

Nos. 12-3322, 12-3654

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

**FTS INTERNATIONAL PROPPANTS, LLC,  
formerly known as  
PROPPANT SPECIALISTS, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of Jurisdiction.....	1
Statement of the Issues Presented.....	3
Statement of the Case.....	4
Statement of Facts.....	5
I. The Board’s Findings of Fact.....	5
A. The Representation Proceeding.....	5
1. The Company’s Operations.....	5
2. Employees’ Scheduling and Duties.....	6
3. Barrett Oliver’s Responsibilities.....	6
4. After the Board-Conducted Election, the Hearing Officer Issues a Decision on Challenged Ballots and Objections to the Election Results; the Board Affirms; the Final Tally of the Ballots Reveals that the Union Won the Elections.....	8
B. The Unfair Labor Practice Proceeding.....	10
II. The Board’s Conclusions and Order.....	11
Summary of Argument.....	11
Standard of Review.....	14
Argument.....	15
I. The Company’s Recess Appointment Challenges Lack Merit.....	15

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. The President’s Recess Appointment Authority Is Not Confined to Intersession Recesses .....	16
B. The President May Fill All Vacancies During a Recess, Not Just Those Vacancies That Arise During That Recess .....	32
II. The Company Violated Section 8(a)(5) and (1) of the Act by Refusing To Bargain With and Provide Relevant Information to the Union .....	40
A. The Company Failed To Carry Its Burden of Demonstrating that Oliver Was a Statutory Supervisor Excluded from the Act’s Protection .....	41
1. Applicable Principles .....	41
2. Substantial Evidence Supports the Board’s Finding That the Company Did Not Carry Its Burden of Proving That Oliver Exercised Independent Judgment in “Assigning” Employees ...	46
3. Substantial Evidence Supports the Board’s Finding That the Company Did Not Carry Its Burden of Proving That Oliver “Responsibly Directs” Employees .....	53
4. The Board Did Not Need To Consider the Alleged Secondary Indicia of Oliver’s Supervisory Authority .....	57
B. The Company Failed To Carry Its Burden of Demonstrating That Oliver’s Participation in the Election Impermissibly Interfered with Employees’ Free Choice .....	57
C. The Company’s Claim That It Was Denied Due Process Is Meritless; As the Board’s Decision States, the Board Considered the Record and the Company’s Submissions .....	63
Conclusion .....	68

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Akal Security, Inc.</i> , 354 NLRB No. 11 (2009), <i>reissued</i> 355 NLRB No. 106 (2010) .....	52
<i>Allentown Mack Sales &amp; Svc., Inc. v. NLRB</i> , 522 U.S. 359 (1998) .....	14
<i>Alstyle Apparel</i> , 351 NLRB 1287 (2007) .....	49, 55
<i>Anderson v. Hardman</i> , 241 F.3d 544 (7th Cir. 2001) .....	66
<i>Anniston Yarn Mills</i> , 103 NLRB 1495 (1953) .....	52
<i>Beard v. Cameron</i> , 7 N.C. (3 Mur.) 181 (1819) .....	31
<i>Beverly Enters.-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999) .....	45
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964) .....	2
<i>Braniff Airways, Inc. v. Civil Aeronautics Bd.</i> , 379 F.2d 453 (D.C. Cir. 1967) .....	64
<i>B-P Custom Building Products, Inc.</i> , 251 NLRB 1337 (1980) .....	60, 66
<i>Certain-Teed Prods. Corp. v. NLRB</i> , 562 F.2d 500 (7th Cir. 1977) .....	66

**TABLE OF AUTHORITIES**

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>Colgate-Palmolive Co.</i> , 323 NLRB 515 (1997) .....	52
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006) .....	44, 55
<i>Dallas Times Herald</i> , 315 NLRB 700 (1994) .....	52
<i>E &amp; L Transp. Co. v. NLRB</i> , 85 F.3d 1258 (7th Cir. 1996) .....	57
<i>Evans v. Stephens</i> , 387 F.3d 1220 (2004).....	17, 18, 19, 23, 26, 32
<i>Frazier Indus. Co. v. NLRB</i> , 213 F.3d 750 (D.C. Cir. 2000) .....	62
<i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012) .....	57
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999) .....	3
<i>Freytag v. CIR</i> , 501 U.S. 868 (1991).....	16
<i>G. Heileman Brewing Co. v. NLRB</i> , 879 F.2d 1526 (7th Cir. 1989) .....	41
<i>Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006) .....	44

**TABLE OF AUTHORITIES**

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>Harborside Healthcare, Inc.</i> , 343 NLRB 906 (2004) .....	59
<i>Hercules, Inc. v. EPA</i> , 598 F.2d 91 (D.C. Cir. 1978) .....	64
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996) .....	43
<i>Int’l Transp. Serv.</i> , 344 NLRB 279 (2005), <i>enf. denied on other grounds</i> , 449 F.3d 160 (D.C. Cir. 2006) .....	57
<i>Juniper Indus. Inc.</i> , 311 NLRB 109 (1993) .....	61
<i>Ken-Crest Servs.</i> , 335 NLRB 777 (2001) .....	57
<i>L.S.F. Transp., Inc. v. NLRB</i> , 282 F.3d 972 (7th Cir. 2002) .....	15
<i>Lake Holiday Assocs. v. NLRB</i> , 930 F.2d 1231 (7th Cir. 1991) .....	64
<i>Loparex LLC v. NLRB</i> , 591 F.3d 540 (7th Cir. 2009) .....	14, 44, 45, 47, 49, 51, 53

**TABLE OF AUTHORITIES**

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>Lutheran Home at Moorestown</i> , 334 NLRB 340 (2001) .....	64
<i>Mary Thompson Hosp. v. NLRB</i> , 943 F.2d 741 (7th Cir. 1991) .....	40
<i>Medina County Publ’ns</i> , 274 NLRB 873 (1985) .....	3
<i>Mid-Continent Spring Co.</i> , 273 NLRB 884 (1985) .....	59
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	24
<i>New York Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998).....	45
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	58
<i>NLRB v. Adam &amp; Eve Cosmetics, Inc.</i> , 567 F.2d 723 (7th Cir. 1977) .....	14, 51
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	42
<i>NLRB v. Chi. Tribune Co.</i> , 943 F.2d 791 (7th Cir. 1991) .....	15, 58, 59
<i>NLRB v. Clinton Elec. Corp.</i> , 284 F.3d 731 (7th Cir. 2002) .....	62
<i>NLRB v. Donnelly Garment Co.</i> , 330 U.S. 219 (1947).....	64

## TABLE OF AUTHORITIES

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>NLRB v. Don's Olney Foods, Inc.</i> , 870 F.2d 1279 (7th Cir. 1989) .....	45
<i>NLRB v. Erie Brush &amp; Mfg. Corp.</i> , 406 F.3d 795 (7th Cir. 2005) .....	15, 58
<i>NLRB v. George Koch Sons, Inc.</i> , 950 F.2d 1324 (7th Cir. 1991) .....	40
<i>NLRB v. GranCare</i> , 170 F.3d 662 (7th Cir. 1999) .....	42, 43
<i>NLRB v. Howard Immel, Inc.</i> , 102 F.3d 948 (7th Cir. 1996) .....	55
<i>NLRB v. Howard Johnson Motor Lodge</i> , 705 F.2d 932 (7th Cir. 1983) .....	59
<i>NLRB v. Jasper Chair Co.</i> , 138 F.2d 756 (7th Cir. 1943) .....	64, 65
<i>NLRB v. Kentucky River Community Care, Inc.</i> , 532 U.S. 706 (2001).....	42, 43, 44, 47, 53
<i>NLRB v. KSM Indus., Inc.</i> , 682 F.2d 537 (7th Cir. 2012) .....	14, 63, 65
<i>NLRB v. Meenan Oil Co., L.P.</i> , 139 F.3d 311 (2d Cir. 1998).....	48
<i>NLRB v. Serv. Am. Corp.</i> , 841 F.2d 191 (7th Cir. 1988) .....	59
<i>NLRB v. WFMT, a Div. of Chi. Educ. Television Ass’n</i> , 997 F.2d 269 (7th Cir. 1993) .....	15, 58, 61

## TABLE OF AUTHORITIES

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013) .....	<i>passim</i>
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	13, 43, 44, 47, 49, 53, 56
<i>Oil, Chem. &amp; Atomic Workers Int’l Union v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971) .....	45
<i>Rochelle Waste Disposal, LLC v. NLRB</i> , 673 F.3d 587 (7th Cir. 2012) .....	14, 53
<i>Ruan Transport Corp. v. NLRB</i> , 674 F.3d 672 (7th Cir. 2012) .....	64, 65
<i>T. K. Harvin &amp; Sons, Inc.</i> , 316 NLRB 510 (1995) .....	45
<i>Talmadge Park Inc.</i> , 351 NLRB 1241 (2007) .....	48
<i>The Pocket Veto Case</i> , 279 U.S. 655 (1929) .....	18, 24, 25, 31, 34
<i>U.S. v. Chem. Found., Inc.</i> , 272 U.S. 1 (1926) .....	65
<i>United States v. Allocco</i> , 305 F.2d 704 (2d Cir. 1962) .....	32, 34, 38
<i>United States v. Dunkel</i> , 927 F.2d 955 (7th Cir. 1991) .....	60
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952) .....	16

## TABLE OF AUTHORITIES

<b>Cases –Cont’d</b>	<b>Page(s)</b>
<i>United States v. Woodley</i> , 751 F.2d 1008 (9th Cir. 1985) .....	32
<i>Van Leer Containers, Inc. v. NLRB</i> , 841 F.2d 779 (7th Cir. 1988) .....	62
<i>Vt. Agency of Nat. Res. v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000).....	16
<i>Westinghouse Elec. Corp. v. NLRB</i> , 424 F.2d 1151 (7th Cir. 1970) .....	43
<i>Whitman v. American Trucking Ass’n</i> , 531 U.S. 457 (2001).....	28
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	55, 63

<b>State Constitutions:</b>	<b>Page(s)</b>
Pa. Const. of 1776, § 20 .....	20
Pa. Const. of 1776, § 9 .....	21
Vt. Const. of 1777, Ch. 2, § VII.....	21
Vt. Const. of 1777, Ch. 2, § XVIII .....	20

