found that Entergy failed to prove that dispatchers use independent judgment to assign employees to a place.

3. Entergy errs in relying on secondary indicia of supervisory status

Entergy does not satisfy its burden of proof by relying (Br. 44) on “secondary indicia” of supervisory status—factors not mentioned in Section 2(11) but often cited as additional evidence by the Board and reviewing courts. Secondary indicia are relevant only “where one of the enumerated indicia in [Section 2(11)] is present.” *E & L Transport Co. v. NLRB*, 85 F.3d 1258, 1270 (7th Cir. 1996). Since Entergy failed to prove the presence of any primary indicia, secondary indicia are irrelevant, and the Board properly gave them no consideration. *See Monotech of Miss. v. NLRB*, 876 F.2d 514, 516-18 (5th Cir. 1989) (considering secondary indicia only after finding employees exercised authority set forth in primary indicia); *see also Frenchtown*, 683 F.3d at 315-16.

C. Entergy’s Laches Defense Lacks Merit

Entergy’s laches defense is equally unavailing. The elements of a laches defense are “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Costello v. U.S.*, 365 U.S. 265, 282 (1961). These elements are conjunctive, and Entergy, as the party asserting the defense, bears the burden of proof. *Matter of Bohart*, 743 F.2d 313, 326 n.13 (5th Cir. 1984). Entergy failed to meet its burden.

As the Board noted (D&O1997n.4), while its delay in issuing its decision is “regrettable,” it was not unreasonable or deliberately dilatory. As the Board

explained, the delay was “largely due to the evolving state of the law respecting the standard for evaluating supervisory status under [Section] 2(11) of the Act.”

(D&O1997 n.4.) Thus, much of the delay was due to the normal legal process.

Moreover, delay alone is not enough; the “consequence[s] of the . . . delay” dictates whether corrective action is needed. *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1253-54 (D.C. Cir. 2012). Here, Entergy complains (Br. 55) that because of the delay, “the Unions can unjustly claim additional liability.” However, the Supreme Court has recognized that “the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969). The dispatchers, therefore, should not bear the brunt of any delay. Moreover, Entergy’s argument conveniently ignores how its own actions created the need for the remedy it claims is prejudicial. Entergy disregarded the Board’s well-established warning that an employer acts at its peril when it unilaterally changes employees’ terms and conditions of employment while a unit clarification petition is pending, (D&O1997), and Entergy, not the dispatchers, should be held responsible for such heedless disregard of the pending unit clarification petition. *See Nabors v. NLRB*, 323 F.2d 686, 688 (5th Cir. 1963).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Entergy's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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APRIL 2013

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

ENTERGY MISSISSIPPI, INC.	*
	*
Petitioner/Cross-Respondent	* No. 12-60644
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 15-CA-17213
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 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 foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 18,913 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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