<b>United States Constitution:</b>	<b>Page(s)</b>
U.S. Const. art. I, § 3, cl. 2.....	21
U.S. Const. art. I, § 3, cl. 5.....	26
U.S. Const. art. I, § 5, cl. 4.....	26, 30
U.S. Const. art. I, § 7, cl. 2.....	29
U.S. Const. art. II, § 2, cl. 3 .....	29, 32
U.S. Const. art. II, § 3 .....	23
U.S. Const. amend. XX .....	27
26 J. CONTINENTAL CONG. 1774-1789 (Gaillard Hunt ed., 1928) .....	20
27 J. CONTINENTAL CONG. 1774-1789 (Gaillard Hunt ed., 1928) .....	20, 30

<b>National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.):</b>	<b>Page(s)</b>
Section 2(11) (29 U.S.C. § 152(11)).....	<i>passim</i>
Section 8(a) (29 U.S.C. § 158(a)(1)) .....	3, 4, 10, 11, 41
Section 8(a) (29 U.S.C. § 158(a)(5)) .....	3, 4, 10, 11, 40, 41
Section 9(c) (29 U.S.C. § 159(c)) .....	3
Section 9 (d) (29 U.S.C. § 159(d)).....	2
Section 10(a) (29 U.S.C. § 160(a)).....	2
Section 10(e) (29 U.S.C. § 160(e)).....	2, 55, 63
Section 10(f) (29 U.S.C. § 160(f)).....	2

<b>Attorney General Opinions:</b>	<b>Page(s)</b>
1 Op. Att'y Gen. 631 (1823).....	32, 36
10 Op. Att'y Gen. 356 (1862) .....	35
12 Op. Att'y Gen. 32 (1866).....	33, 37
16 Op. Att'y Gen. 522 (1880) .....	39
33 Op. Att'y Gen. 20 (1921).....	18, 22, 31
41 Op. Att'y Gen. 463 (1960) .....	18

<b>Rules</b>	<b>Page(s)</b>
Fed. R. App. P. 28(a)(9)(A) .....	66
<b>Regulations</b>	<b>Page(s)</b>
29 C.F.R. § 102.48(d)(1) & (2) .....	63
<b>Other Authorities</b>	<b>Page(s)</b>
5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot, ed., 2d ed. 1836) .....	23
2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA (Peter Force, ed., 1839) .....	21
Fabian, JOSEPH WRIGHT: AMERICAN ARTIST, 1756-1793 (1985) .....	34
Federal Judicial Center, <i>Biographical Directory of Federal Judges, William Joshua Allen</i> , at <a href="http://www.fjc.gov/servlet/nGetInfo?jid=29">http://www.fjc.gov/servlet/nGetInfo?jid=29</a> .....	29
Federal Judicial Center, <i>Biographical Directory of Federal Judges, David Davis</i> , at <a href="http://www.fjc.gov/servlet/nGetInfo?jid=573">http://www.fjc.gov/servlet/nGetInfo?jid=573</a> ; Federal Judicial Center, <i>Biographical Directory of Federal Judges, John Archibald Campbell</i> , at <a href="http://www.fjc.gov/servlet/nGetInfo?jid=361">http://www.fjc.gov/servlet/nGetInfo?jid=361</a> .....	35
The Federalist No. 67 (Clinton Rossiter ed., 1961) .....	22, 27
Hartnett, <i>Recess Appointment of Article III Judges: Three Constitutional Questions</i> , 26 <i>Cardozo L. Rev.</i> 377 (2005) .....	33, 35
Herz, <i>Abandoning Recess Appointments?</i> , 26 <i>Cardozo L. Rev.</i> 443 (2005) .....	37
Letter from George Washington to John Jay (Sept. 2, 1787), 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76 .....	20

<b>Other Authorities-Cont'd</b>	<b>Page(s)</b>
Letter from John Adams to James McHenry (April 16, 1799), 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES .....	35
Letter from James McHenry to Alexander Hamilton (April 26, 1799).....	35
Letter from John Adams to James McHenry (April 16, 1799).....	35
Letter from John Adams to James McHenry (May 16, 1799).....	38
11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. (Theo Fenn & Co., 1852) ...	21
Neal Goldfarb, <i>The Recess Appointments Clause (Part 1)</i> , LawNLinguistics.com, Feb. 19, 2013, at <a href="http://lawninguistics.com/2013/02/19/the-recess-appointments-clause-part-1/">http://lawninguistics.com/2013/02/19/the-recess-appointments-clause-part-1/</a> .....	30
Oxford English Dictionary (2d ed. 1989) .....	19, 29
THE PAPERS OF ALEXANDER HAMILTON (H.C. Syrett ed., 1976) .....	35
27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990).....	34
Riddick & Frumin, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. No. 101-28 (1992).....	22
Robert, ROBERT’S RULES OF ORDER (1876).....	17
2 Samuel Johnson, <i>Dictionary of the English Language</i> (1755).....	19
II Webster, <i>An American Dictionary of the English Language</i> (1828) .....	19

<b>Legislative Materials</b>	<b>Page(s)</b>
Congressional Directory for the 112th Congress (2011).....	17, 24, 27, 28, 29
Hogue, Cong. Res. Serv., <i>Intrasession Recess Appointments</i> (2004) .....	17, 18, 25
Hogue, et al., Cong. Res. Serv., <i>The Noel Canning Decision and Recess Appointments Made from 1981-2013</i> (2013).....	17
8 Annals of Cong. 2197 (Dec. 19, 1798).....	21
157 Cong. Rec. S8783.....	19
S. Rep. No. 58-4389 (1905).....	22
S. Exec. J., 3rd Cong., 1st Sess. (1793) .....	34
Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947)) .....	42
N.J. LEGIS. COUNCIL J., 23rd Sess. (1798-99).....	21
3 H.L. Jour. 61 (Mar. 22, 1621).....	20
3 H.L. Jour. 74 (Mar. 27, 1621).....	20

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of FTS International Proppants, LLC, formerly known as Proppant Specialists, LLC (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the

National Labor Relations Act, as amended.<sup>1</sup> The Decision and Order, issued on August 15, 2012, and reported at 358 NLRB No. 103, is a final order with respect to all parties under Section 10(e) and (f) of the Act.<sup>2</sup>

The Company petitioned for review of the Board's Order on October 10, 2012, and the Board cross-applied for enforcement of the Order on November 20. The Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act. Both were timely filed, as the Act imposes no time limit for such filings.

As the Board's unfair-labor-practice Order is based partly on findings made in the underlying representation (election) proceeding, the record in that case (Board case number 30-RC-6783) is also before the Court pursuant to Section 9(d) of the Act.<sup>3</sup> Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board," but does not give the Court general authority over the representation proceeding.<sup>4</sup> The

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<sup>1</sup> 29 U.S.C. § 160(a).

<sup>2</sup> 29 U.S.C. § 160(e) & (f).

<sup>3</sup> 29 U.S.C. § 159(d); see *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

<sup>4</sup> 29 U.S.C. § 159(d).

Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case.<sup>5</sup>

### **STATEMENT OF THE ISSUES PRESENTED**

Ultimately at issue in this case is whether the Board properly concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to International Union of Operating Engineers, Local 139 ("the Union"), which the Board certified as the bargaining representative of a unit of the Company's employees.

1. Whether the President's recess appointments to the Board were valid.
2. The Company also challenges the merits of the Board's Order finding that the Company violated Section 8(a)(5) and (1) of the Act. Specifically, the Company raises three subsidiary issues relating to the representation proceeding underlying that Order:

- a) whether substantial evidence supports the Board's finding that the Company did not carry its burden of proving that Barrett Oliver was a statutory supervisor who exercised independent judgment in either "assign[ing]" or "responsibly [] direct[ing]" employees as defined by Section 2(11) of the Act;

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<sup>5</sup> 29 U.S.C. § 159(c); *see, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

- b) whether substantial evidence supports the Board’s finding that the Company failed to carry its burden of proving that Oliver’s pro-union conduct tainted the election because he was a supervisor or a person “closely associated with management”; and
- c) whether this Court has jurisdiction to consider the Company’s due process argument and, if so, whether the Company has presented clear evidence sufficient to overcome the “presumption of regularity” and prove that the Board did not consider the record in its entirety.

### **STATEMENT OF THE CASE**

This case involves the Company’s refusal to bargain with the Union and to provide the Union with relevant and necessary information after the Company’s equipment operators, lab techs, and mechanics voted in favor of union representation in a Board-conducted election. The Board found that the Company’s refusal to bargain violated Section 8(a)(5) and (1) of the Act<sup>6</sup> and ordered the Company to recognize and bargain with the Union. (APP067-68.)<sup>7</sup> The Company does not dispute that it has refused to bargain. Instead, it claims that, in the underlying representation proceeding, the Board erred in finding that

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<sup>6</sup> 29 U.S.C. § 158(a)(5) & (1).

<sup>7</sup> Where applicable, references preceding a semicolon are to the Board’s findings; those following to the supporting evidence. “APP” refers to the short appendix, filed pursuant to 7th Cir. R. 30(a); “JA” refers to the joint appendix, filed pursuant to 7th Cir. R. 30(b).

the Company failed to meet its burden of proving that employee Barrett Oliver is a statutory supervisor and that Oliver's conduct during the representation election was objectionable. The Board's findings in the representation and unfair-labor-practice proceedings, as well as the Decision and Order under review, are summarized below.

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. The Representation Proceeding**

##### **1. The Company's Operations**

The Company operates a sand refining facility in Oakdale, Wisconsin. (APP004; JA0470-71.) After first harvesting sand from local bogs, the Company processes the sand at an on-site "Wet Plant," dries and further sifts the sand at a "Dry Plant," and then finally stores the sand on-site until it is time for delivery. (APP004-05; JA0471-72, 0474-78.) The Company's customers use the processed sand for hydraulic fracturing or "fracking." (APP005; JA0457.)

Throughout the refining process, laboratory technician employees test the sand to determine its grade. (APP005; JA0475-76.) According to the Company's standing policy, the Company only delivers sand to its customers if the tests indicate that ninety percent of the sand meets the customers' specifications. (APP011; JA0643.)

## **2. Employees' Scheduling and Duties**

The Oakdale facility operates twenty-four hours a day, seven days a week. (APP006; JA1448-56.) Employees at the Oakdale facility work during one of two shifts: an "AM-PM" shifting lasting from 6AM to 6PM, or a "PM-AM" shift lasting from 6PM to 6AM. (APP006; JA0632.) Normally, ten employees were scheduled to work during the AM-PM shift, and eight employees worked during the PM-AM shift. (APP006; JA0486-87, 1448-56.) Employees at the facility include Loader Operators, who haul the sand; Operators, who operate the machinery in the plants; lab technician/loadout employees, who test the sand and load it for shipment; and Utility employees, who rotate around the plants, performing whatever work is needed at the moment. (APP006; JA0484-87.)

All employees ultimately report to a Plant Manager. Up until April 2011, this was John Rice; thereafter, the Acting Plant Manager was Wayne Dailey. (APP007; JA0470, 0497.)

## **3. Barrett Oliver's Responsibilities**

On January 28, 2011, then-Plant Manager Rice gave equipment operator Barrett Oliver a \$1/hour raise, increasing his wage to \$16/hour, and designated him as the PM-AM Crew Leader. (APP012; JA1071-73.) Rice told Oliver his new responsibilities were to "make sure that . . . everything kept moving, just keep checking up on stuff, keep things right going with everybody else." (APP008;

JA1072.) Oliver testified that as Crew Leader, his duty was “[g]oing from plant to plant doing whatever needs to be done. . . . [I]f this broke down, I was over here helping them fix it. If this was running good, I’d go to this plant and see if they needed help doing anything. Pretty much, I kind of floated around, constantly doing stuff, and if I was needed I would, say, run loader all night.” (APP008; JA1206.) Oliver never received any written job description for his new position. (APP008; JA1071-73, 1131.)

Todd Rainey was the Crew Leader for the AM-PM shift, but he possessed additional authority that Oliver did not. When a problem or issue with an employee arose during the PM-AM shift, Oliver did not take any action himself; instead, he waited until the change-over in shift and then relayed the problem or issue to Rainey. (APP031-32, 040; JA0704, 1087-88.) One night, the plant machinery broke down and further work became impossible. Before shutting down the plant and telling the employees to go home, Oliver called Rainey to secure his permission. (APP033; JA1080-84.)

Furthermore, Rainey prepared employees’ work assignments. (APP011, 036-37; JA0508-10, 0544-45, 0754.) In consultation with the Plant Manager, Rainey regularly prepared a written schedule specifying who was working on a given day, during which shift, in which plant, and in which role. (APP012; JA0508-10.) At the beginning of the PM-AM shift, Oliver told employees their

assignments, relying upon the written schedule as well as any assignments carried over from the preceding shift. (APP010-12; JA0669-71.) When Oliver was absent from work, however, the employees on the PM-AM shift ascertained their assignments themselves and begin work on their own initiative. (APP038; JA0520, 0672-73, 0725-26, 0737-38, 0781.) Occasionally, Oliver asked an employee to deviate from the preset assignment because another employee was absent or late. When he did so, he asked whichever on-duty employee happened to be available or sufficiently trained to rotate into the unoccupied assignment. (APP016-17, 037; JA0735-36, 0921-23.) Employees understood that they could shut down the refining process on their own in case of safety emergencies. (APP014; JA0704.)

On a separate occasion, Oliver apparently permitted the lab technicians to ship sand to a customer, even though the sand tested below the Company's standard ninety-percent grade. (APP011; JA1030-34.) According to Company protocol, the Plant Manager or the head quality control officer had to specially authorize such below-grade shipments of sand. (APP041; JA0642-44, 0675.)

**4. After the Board-Conducted Election, the Hearing Officer Issues a Decision on Challenged Ballots and Objections to the Election Results; the Board Affirms; the Final Tally of Ballots Reveals that the Union Won the Election**

On June 9, 2011, the Board conducted a representation election in the Company's office. (APP059; JA0005-12.) Oliver served as an election observer

for the Union; Mechanic Harry Burdett was the Company's observer. (APP059; JA0616-17, 1105.) While serving as election observer, Oliver wore a hat and shirt with the Union's logo. (APP058; JA0456, 0615.) Both the Union and the Company challenged ballots cast during the election. The Union challenged the ballots of two employees: Todd Rainey, alleging that he was a statutory supervisory; and Ralea Rainey (Todd Rainey's wife), alleging that she was a clerical employee. The Company challenged the ballot of Barrett Oliver on the grounds that he was statutory supervisor. In addition, the Company lodged several objections to the conduct of the election, arguing that the participation of Oliver and others had irremediably "tainted" the election results. When the unchallenged ballots were counted, the tally was 8 votes for the Union and 7 votes against. (APP001-3; JA0012.) The challenged ballots were therefore determinative.

After a hearing taking evidence on the challenges and objections, a Hearing Officer appointed by the Regional Director issued a decision sustaining the challenge to Ralea Rainey, rejecting the challenges to Oliver and Todd Rainey, and dismissing the Company's objections to the election's conduct. The Company filed a request for review of the Hearing Officer's decision with the Board. On April 3, 2012, the Board (Chairman Pearce and Members Flynn and Block) adopted the Hearing Officer's decision, with certain modifications, and ordered

that the Regional Director open and count the ballots of Oliver and Todd Rainey. (APP065-66 & n.1.)

When the challenged ballots were opened, the final vote tally was 9 votes for the Union and 8 votes against representation. (JA0395.) Pursuant to the Board's direction, the Regional Director certified the Union as the bargaining unit's exclusive bargaining representative on April 19, 2012. (APP068; JA0396.)

**B. The Unfair Labor Practice Proceeding**

After being certified, the Union requested that the Company bargain and provide the Union with certain information. The Company refused, and the Union filed a charge with the Board. (APP067-68; JA0416-30)

The Acting General Counsel issued an unfair-labor-practice complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and provide it with information relevant and necessary to its collective-bargaining duties. (APP067; JA0398-402.) In its answer, the Company admitted its refusal to bargain and provide information but contended that the Board had improperly certified the Union. (APP067; JA0403-09.)

The Acting General Counsel subsequently filed a motion for summary judgment, and the Board issued an order transferring the proceeding to itself and requesting that the Company show cause why the motion should not be granted. (APP067; JA0410-34.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On August 15, 2012, the Board (Chairman Pearce and Members Hayes and Block) issued a Decision and Order granting the Acting General Counsel's motion for summary judgment. (APP068.) The Board concluded that all issues pertaining to the validity of the Union's certification had been, or could have been, litigated in the representation case proceeding and thus could not be relitigated in the unfair labor practice proceeding. (APP067.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and provide it with the requested information. (APP068.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (APP068.) Affirmatively, the Board's Order requires the Company to bargain with the Union upon request and to embody any understanding that is reached in a signed agreement; to furnish the Union with the information it requested; and to post an appropriate notice in hard copy and electronically if the Company customarily communicates with its employees in that manner. (APP068-69.)

### **SUMMARY OF ARGUMENT**

1. The Company contends on the basis of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the President's recess appointments to the Board in

January 2012 were invalid, and that the Board therefore lacked a quorum when it issued its order. *Noel Canning* is an outlier decision, and conflicts with the decisions of three other courts, two sitting *en banc*. Indeed, the claims approved in *Noel Canning* are wrong as a matter of constitutional text, history, and purpose. They conflict with the conclusions of every other court of appeals to address such challenges. And they would throw out nearly two centuries of long-accepted Executive Branch practice.

2. The Board's Order against the Company should be enforced, as the Company has failed to show that the Board improperly certified the Union. The Company bears the burden of proving the Board's certification improper, and substantial evidence supports the Board's findings that the Company failed to carry that burden.

First, the Company did not meet its burden of showing that Oliver was a statutory supervisor whose vote was incorrectly included in the election results. The Act requires that supervisors exercise "independent judgment" when engaging in the supervisory activities listed in Section 2(11) of the Act. But, as the Board correctly found, the evidence did not show that Oliver exercised "independent judgment" when putatively "assign[ing]" work or "responsibly [] direct[ing]" the employees on his shift. Oliver only "assign[ed]" work when needed to cover for a late or absent employee, and the record either left unexplained why and how Oliver

selected the substitute or indicated that he selected the first available and trained employee to fill in. In the latter instance, his assignment of tasks was therefore limited and routine and did not require “form[ing] an opinion or evaluation by discerning and comparing data,”<sup>8</sup> as required by the Act. The Company likewise failed to show that Oliver exercised “independent judgment” when “responsibly [] direct[ing]” his coworkers. The incidents identified by the Company show Oliver acting firmly under the control of others. The Company has not met its burden of proving Oliver’s “independent” judgment.

Second, the Company failed to carry its burden of showing objectionable conduct by Oliver that materially affected the results of the representation election. The Company premises its objections upon Oliver’s status as a statutory supervisor or person “closely associated with management,” but he was neither. Oliver was not a supervisor for the reasons discussed above; furthermore, substantial evidence supports the Board’s finding that Oliver was not “closely associated with management” since he did not attend management meetings, speak on behalf of management, or promise employees benefits on behalf of management.

In closing, the Company claims the Board denied it due process, alleging that the Board rejected the Company’s arguments without reviewing the record. The Company failed to present this claim to the Board; consequently, this Court

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<sup>8</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

lacks jurisdiction to consider it. In any event, the allegation is completely unsupported and contradicts the Board's explicit assertion that it reviewed the record. The "presumption of regularity" accorded agency processes therefore disposes of this claim.

### STANDARD OF REVIEW

This Court defers to the Board's interpretations of the terms listed in Section 2(11) "unless they are irrational or inconsistent with the Act."<sup>9</sup> A specific determination of supervisory status by the Board also receives deference, because "it rests, at least in part, on a factual finding."<sup>10</sup> Therefore, "the Board's determination regarding the supervisory status of an employee will not be overturned as long as substantial evidence exists to support the Board's finding."<sup>11</sup> "The substantial evidence test 'requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree that *could* satisfy the reasonable fact finder.'"<sup>12</sup>

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<sup>9</sup> *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012) (quoting *Loparex LLC v. NLRB*, 591 F.3d 540, 545 (7th Cir. 2009)).

<sup>10</sup> *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 593 (7th Cir. 2012); accord *KSM Indus.*, 682 F.3d at 543 (citing *Loparex*, 591 F.3d at 545).

<sup>11</sup> *NLRB v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977) (citation omitted).

<sup>12</sup> *Rochelle Waste*, 673 F.3d at 592 (emphasis in original); see also *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently,

Board-run representation elections are presumed valid.<sup>13</sup> Consequently, a party objecting to the conduct of an election “has the formidable burden of demonstrating that the election is invalid.”<sup>14</sup> This Court “defer[s] to the Board’s reasonable selection of rules and policies to govern the election,” and, like supervisory status determinations, “will uphold the application of those rules if substantial evidence supported the Board’s decision.”<sup>15</sup>

## ARGUMENT

### I. THE COMPANY’S RECESS APPOINTMENT CHALLENGES LACK MERIT

The Company argues that the President’s recess appointments to the Board, announced on January 4, 2012, were unlawful, relying on a recent decision of the D.C. Circuit, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *Noel Canning* held the appointments unconstitutional on two alternative theories (1) that they were made during an *intrasession* recess, and thus outside the scope of the

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[the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board’s conclusion.”); *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir. 2002).

<sup>13</sup> *NLRB v. WFMT, Div. of Chi. Educ. Television Ass’n*, 997 F.2d 269, 274 (7th Cir. 1993).

<sup>14</sup> *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005) (citing *WFMT*, 997 F.2d at 274); accord *NLRB v. Chi. Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991).

<sup>15</sup> *Chi. Tribune*, 943 F.2d at 794.

Recess Appointments Clause, and (2) that they improperly filled vacancies that first arose before the recess in question.<sup>16</sup> This Court should reject the Company's challenges based on *Noel Canning*, and instead follow the decisions of the three other courts of appeals to consider these issues.<sup>17</sup>

**A. The President's Recess Appointment Authority Is Not Confined to Intersession Recesses**

The Company urges that the President may make recess appointments only during recesses that occur between enumerated sessions of the Senate, commonly known as *intersession* recesses. In common parlance, intersession recesses occur

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<sup>16</sup> The Board has determined, in consultation with the Solicitor General, to petition the Supreme Court for a writ of *certiorari* in *Noel Canning*. That petition is due April 25, 2013.

<sup>17</sup> We do not understand the Company to be urging reversal of the Board decision on any ground not addressed by *Noel Canning*. See Br. 23 (“Here, as in *Noel Canning*, the Court should find the Board’s Order void *ab initio* because the Board lacked the proper quorum[.]”) Although the Company describes *Noel Canning* as holding that “the Senate was not in Recess” because “it was operating by unanimous consent agreement to hold *pro forma* sessions every three business days” (Br. 23), the D.C. Circuit never addressed that claim. See 499 F.3d at 500. Accordingly, we do not address this claim here.

Moreover, although the Company describes its challenges as going to this Court’s subject matter jurisdiction (Br. 24), the Supreme Court has repeatedly held that challenges to the constitutionality of appointments are “nonjurisdictional.” See *Freytag v. CIR*, 501 U.S. 868, 878-879 (1991); see also *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (“[N]or is the validity of *qui tam* suits under [the Appointments Clause] a jurisdictional issue that we must resolve here.”); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (district court erred in treating an alleged defect in the appointment of an agency examiner as a jurisdictional question that could be raised for the first time on judicial review).

when the Senate uses a specific type of adjournment known as an adjournment *sine die*, the long-accepted parliamentary mechanism for terminating a legislative session. See Robert, ROBERT'S RULES OF ORDER 148, 155 (1876) (legislative sessions terminate at the time the legislature adjourns "*sine die*"—literally "without [a] day" specified for reconvening).

When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session, and the resulting recess is commonly referred to as an *intrasession* one. In the Company's view, the President is powerless to make recess appointments during intrasession recesses, even though such recesses are today far more common, and often longer, than intersession recesses. See Congressional Directory for the 112th Congress 529-38 (2011) (hereinafter "Congressional Directory"). Although this argument was recently accepted in *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).

The Company'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, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The Noel Canning Decision and Recess Appointments Made From 1981-2013*, at 22-28 (2013).

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 such 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 such appointments.<sup>18</sup> The Company nevertheless urges that every one of these appointments was unconstitutional. This Court should reject that contention. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

1. The Company’s argument founders at the outset on the text of the Recess Appointments Clause, because that text “does not differentiate between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. The plain meaning of the term “recess,” both at the Framing and today, means a “period of cessation

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<sup>18</sup> *See, e.g.*, 41 Op. Att’y Gen. 463, 468 (1960); 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 Appointment Clause, and interpreting the Pay Act in a consistent manner).

from usual work.” 13 Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from the 17th and 18th centuries); *see also* II Webster, An American Dictionary of the English Language 51 (1828) (defining “recess” as a “[r]emission or suspension of business or procedure”); 2 Samuel Johnson, Dictionary of the English Language 1650 (1755) (same); *Evans*, 387 F.3d at 1224-25. 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 its “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 (“They [the House of Commons] humbly desire to know the Time of the Recess of this Parliament, and of the Access again, as they may accordingly depart and meet

again at the same Time as their Lordships shall.” (citing 3 H.L. Jour. 61 (Mar. 22, 1621)); 3 H.L. Jour. 74 (Mar. 27, 1621) (adjourning until April 17).

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.<sup>19</sup> And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”<sup>20</sup>

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

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<sup>19</sup> *See* 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 J. CONTINENTAL CONG. 1774-1789, 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.

<sup>20</sup> *See, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York “during the recess” due to a broken carriage), *reprinted in* 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76; 3 Farrand, *supra*, at 191 (recounting a 1787 speech by Luther Martin in which he discussed matters that occurred “during the recess” of the Convention); *see also* 2 Farrand, *supra*, at 128.

*sine die* adjournment or its equivalent and that were therefore intrasession recesses in common parlance.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> The absence of objection is telling, for the

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<sup>21</sup> See, e.g., 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (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 THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (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, § 9; Vt. Const. of 1777, fch. II, § VII.

<sup>22</sup> 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

<sup>23</sup> See 8 Annals of Cong. 2197 (Dec. 19, 1798) (noting that Franklin Davenport, “appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature \* \* \* took his seat in the Senate”); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess between November 8, 1798 and January 16, 1799).

Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See generally* Butler & Wolf, *United States Senate Election, Expulsion and Censure Cases: 1793-1990* (1995).

Furthermore, the Executive Branch and the Senate have long employed a common functional definition of “the Recess of the Senate,” a definition that is equally applicable to intersession and intrasession recesses. *Compare* 33 Op. Att’y Gen. at 21-22, 25 (1921 opinion noting that the “essential inquiry” looks to whether the adjournment is “of such duration that the members of the Senate owe no duty of attendance;” whether the Senate’s “chamber [is] empty;” and whether the Senate is “absent so that it can not receive communications from the President or participate as a body in making appointments”), *with* S. Rep. No. 58-4389, at 2 (1905) (Senate Judiciary Committee report looking to similar factors).<sup>24</sup>

This interpretation best serves the purpose of the Recess Appointments Clause, which is to ensure that the President may fill vacant offices when the Senate is unavailable to offer advice and consent on nominations, while also freeing the Senate from having “to be continually in session for the appointment of officers.” *The Federalist* No. 67, at 410 (Clinton Rossiter ed., 1961) (Alexander

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<sup>24</sup> The Senate’s modern parliamentary precedents continue to cite the 1905 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).

Hamilton).<sup>25</sup> 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.

By contrast, the Company’s position 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 adjournment to a date certain. For example, the 82nd Congress’s second session ended on July 7 when Congress adjourned *sine die*, and the President was able to make appointments from then until January 3, when the next session of Congress began pursuant to the 20th

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<sup>25</sup> *See also* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (ELLIOT’S DEBATES) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted). The Clause also enables the President to meet his continuous constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3; *see also* 4 ELLIOT’S DEBATES 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments \* \* \* can be vested nowhere but in the executive”).

Amendment. 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 equally long, but it would have constituted an intrasession recess, during which the President would have been powerless to make recess appointments under the Company's theory. 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); *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.<sup>26</sup> In any event, the Supreme Court has held “that a practice of at least *twenty* years duration on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, 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 (emphasis added and internal quotations marks and citation omitted). The practice of intrasession recess appointments stretches back at least *ninety* years, and is likewise entitled to “great regard.”

2. *Noel Canning* failed to take proper account of any of the above points, and instead employed its own 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 it “suggests specificity.” 705 F.3d at 500 (emphasis added). But as the *en banc*

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<sup>26</sup> Moreover, *Noel Canning* misjudged the rarity of early intrasession recess appointments. It claimed that “Presidents made only three documented intrasession recess appointments prior to 1947.” 705 F.3d at 502. That count is well short of the mark. *See* Hogue, *Intrasession Recess Appointments*, *supra*, at 3 (identifying 25 intrasession recess appointments before 1947).

Eleventh Circuit explained, 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 (citing dictionary usages). 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 conduct business, rather than a *specific* one.<sup>27</sup>

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 Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days “during *the Session* of Congress.” Art. I, § 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to “the Session” cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President “in *the Absence* of the Vice President,” Art. I, § 3, cl. 5

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<sup>27</sup> Indeed, it is apparent that even the *Noel Canning* court could not have meant to use the definition of “the” on which it purported to rely. *See Noel Canning*, 705 F.3d at 500 (“‘the’ [is] an ‘article noting a *particular* thing’” (quoting Johnson, *supra* at 2041)). *Noel Canning* did not read “the Recess of the Senate” as referring to a particular recess in the same way that “the pen on the table” refers to a particular pen. Instead, it read “the Recess” as referring generically to the *class* of all intersession recesses. Once that Rubicon is crossed, “the” provides no textual basis for drawing a constitutional line between a restrictive class of recesses limited to intersession ones, and a broader class that includes intrasession ones as well.

(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 pp. 19-21, supra.*

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 is constitutionally required to have at least two enumerated sessions per Congress, *see Amend. XX*, and in the 18th and 19th Centuries, the Senate regularly had three or four enumerated sessions. *See generally* Congressional Directory, *supra*, at 522-26. Thus, the Senate regularly had at least two intersession “Recesses” per Congress.

*Noel Canning* also urged that the structure of the Clause supported its conclusion 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 that the Framers anticipated that the recess appointment power could be invoked only between enumerated congressional sessions. *Id.* (citing Federalist No. 67). 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 the 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.”).

Nor is there anything peculiar about the result that an intrasession recess appointee’s term lasts the remainder of the current session and terminates at the end of the next session. An intrasession recess appointee may take office anytime during a session, including near the very end of one. Indeed, some intrasession recesses have extended almost to the end of the enumerated session itself. *See, e.g., Congressional Directory, supra*, at 528, 533, 536. In those situations, the Senate may not have an opportunity before the end of its current session to consider nominees appointed during an intrasession recess. Thus, it is perfectly sensible to have the end of the *next* session serve as a uniform terminal date for recess appointees, as it ensures that the Senate has a full opportunity to consider nominees regardless of when they receive their appointments.

Moreover, under the original schedule for legislative sessions prior to the Twentieth Amendment, *intersession* recess appointments could last a significant amount of time. For example, on April 18, 1887, President Grover Cleveland

recess appointed William Allen to serve as United States district judge in the Southern District of Illinois.<sup>28</sup> Had he not been confirmed by the Senate, Allen’s temporary commission would have lasted until October 20, 1888, at the end of the Senate’s next session—a span of 552 days. *See Congressional Directory*, *supra*, at 526. And that temporary commission would have continued even longer had the Senate’s session run until the start of the next session in December 1888. *Id.*

Looking at other parts of 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 to the extent that these terms were distinguished from one another in the Constitution, the distinction was not the one that *Noel Canning* perceived. 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). *Compare, 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”) *with* Art. II, § 2, cl. 3 (“[t]he President shall have Power to fill up all Vacancies that may happen during the

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<sup>28</sup> *See* Federal Judicial Center, *Biographical Directory of Federal Judges*, *William Joshua Allen*, at <http://www.fjc.gov/servlet/nGetInfo?jid=29>.

Recess of the Senate”).<sup>29</sup> 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. 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.” 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, *supra* (expressing regret that he had been unable to come to New York “during the adjournment” because a broken carriage had impaired his travel “during the recess”).

In any event, 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

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<sup>29</sup> 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* Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, at <http://lawninguistics.com/2013/02/19/the-recess-appointments-clause-part-1/>.

(recognizing that breaks of less than three days are still “adjourn[ments]”), but the Executive has long understood that such short breaks that do not genuinely render the Senate unavailable to provide advice and consent and do not trigger the President’s authority under the Recess Appointments Clause. 33 Op. Att’y Gen. at 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 id.* 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 clause was interpreted to not apply to intrasession recesses. *Id.* 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 id.* That analysis is no answer to the weight of historical evidence showing that the Framers would have naturally understood “the Recess of the Senate” to encompass inter- and intrasession recesses, and the “great regard” owed to Presidential practice, acquiesced in by the Senate, spanning at least ninety years. *See The Pocket Veto Case*, 279 U.S. at 690.

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, and they have a strong incentive to do so, because recess appointments are only temporary.

**B. The President May Fill All Vacancies During a Recess, Not Just Those Vacancies That Arise During that Recess**

The Company also asserts that the President lacked the authority to make the January 2012 recess appointments because they did not arise during a recess. The 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, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). *Noel Canning*'s contrary conclusion 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 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).<sup>30</sup> 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

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<sup>30</sup> *See also* Hartnett, *Recess Appointment of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 381-84 (2005) (giving examples of events that “happen” over an extended period).

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 President Monroe, 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 proposed by the Company and 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 a statute enacted in April 1792.<sup>31</sup> Under *Noel Canning's* interpretation,

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<sup>31</sup> 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 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 that office, and even if he had been, it would have also been during the same recess in which 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).

the vacancy did not “happen” during the recess because it arose when the statute was first passed, 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.<sup>32</sup> President Washington’s immediate successor, John Adams, expressed the same understanding as the government does today<sup>33</sup> (as did apparently the fourth President, James Madison, and possibly also the third, Thomas Jefferson<sup>34</sup>). And President Abraham Lincoln adopted the same view when he recess appointed David Davis to the Supreme Court on October 17, 1862, to a seat that had been vacated by his predecessor on April 30, 1861.<sup>35</sup> See 10 Op. Att’y Gen. 356 (1862) (advising Lincoln that he could make this

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<sup>32</sup> 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).

<sup>33</sup> See Letter from John Adams to James McHenry (April 16, 1799), *reprinted in* 8 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* (“ADAMS WORKS”) 632-33; 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.

<sup>34</sup> Hartnett, *supra*, at 391-401.

<sup>35</sup> Federal Judicial Center, *Biographical Directory of Federal Judges, David Davis*, at <http://www.fjc.gov/servlet/nGetInfo?jid=573>; Federal Judicial Center, *Biographical Directory of Federal Judges, John Archibald Campbell*, at <http://www.fjc.gov/servlet/nGetInfo?jid=361>.

appointment, on the ground that the question had been “settled in favor of the power, as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate”).

The government’s long-settled interpretation is also more consistent with the purpose of the Recess Appointment 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, the slowness of long-distance communication in the 18th Century meant that 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. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations 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. The Company’s position, by contrast, would make the President’s ability to fill offices turn on the fortuity of when the previous holder left office. But “[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 must be filled

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

2. The Company’s position also creates serious textual difficulties. If, as the Company 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, the Company’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.”

*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, and it is not clear that any President ever found the advice wholly persuasive. 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.<sup>36</sup>

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<sup>36</sup> 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 order, because under the facts found by *Noel Canning* the appointment of

## II. THE COMPANY VIOLATED SECTION 8(a)(5) and (1) OF THE ACT BY REFUSING TO BARGAIN WITH AND PROVIDE RELEVANT INFORMATION TO THE UNION

Section 8(a)(5) of the Act<sup>37</sup> prohibits an employer from refusing to bargain collectively with the representative of its employees; it also obligates an employer to provide its employees' representative with information relevant and necessary to collective-bargaining activities.<sup>38</sup> Here, the Company admittedly (Br. 17) refused

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the only recess appointee on the panel that issued the challenged order—Sharon Block—met that purported requirement. The other two panel members, Brian Hayes and Mark Pearce, were Senate-confirmed members of the Board.

Member Block's seat was previously held by Craig Becker. *Noel Canning* understood Becker's recess appointment to have terminated pursuant to the Recess Appointments Clause "at the end" of the Senate's session—at noon on January 3, 2012. *See* 705 F.3d at 512. *Noel Canning* nevertheless appears to have erroneously regarded Becker's appointment as having ended, *during* the Senate's earlier session. *Id.* at 513. That view cannot be squared with the Recess Appointments Clause's provision regarding the termination date of appointments. If Becker occupied the position until the end of the Senate's session, the vacancy Block filled could not have arisen in that same session. By definition, the vacancy must have arisen *after* the earlier recess appointment ended at the end of the session—*i.e.*, during the recess. The appointment of Block on January 4 was thus made during that same period in which the vacancy she filled had arisen.

<sup>37</sup> 29 U.S.C. § 158(a)(5) ("It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .").

<sup>38</sup> *See NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1330 (7th Cir. 1991) ("The employer's duty to bargain requires that it 'furnish all requested, relevant information 'that is necessary to the union in order for it to fulfill its obligation as representative of bargaining unit employees.'") (quoting *Mary Thompson Hosp. v. NLRB*, 943 F.2d 741, 745 (7th Cir. 1991)).

to bargain and to provide information so that it could contest the validity of the Union's certification as bargaining representative.

The Company's challenge is meritless. The Board correctly certified the Union, and, as shown below, substantial evidence supports the Board's subsidiary findings that Oliver was not a statutory supervisor and that no objectionable conduct occurred during the election. Thus, the Company's refusal to bargain and provide information violated Section 8(a)(5) and (1) of the Act.<sup>39</sup>

**A. The Company Failed to Carry Its Burden of Demonstrating that Oliver Was a Statutory Supervisor Excluded from the Act's Protection**

**1. Applicable Principles**

The Act excludes from its protection "any individual employed as a supervisor."<sup>40</sup> In turn, the Act defines the term "supervisor" as:

[a]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, 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.<sup>41</sup>

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<sup>39</sup> A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989).

<sup>40</sup> 29 U.S.C. § 152(3).

<sup>41</sup> 29 U.S.C. § 152(11).

In *NLRB v. Kentucky River Community Care, Inc.*, the Supreme Court glossed this section of the Act, stating 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.’”<sup>42</sup>

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees—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.”<sup>43</sup> “Many nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding’ of supervisory status under the Act.”<sup>44</sup>

Thus, “consistent with congressional intent, ‘the [B]oard has a duty to employees

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<sup>42</sup> 532 U.S. 706, 713 (2001) (citation omitted); *accord NLRB v. GranCare*, 170 F.3d 662, 665 (7th Cir. 1999) (en banc).

<sup>43</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)) (internal quotation marks omitted); *see also NLRB v. GranCare, Inc.*, 170 F.3d 662, 666 (7th Cir. 1999) (en banc) (“[I]t is important to keep in mind that Congress, in enacting § 2(11), sought to distinguish between true supervisors, those vested with ‘genuine management prerogatives,’ and other employees.”) (quoting *Bell Aerospace*, 416 U.S. at 267, 281).

<sup>44</sup> *Kentucky River*, 532 U.S. at 713 (citation omitted).

to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect.”<sup>45</sup>

By interpreting and elaborating upon the “independent judgment” required by Section 2(11), the Board has clarified the distinction between “genuine management prerogatives” and only “nominally supervisory functions.” In *Kentucky River*, the Supreme Court held that “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status.”<sup>46</sup> Thus, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.”<sup>47</sup>

The Board exercised that discretion and interpreted “independent judgment” in *Oakwood Healthcare, Inc.*,<sup>48</sup> and its two companion cases, *Croft Metals, Inc.*,<sup>49</sup>

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<sup>45</sup> *GranCare*, 170 F.3d at 666 (quoting *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970)); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (the Board “must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”).

<sup>46</sup> *Kentucky River*, 532 U.S. at 713 (emphasis in original).

<sup>47</sup> *Id.* (emphasis in original); see also *Grancare*, 170 F.3d at 666 (according *Chevron* deference to Board’s interpretation of “independent judgment” requirement of Section 2(11)).

<sup>48</sup> 348 NLRB 686 (2006); see also *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009) (“We thus owe *Chevron* deference to the Board’s decision in *Oakwood Healthcare.*”).

and *Golden Crest Healthcare Center*.<sup>50</sup> “[A] judgment is not independent,” the Board noted, “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.”<sup>51</sup> “[T]o exercise ‘independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.’”<sup>52</sup> “Independent judgment” exhibits “a degree of discretion that rises above the ‘routine or clerical.’”<sup>53</sup>

The burden of proving supervisory status—including the element of “independent judgment”—rests with the party asserting it.<sup>54</sup> It is not enough to show the mere ability or authority to exercise independent judgment; the party asserting supervisory status must support its claim with specific examples of the

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<sup>49</sup> 348 NLRB 717 (2006).

<sup>50</sup> 348 NLRB 727 (2006).

<sup>51</sup> *Oakwood*, 348 NLRB at 693.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; accord *Loparex*, 591 F.3d at 552 (“Meeker’s method of assignment was routine and clerical in nature; therefore, the Board acted within its authority when it concluded that [he] did not exercise the requisite independent judgment to qualify as [a] supervisor[] under the Act.”).

<sup>54</sup> *Kentucky River*, 532 U.S. at 711-12.

actual exercise of independent judgment.<sup>55</sup> Conclusory or generalized testimony is insufficient.<sup>56</sup> Similarly, mere job descriptions or titles do not determine supervisory status.<sup>57</sup>

It is uncontested that in his position as Crew Leader, Oliver never had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust the grievances of other employees or to effectively recommend any of these actions.<sup>58</sup> (APP008-9.) Therefore, the Company rests its claim that Oliver is a supervisor upon two statutory indicia, arguing that Oliver “assign[ed]” employees and “responsibly [] direct[ed]” them.

As shown below, the Board correctly concluded that the Company failed to show that Oliver exercised “independent judgment” in either “assign[ing]” or

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<sup>55</sup> *Loparex*, 591 F.3d at 551-52 (“While it is possible that a statutory supervisor need only have the authority to exercise one of the supervisory powers enumerated in Section 2(11), this does not suffice for the exercise of independent judgment.”) (citing *NLRB v. Don’s Olney Foods, Inc.*, 870 F.2d 1279, 1283-84 (7th Cir. 1989)).

<sup>56</sup> *See Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999) (“Statements by management purporting to confer authority do not alone suffice.”); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”).

<sup>57</sup> *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998); *accord T. K. Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995) (“The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification.”).

<sup>58</sup> *See* 29 U.S.C. § 152(11).

“responsibly [] direct[ing]” his coworkers. (APP065-66 & n.1.) Attempting to overcome this finding, the Company cites to (1) Oliver’s role in the onetime closure of the Oakdale facility (Br. 44), (2) his communication of assignments to employees at the beginning of their shift (Br. 44), (3) his occasional and temporary rotation of employees among tasks (Br. 44-45), and (4) his apparent authorization of a shipment of below-grade sand (Br. 45-48). The Board concluded that the Company did not demonstrate that any of these activities involved the exercise of “independent judgment,” either because Oliver was acting pursuant to direction from others, Oliver was making decisions in an automatic and mechanical way, or the Company simply failed to present any evidence concerning Oliver’s decisionmaking process. (APP031-44, 065 n.1.) Substantial evidence supports that conclusion and the Board’s ultimate determination that Oliver was not a statutory supervisor.

**2. Substantial Evidence Supports the Board’s Finding That the Company Did Not Carry Its Burden of Proving That Oliver Exercised Independent Judgment in “Assigning” Employees**

In seeking to demonstrate that Oliver is a statutory supervisor, the Company argues that Oliver assigned employees while serving as Crew Leader for the PM-AM shift (Br. 38-48). The Board found that the Company did not carry its burden of proving assignment, since it failed to introduce evidence of independent judgment or its evidence indicated that Oliver designated tasks among the

employees on his shift in a limited and routine manner that did not reflect “independent judgment.” (APP038-39, 065 n.1.) Substantial evidence supports this conclusion.

As the Board explained in *Oakwood*, the term “assign” in Section 2(11) “refer[s] to 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.”<sup>59</sup> As with every statutory indicia, however, such “assign[ing]” does not confer supervisory status unless accompanied by the exercise of “independent judgment.”<sup>60</sup>

The Board correctly concluded that Oliver did not exercise “independent judgment” when putatively “assign[ing]” work. Without deciding whether Oliver’s designation of tasks amounted to “assign[ment]” under Section 2(11), the Board found that the Company had not presented evidence showing that Oliver’s method of designating work was more than “routine” or involved anything to be “discerned, evaluated, or compared”; therefore, it had failed to carry its burden of showing the exercise of independent judgment by Oliver. (APP032, 065 n.1.) The written work schedule, prepared by persons besides Oliver, dictated the assignment of significant duties among the employees on the PM-AM shift. (APP011-12.)

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<sup>59</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006).

<sup>60</sup> *See* 29 U.S.C. § 152(11); *Kentucky River*, 532 U.S. at 712-13; *Loparex*, 591 F.3d at 549.

This left Oliver with only reading those assignments aloud to employees and occasionally designating tasks “to fill a need because someone was absent, late, etc.” (APP037.)

Substantial evidence supports the Board’s finding that Oliver’s method of designating tasks to employees on his shift did not reflect “independent judgment.” (APP065 n.1.) When the occasion arose, Oliver reflexively assigned the first trained and available employee to an unmanned position, without attempting to match employees to the positions based on their relative skills or efficiency. For example, Oliver designated Ethan Kogutkiewicz—who “was standing right next to” Oliver—to fill in for an absent employee (Br. 45) when another employee working at the time “could have just as easily” performed the task. (APP016-17, 035; JA0922.) Similarly, when Oliver occasionally rotated temporary employees (such as Chuck Miller) between cleaning and taking sand samples (Br. 44), he did so because company policy prohibited those employees from performing the other tasks in the plant, which involved heavy machinery.<sup>61</sup> (APP032-33; JA0736-39.)

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<sup>61</sup> See, e.g., *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311, 321 (2d Cir. 1998) (no independent judgment where dispatchers’ “decisionmaking is directed and circumscribed by clearly established Company policy”); *Talmadge Park Inc.*, 351 NLRB 1241, 1248 (2007) (putative housekeeping supervisor exercised no independent judgment where her “actions are not discretionary but are controlled by the facility’s policy that the laundry must be fully staffed and/or [her superior’s] instructions”).

The Board reasonably concluded such routine designation of tasks did not exhibit the exercise of “independent judgment.” (APP033, 036.)<sup>62</sup>

The record evidence undermines the Company’s attempt to characterize Oliver’s responsibilities differently, either as more independent or more complex and evaluative in nature. When Oliver would “meet[] with employees and tell[] them what work needed to be done” (Br. 44), he merely repeated the assignments given to him by others, either in-person during the shift change-over or via the written work schedule; thus, Oliver was assigning work pursuant to “the verbal instructions of a higher authority”<sup>63</sup> and not exercising independent judgment. (APP011-12; JA0508-10, 0544-45.) Similarly, on the one occasion when Oliver told employees to shut down the facility (Br. 32-33, 44), he took that action only after seeking and receiving permission from Rainey (APP033; JA1025-26). As Employee Sandra Haskins testified:

**Haskins:** In order for us to be sent home, Barrett said that he had

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<sup>62</sup> See, e.g., *Loparex*, 591 F.3d at 551-52 (upholding Board’s determination that employee’s “method of assignment was routine and clerical” and therefore insufficient for purposes of Section 2(11)); *Alstyle Apparel*, 351 NLRB 1287, 1287, 1304 (2007) (finding no “independent judgment” exercised by shift leader where “assignments of employees to specific machines were dictated solely by machine availability and employee capability, the determination or guidelines for which rested elsewhere”).

<sup>63</sup> *Oakwood Healthcare*, 348 NLRB at 693; see also *id.* (“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.”) (emphasis added).

to call Mr. Rainey to get permission.

...

**Union Counsel:** And what did you hear Barrett Oliver say on the phone?

**Haskins:** He explained the situation at the time and what was going on, and said he felt that people should be sent home and he was calling to notify him.

(JA1025-26.)

The Company argues (Br. 33) that Haskins' testimony shows that Oliver called Rainey to "notify" him of the fait accompli that Oliver was shutting down the plant. This ignores her testimony that Oliver was calling Rainey "to get permission" to send employees home. The Board's conclusion that Oliver did not exercise independent judgment in closing the plant is therefore consistent with Haskins' testimony and furthermore dovetails with Oliver's own account that he sought and received permission from Rainey before sending employees home:

**Union Counsel:** What did you say to Mr. Rainey when you called him?

**Oliver:** . . . I asked if it was all right if we went ahead and went home, so that way they could finish it up in the morning. And he said, "Yeah, go ahead and go home and we will take care of it in the morning."

(JA1083.)

Oliver's responsibilities were therefore not materially similar to those of the warehouse supervisor in *NLRB v. Adam & Eve Cosmetics, Inc.*,<sup>64</sup> contrary to the Company's claims (Br. 43-44). There, the warehouse supervisor assigned employees to tasks on a fluid basis with apparently full discretion, deciding which items to move, how to move them, who was to drive the trucks, and in general "instruct[ing] the boys what [he] wanted them to do."<sup>65</sup> In contrast, Oliver's duties were routine and mechanical: Oliver passed along to his coworkers the assignments on the written schedule and only found an available coworker to fill in when an unexpected absence arose.

Oliver much more closely resembles the shift leader in *Loparex*, whose methods of assigning work this Court found lacking in the independent judgment required under the Act. When assigning work, the shift leader in *Loparex* used "three basic strategies: (1) making sure people rotated to different machines; (2) allowing a person to continue working on the same machine if a project took more than a day; and (3) random assignment."<sup>66</sup> As this Court held, none of these approaches exhibited independent judgment, since the shift leader "did not take into account the personal characteristics of his co-workers" or otherwise discern or

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<sup>64</sup> 567 F.2d 723 (7th Cir. 1977).

<sup>65</sup> *Id.* at 726.

<sup>66</sup> *Loparex*, 591 F.3d at 551.

compare data when making assignments.<sup>67</sup> The same is true of Oliver's methods of designating work, such as they were.

Finally, the Company's reliance upon the Board's decision in *Akal Security, Inc.*<sup>68</sup> (Br. 38-39, 44-45) is misplaced. The finding by the administrative law judge that the court security officer was a statutory supervisor has no precedential value because the respondent in that case did not except to, and the Board did not consider, that finding.<sup>69</sup> Moreover, the disputed supervisor in *Akal* worked in a dynamic federal courthouse setting, assigning duty posts, scheduling work shifts, and granting overtime and time off.<sup>70</sup> Oliver performed no such tasks, besides occasionally replacing absent coworkers with the first available person he saw.

The Company has therefore failed to present either evidence or case law that vitiates the Board's finding that the Company did not carry its burden of showing that Oliver "assign[s]" work with independent judgment within the meaning of Section 2(11).

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<sup>67</sup> *Id.*

<sup>68</sup> 354 NLRB No. 11 (2009), *reissued* 355 NLRB No. 106 (2010).

<sup>69</sup> *See Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997) ("It is a well-established practice of the Board to adopt an administrative law judge's findings to which no exceptions are filed. Findings adopted under such circumstances are not, however, considered precedent for any other case.") (citing *Dallas Times Herald*, 315 NLRB 700 (1994); *Anniston Yarn Mills*, 103 NLRB 1495 (1953)).

<sup>70</sup> *See* 354 NLRB No. 11, Slip Op. at 11-12.

### **3. Substantial Evidence Supports the Board’s Finding that the Company Did Not Carry its Burden of Proving that Oliver “Responsibly Directs” Employees**

The Company also argues (Br. 26-28, 41-48) that Oliver qualifies as a statutory supervisor because he “responsibly direct[ed]” employees. The Board rejected this argument, too, finding that the Company’s proffered examples of “responsibl[e] direct[ion]” did not reflect any exercise of “independent judgment” on Oliver’s part. Substantial evidence supports this finding.

In *Oakwood*, the Board clarified the burden that a party bears in proving “responsible direction” under the Act. To show “direction,” the party must prove that “the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.”<sup>71</sup> The party must also show that such direction is “responsible” – *i.e.*, that “the employee must be accountable for the coworker's performance.”<sup>72</sup> Finally, the party must demonstrate that the putative acts of responsible direction involve the exercise of “independent judgment.”<sup>73</sup>

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<sup>71</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006); *see also Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 594-95 (7th Cir. 2012) (discussing *Loparex*, 591 F.3d at 549-51).

<sup>72</sup> *Rochelle Waste Disposal*, 673 F.3d at 594 (citing *Loparex*, 591 F.3d at 549); *accord Oakwood Healthcare*, 348 NLRB at 691–92.

<sup>73</sup> *See* 29 U.S.C. § 152(11); *Kentucky River*, 532 U.S. at 712-13; *Loparex*, 591 F.3d at 549.

Once again, the Board concluded that the Company had failed to carry its burden of showing that Oliver exercised “independent judgment” in carrying out his putative authority to “responsibly [] direct.” The Board was unconvinced by the Company’s emphasis upon Oliver’s alleged decision to ship sand below the standard grade of ninety percent. The record did not reveal how Oliver arrived at the decision to ship the sand or whether Oliver had secured permission beforehand from the plant manager or the head quality control officer. (APP041-42; JA0642-44, 0675.) The Company conspicuously failed to question Oliver concerning the incident. (APP041 n.11, 042.) Thus, the Board found that the Company had failed to carry its burden of demonstrating the exercise of independent judgment on Oliver’s part (APP042) – a finding supported by substantial evidence.

In attacking this finding by the Board, the Company proffers three incidents when Oliver allegedly engaged in responsible direction: (1) when hot sand spilled in the Dry Plant (Br. 33; JA1169-71), (2) when Oliver sent employees home (Br. 44; JA1025-26, 1081-83), and (3) when Oliver authorized the shipment of below-grade sand (Br. 45-46; JA0642-44, 1030-34). None of these incidents evince independent judgment on Oliver’s part, much less render the Board’s conclusion unreasonable when considered on the record as a whole.

First, the Company failed to argue or even mention (JA0245-65, 0266-323) to the Board the sand spillage incident. Therefore, Section 10(e) of the Act

jurisdictionally bars this Court from considering the claim that this evidence demonstrates responsible direction.<sup>74</sup> In any event, the Company has failed to show how the sand spillage incident reveals the exercise of “independent judgment” on Oliver’s part. While Oliver was serving as Crew Leader, a malfunctioning auger started to spill hot sand around the Dry Plant, and the employees on Oliver’s shift stopped their respective work to help clean up. (JA1169-71.) The record is devoid of evidence concerning the information or factors, if any, that Oliver “discern[ed] and compar[ed]” in this situation.<sup>75</sup> Furthermore, the record indicates that employees would automatically stop their work to address any problem that halted production. (APP032; JA0703, 1075, 1115.)<sup>76</sup> With regard to the second incident, Oliver closed the plant after a

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<sup>74</sup> See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *NLRB v. Howard Immel, Inc.*, 102 F.3d 948, 951 (7th Cir. 1996).

<sup>75</sup> See, e.g., *Alstyle Apparel*, 351 NLRB 1287, 1305 (2007) (“[L]ittle evidence was adduced of factors the shift leaders might have considered in directing employees, preventing a conclusion that the degree of discretion involved rose above the routine or clerical.”); *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (“The Employer adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making production decisions and directing employees. Thus, we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical.”).

<sup>76</sup> See JA0703 (“Q: And what would happen if something was broke? A: Well we’d fix it right away.”) (testimony of employee Bob St. Clair); JA1075, 1115 (“Q: What were your tasks? A: . . . [Y]ou know, if anything broke down, we were all over there fixing it. . . . [F]ix the auger, that was always a group effort if something broke.”) (testimony of employee Barrett Oliver).

mechanical breakdown only after seeking and securing Rainey's permission. Therefore, as discussed above,<sup>77</sup> Oliver's actions were not "independent" because he sought approval from another.<sup>78</sup> Finally, concerning Oliver's alleged determination to ship below-grade sand, the Company points to no evidence concerning how Oliver made that decision and presents no argument to rebut the Board's sound conclusion that the Company therefore failed to carry its burden of proving "independent judgment." (APP042.)

As explained above, when deciding that Oliver did not "responsibly [] direct" the employees on his shift, the Board limited itself to finding that the Company did not carry its burden of showing the exercise of "independent judgment" by Oliver. (APP065 n.1.) Consequently, the Company's lengthy digression concerning the adverse consequences that Oliver might hypothetically suffer on account of those employees' performance (Br. 34-38) is irrelevant.

Substantial evidence thus supports the finding that the Company did not carry its burden of presenting evidence that Oliver exercised "independent judgment" in "responsibly direct[ing]" his coworkers. (APP041.) The Company has failed to undermine that support in any way.

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<sup>77</sup> See pp. 49-50, *supra*.

<sup>78</sup> *Oakwood*, 348 NLRB at 693 ("[T]o exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others.").

#### **4. The Board Did Not Need To Consider the Alleged Secondary Indicia of Oliver’s Supervisory Authority**

The Company accuses the Board of having “improperly ignored” (Br. 39-41) secondary indicia of Oliver’s supervisory status. The Board has long held that secondary indicia are irrelevant to the analysis of supervisory status unless at least one of the primary indicia listed in Section 2(11) is present,<sup>79</sup> and reviewing courts have approved this approach.<sup>80</sup> The Board thus had no reason to consider the Company’s evidence of secondary indicia, having found that Oliver neither “assign[ed]” nor “responsibly [] direct[ed]” with independent judgment, as required by the Act.

#### **B. The Company Failed To Carry Its Burden of Demonstrating That Oliver’s Participation in the Election Impermissibly Interfered with Employees’ Free Choice**

In addition to challenging Oliver’s determinative ballot, the Company objects (Br. 49-64) to the election results on the grounds that Oliver’s pro-union conduct as a statutory supervisor or person “closely associated with management” tainted the election. Oliver was neither of these things, however; consequently, his

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<sup>79</sup> See *Int’l Transp. Serv., Inc.*, 344 NLRB 279, 285 (2005), *enf. denied on other grounds*, 449 F.3d 160 (D.C. Cir. 2006); *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001).

<sup>80</sup> See *E & L Transp. Co. v. NLRB*, 85 F.3d 1258, 1270 (7th Cir. 1996) (secondary indicia are “not determinative on their own” and are only relevant “where one of the enumerated indicia in § 152(11) is present”); *see also Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 315 (6th Cir. 2012) (same).

conduct did not violate any election standards. The Company's objections therefore amount to a daisy-chain of unobjectionable conduct that the Board correctly dismissed, and substantial evidence supports this conclusion.

Judicial review "of the Board's decision to certify a collective bargaining agent following an election is extremely limited."<sup>81</sup> "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."<sup>82</sup> Consequently, a "Board-run representation election is presumed valid,"<sup>83</sup> and "[t]he party challenging the election has the formidable burden of demonstrating that the election is invalid, and that substantial evidence does not support the Board's decision."<sup>84</sup> "To meet this burden, the objecting party must show that the unlawful acts occurred and 'that those acts

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<sup>81</sup> *NLRB v. Chi. Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991).

<sup>82</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 328 (1946).

<sup>83</sup> *NLRB v. WFMT, Div. of Chi. Educ. Television Ass'n*, 997 F.2d 269, 274 (7th Cir. 1993).

<sup>84</sup> *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005) (citing *WFMT*, 997 F.2d at 274; *Chicago Tribune*, 943 F.2d at 794).

interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.”<sup>85</sup>

The Company's objections to the election fail because they are founded upon the erroneous premise that Oliver was a supervisor or an employee “closely associated with management.” Under certain circumstances, participation in an election by a supervisor<sup>86</sup> or employee “closely associated with management”<sup>87</sup> can serve as a basis for overturning an election. But Oliver was not a statutory supervisor, as shown above.<sup>88</sup> Consequently, the Board was correct to dismiss (APP055-58, 065 n.1) the Company's arguments that Oliver wrongfully tainted the election results qua supervisor (Br. 54, 57-64).

The Board also rejected the Company's alternative argument that, even if not a supervisor, Oliver was “closely associated with management” (APP065 n.1).

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<sup>85</sup> *Chi. Tribune*, 943 F.2d at 794 (citing *NLRB v. Serv. Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988)).

<sup>86</sup> *See generally Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004); *see also NLRB v. Howard Johnson Motor Lodge*, 705 F.2d 932, 934 (7th Cir. 1983) (recognizing certain situations where supervisory participation could invalidate an election).

<sup>87</sup> *See, e.g., Mid-Continent Spring Co.*, 273 NLRB 884, 884 (1985) (“[T]he Board has held that the use of such [persons closely associated with management as] observers by an employer warrants setting aside the election since it is a fundamental deviation from the Board's established rules for the conduct of an election.”).

<sup>88</sup> *See pp. 41-57, supra.*

Accordingly, the Board rightly dismissed the Company's remaining objections based upon that claim. When the Company pressed this argument that Oliver was "closely associated with management" in its brief to the Board (JA0306-10), it relied primarily on the Board's decision in *B-P Custom Building Products, Inc.*<sup>89</sup> There, the Board attributed an employee's threats and other coercive statements made during a representation election to his employer because his coworkers understood him to be the employer's agent.<sup>90</sup> The Company complains (Br. 67) that the Board incorrectly stated that if the Company made an agency argument, that argument was only "implied" (APP065 n.1). The Company admits (Br. 53, 67), however, that neither "agency" nor "agent" was ever mentioned in the Company's brief to the hearing officer or the Board. Therefore the Board cannot be faulted for finding this argument merely "implied."<sup>91</sup> In any event, the Company's complaint is misplaced: in its Decision, the Board explicitly addressed and rejected the contention that Oliver was seen as an agent of management – as well as the contention that Oliver was "closely identified with management" – because, unlike the employee in *B-P Custom*, Oliver did not "attend[] management

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<sup>89</sup> 251 NLRB 1337 (1980).

<sup>90</sup> *Id.* at 1338.

<sup>91</sup> *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

meetings,” “promise[] employees benefits on behalf of the employer,” or “sp[ea]k on behalf of management at employee meetings.” (APP065 n.1.)

Substantial evidence supports that finding. The Company identifies no evidence that Oliver “attended management meetings” or “promised employees benefits on behalf of the employer.” And while Oliver did regularly announce to the PM-AM crew their assignments for the day (Br. 52), he was merely reading aloud the set written schedule prepared by others (APP011-12; JA0508-10, 1448-53), as his coworkers understood him to be doing (JA0669-71). As this Court has stated in a similar context, “[t]he test of agency in the union election context is stringent,”<sup>92</sup> and the Board reasonably has interpreted “speaking on behalf of management” to require more than Oliver’s rote recitation of the schedule to his coworkers.<sup>93</sup>

Given that Oliver was neither a statutory supervisor nor “closely associated with management,” the Board correctly found that Oliver’s conduct during the election was unobjectionable and therefore categorically insufficient to set aside the election results. For the purposes of its Decision, the Board assumed (without

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<sup>92</sup> *NLRB v. WFMT, a Div. of Chi. Educ. Television Ass’n*, 997 F.2d 269, 276 (7th Cir. 1993).

<sup>93</sup> *See, e.g., Juniper Indus. Inc.*, 311 NLRB 109, 110, 115 (1993) (finding that foreman was not “placed in the position of a conduit reflecting company policy,” despite the fact that foreman regularly communicated job assignments to employees and served as translator to Creole employees).

finding) that Oliver had solicited union cards, advocated on behalf of the union, worn a Union cap and t-shirt while serving as an election observer, and “secretly tape-recorded conversations with managers and other employees.” (APP055-58.) According to settled Board law, such conduct, if done by an employee, is not objectionable.<sup>94</sup> Because he was neither a supervisor nor person closely associated with management, the sum total of Oliver’s conduct was not wrongful,<sup>95</sup> and the Board correctly declined to consider the impact of that conduct upon the election results. (APP055-58.) This Court should therefore dismiss the Company’s election objections.

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<sup>94</sup> *NLRB v. Clinton Elec. Corp.*, 284 F.3d 731, 739 (7th Cir. 2002) (“Rights protected under the NLRA include the right of individual employees to solicit on behalf of a union-organizing campaign.”); *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 758 (D.C. Cir. 2000) (“[A]n employee’s repeated solicitations of a coworker to sign an authorization card were protected under the Act.”); *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 788 (7th Cir. 1988) (“[T]he mere display of partisan insignia by observers during an election, without more, does not warrant setting aside an election.”); *id.* (collecting cases).

The Board correctly noted that there exists no Board authority “holding that recording conversations in a context free of objectionable or unlawful conduct amounts to objectionable conduct.” (APP057.)

<sup>95</sup> *See Van Leer Containers*, 841 F.2d at 788 (“A party may not use a cumulative impact argument to transform a number of insubstantial objections to an election into a serious challenge.”).

**C. The Company's Claim That It Was Denied Due Process Is Meritless;  
As the Board's Decision States, the Board Considered the Record  
and the Company's Submissions**

The Company additionally contends (Br. 64-69) that the Board denied it due process in the underlying representation proceeding by failing to review the record evidence and its argument regarding Oliver's ostensible authority. The Court lacks jurisdiction to consider this argument. In any event, such unfounded allegations are insufficient to overcome the "presumption of regularity" accorded to the Board and its processes.

This Court lacks jurisdiction to consider this due process argument because the Company failed to present it to the Board. (JA0266-319.) After the Board issued its Decision and Direction ordering that Oliver's ballot be opened (APP065-66), the Company failed to file a motion for reconsideration with the Board or otherwise raise its due process claim.<sup>96</sup> As a result, the Board had no opportunity to correct its alleged failure to review the record evidence and the Company's submissions. Under Section 10(e) of the Act, this failure by the Company to present its due process argument to the Board deprives this Court of jurisdiction to consider it.<sup>97</sup>

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<sup>96</sup> 29 C.F.R. § 102.48(d)(1) & (2).

<sup>97</sup> See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); see also *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012) (concluding that Court lacked jurisdiction to hear issue that employer could

In any event, the Company has not overcome the presumption of regularity owed to the Board. A complainant faces a heightened evidentiary burden when alleging that the Board did not follow its established procedures and fulfill its adjudicatory function:

In light of the authority with which Congress has endowed the Board, and with due regard to the conscientiousness which we must attribute to another branch of the Government, we cannot reject its explicit avowal that it did take into account evidence which it should have considered unless an examination of the whole record puts its acceptance beyond reason.<sup>98</sup>

This “presumption of regularity” requires that courts presume that agency officials execute their adjudicatory responsibilities fairly absent “clear evidence to the contrary.”<sup>99</sup> Bare allegations that the Board did not review the record are clearly

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have raised but did not raise before Board on motion for reconsideration); *Lake Holiday Assocs. v. NLRB*, 930 F.2d 1231, 1238 (7th Cir. 1991) (refusing to consider due process argument that employer could have raised but did not raise during representation proceeding).

<sup>98</sup> *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947) (Frankfurter, J.); *see also, e.g., Ruan Transport Corp. v. NLRB*, 674 F.3d 672, 675 (7th Cir. 2012) (“In its order, the Board declared that it had reviewed the record, and this decision has a ‘presumption of regularity.’”) (quoting *NLRB v. Jasper Chair Co.*, 138 F.2d 756, 758 (7th Cir. 1943)).

<sup>99</sup> *U.S. v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). *See also Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (stating that the presumption of regularity “can be overcome, and further explication can be required of the decisionmaker, only upon a strong showing of bad faith or improper behavior”); *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967); *Jasper Chair*, 138 F.2d at 758; *see also Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001) (noting that “presumption of regularity supports the official

insufficient to establish a violation of due process.<sup>100</sup>

Here, the Company's allegations run headlong into the presumption of regularity. The Board's decision explicitly states that it reviewed both the record evidence and the submitted briefing: "Having reviewed the record in light of the exceptions and briefs, the Board adopts the hearing officer's findings and recommendations." (APP065 n.1.) This description by the Board of its internal processes is owed the presumption of regularity. Thus, as this Court recently did in *Ruan Transport Corp. v. NLRB*,<sup>101</sup> it should take at face value the Board's assertion that it reviewed the record unless the Company can present "clear evidence to the contrary."<sup>102</sup>

The Company presents no evidence – let alone "clear evidence" – to rebut the presumption of regularity. Strangely, the Company bases its claim of irregularity (Br. 67) on the alleged failure of the Board to consider whether Oliver

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acts of public officers in the absence of clear evidence to the contrary") (citing *Chem. Found.*, 272 U.S. at 14-15).

<sup>100</sup> See *KSM Indus.*, 682 F.3d at 545 ("It takes much more for us to intervene than a disappointed party's hunch that the Board gave a cursory review to its case."); *Jasper Chair*, 138 F.2d at 758 ("[W]here the Board declares that it has considered 'the entire record in the case,' it cannot be said that the Board did not consider the evidence.").

<sup>101</sup> 674 F.3d at 675.

<sup>102</sup> *Chem. Found. Inc.*, 272 U.S. at 14-15.

was “closely associated with management.” As discussed above (pp. 59-61), the Board specifically addressed that issue in its Decision (APP065 n.1) and examined and distinguished the precedent presented by the Company (JA0306-10) in support of its claim – *i.e.*, *B-P Custom*.<sup>103</sup> Besides *B-P Custom*, the Company has failed to identify to this Court any argument or precedent on this issue that the Board allegedly failed to consider.

Lastly, the Company fails to provide any details to support its vague claim that, even if the Court finds no due process violation, the Board’s factual findings are “inconsistent with the Record.” (Br. 69.) This “generalized assertion of error”<sup>104</sup> does not satisfy the Federal Rules of Appellate Procedure and is categorically insufficient to deny enforcement of the Board’s Order.<sup>105</sup>

In sum, the Company has cited no record evidence that contradicts the Board’s explicit assurance that it reviewed the record and the Company’s

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<sup>103</sup> Cf. *Certain-Teed Prods. Corp. v. NLRB*, 562 F.2d 500, 504 (7th Cir. 1977) (“We cannot conclude . . . that the issue raised by the company was not considered.”), *enforcing* 225 NLRB 971, 972 (1976) (“[We have] reviewed the relevant representation case documents and conclude that any assumption that the Board did not consider the specific issue is unwarranted despite the fact that the Hearing Officer and the Board may have overruled the objection in issue with less specificity than Respondent deemed necessary.”).

<sup>104</sup> *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001).

<sup>105</sup> See Fed. R. App. P. 28(a)(9)(A) (stating that appellant’s brief “must contain appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Anderson*, 241 F.3d at 545.

submissions in their entirety. Even if this Court had jurisdiction to consider this claim, the Company has failed to carry the burden of demonstrating any deprivation of due process.

## CONCLUSION

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

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March 2013  
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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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FTS INTERNATIONAL PROPPANTS,	)	
LLC, formerly known as	)	
PROPPANT SPECIALISTS, LLC	)	
Petitioner	)	
	)	
v.	)	Nos. 12-3322,
	)	12-3654
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
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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 16,004 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, D.C.  
this 22<sup>nd</sup> day of March 2013

## **RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS**

Relevant provisions of the United States Constitution are as follows:

### **Article I, Section 3, cl. 2**

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].

### **Article I, Section 3, cl. 5**

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

### **Article I, Section 5, cl. 4**

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

### **Article I, Section 7, cl. 2**

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten

Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

**Article II, Section 2, cl. 3**

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.

**Article II, Section 3**

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**Amendment XX, Section 2**

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Relevant provisions of the National Labor Relations Act and regulations of the National Labor Relations Board are as follows:

**Section 2(3) & (11) of the Act, 29 U.S.C. § 152(11):**

- (3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or

any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 161 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

- (11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, 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.

**Section 7 of the Act, 29 U.S.C. § 157:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

**Section 9(c) & (d) of the Act, 29 U.S.C. § 159(c) & (d):**

(c) Hearings on questions affecting commerce; rules and regulations

- (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--
- (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

- (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

- (2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.
- (3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.
- (4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

- (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

**Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (3):**

It shall be an unfair labor practice for an employer--

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

...

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 102.48(d)(1) & (2) of Title 29 of the Code of Federal Regulations, 29 C.F.R. § 102.48(d)(1) & (2):**

(d)

- (1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a

hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

- (2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

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

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FTS INTERNATIONAL PROPPANTS,	)	
LLC, formerly known as	)	
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v.	)	Nos. 12-3322,
	)	12-3654
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 22, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who are registered users:

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NATIONAL LABOR RELATIONS BOARD  
1099 14th Street, N.W.  
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Dated at Washington, D.C.  
this 22<sup>nd</sup> day of March 2013