

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

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**NATIONAL NURSES ORGANIZING COMMITTEE-TEXAS/  
NATIONAL NURSES UNITED (BAY AREA HEALTHCARE  
GROUP, LTD. d/b/a CORPUS CHRISTI MEDICAL CENTER,  
AN INDIRECT SUBSIDIARY OF HCA HOLDINGS, INC.),  
Respondent**

**and**

**Case 16-CB-225123**

**ESTHER MARISSA ZAMORA,  
Charging Party**

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**CHARGING PARTY’S OPPOSITION TO THE ACTING GENERAL COUNSEL’S  
MOTION TO REMAND THE COMPLAINT TO THE REGIONAL DIRECTOR FOR  
DISMISSAL OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT**

**INTRODUCTION & SUMMARY OF ARGUMENT**

Charging Party Esther Marissa Zamora (“Ms. Zamora”) opposes Acting General Counsel Peter S. Ohr’s Motion to remand the Complaint for dismissal by the Regional Director, or to have the Board dismiss the Complaint itself.

The ULP charge filed by Ms. Zamora was found by General Counsel Peter Robb’s Office of Appeals to be meritorious and worthy of prosecution. Thereafter, Region 16 issued the Complaint, subpoenas were issued, and a two-day contested hearing was held in Corpus Christi, Texas in February, 2020. The ALJ issued his decision and all parties, including the Respondent National Nurses Organizing Committee-Texas/National Nurses United (“NNOC”), filed exceptions or cross exceptions, which have been fully briefed before the Board since November, 2020. Because of the novel and important issues presented, the AFL-CIO filed an amicus brief.

Given this posture, the case *must* be decided by the Board regardless of the Acting General Counsel’s Office’s suddenly-changed position. “[I]t is well settled that ‘the Board’s power to prevent unfair labor practices is exclusive, and . . . ‘the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.’” *Indep. Stave Co.*, 287 NLRB 740, 741 (1987) (citations omitted). It is simply too late in the proceedings for an Acting General Counsel to “throw the speeding locomotive into reverse” based on bare political and ideological considerations and seek dismissal of the Complaint.<sup>1</sup> This is so because Ms. Zamora, the Charging Party who initiated this case under 29 U.S.C. § 160(b), is a full party with a right to have her pending exceptions decided by the Board, *see* NLRB Rules and Regulations Section 102.46(a)<sup>2</sup>, and a parallel right to appeal any final order the Board renders in her case. *See* NLRA Section 10(f), 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . .”); *Auto Workers Local 283 v. Scofield*, 382 U.S. 205, 217-22 (1965) (employees have statutory rights

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<sup>1</sup> *See* Top NLRB Lawyer Tries to Squash Ongoing Neutrality Pact Case, Bloomberg Law, <https://news.bloomberglaw.com/daily-labor-report/top-nlr-lawyer-tries-to-squash-ongoing-neutrality-pact-case> (Feb. 24, 2021). It is also noteworthy that the Acting General Counsel does not propose any remedy or settlement that could protect Ms. Zamora’s Section 7 rights. *See, e.g., Independent Stave Co.*, 287 NLRB 740 (1987); *Flint Iceland Arenas*, 325 NLRB 318 (1998) (revoking an ALJ’s approval of an inadequate settlement agreement). Here, in his haste to do the bidding of politically-motivated outside forces that have no concern for Ms. Zamora’s Section 7 rights, the Acting General Counsel’s Motion conveniently ignores the existence of an independent party—Ms. Zamora—who is not bound by his machinations. *Auto Workers Local 283 v. Scofield*, 382 U.S. 205, 217-22 (1965).

<sup>2</sup> R&R 102.46(a) states: “*Exceptions and brief in support.* Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any *party* may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge’s decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions.” (Emphasis added).

to pursue their own exceptions, and to file their own petitions for review or intervene in those filed by other parties). The Acting General Counsel has no authority to unilaterally seek dismissal of Ms. Zamora's exceptions.

Finally, the Acting General Counsel had no authority to file the Motion because: (1) the removal of General Counsel Robb was unlawful; and (2) Acting General Counsel Ohr was unlawfully appointed. The serial removal of General Counsel Robb, and then his principal deputy Alice Stock, was unlawful because the General Counsel is a federal officer in an independent, quasi-judicial agency established by Congress to administer private-sector labor laws. The General Counsel is charged, for a set term, with independently executing the National Labor Relations Act, not discretionary Presidential policy. NLRA Section 3(d), 29 U.S.C. § 153(d). Exercising the power of the General Counsel's Office (except in emergency circumstances not present here) requires both appointment *and* Senate confirmation. Thus, the purported appointment of Acting General Counsel Ohr—a non-Senate confirmed official—was unlawful, and any act by Mr. Ohr (and anyone acting on his behalf) is *ultra vires* and null and void. As such, Mr. Ohr has no authority to seek the dismissal of a fully litigated complaint issued by General Counsel Robb and pending before the Board.

#### **I. The General Counsel's Motion Should Be Denied on its Merits.**

##### **A. The General Counsel Lacks Authority to Dismiss the Complaint at this Stage of the Proceeding.**

The Board must deny the Acting General Counsel's Motion because it is filed under a false premise—that a General Counsel can demand the dismissal of a complaint when the merits are already under consideration by the Board. Succumbing to such a demand would elevate the General Counsel's Office above the Board, and infringe on the Board's exclusive power to adjudicate violations of the Act. *See, e.g., UPMC*, 365 NLRB No. 153 (2017).

To the contrary, it is well-established that the General Counsel loses “final authority” over a complaint when the merits of the case are before an ALJ or the Board itself. *Id.*; *Sheet Metal Workers, Local 28 (Am. Elgen)*, 306 NLRB 981 (1992) (General Counsel cannot withdraw a complaint after evidence has been presented to an ALJ); *Indep. Stave Co.*, 287 NLRB 740 (1987); *Robinson Freight Lines*, 117 NLRB 1483 (1957). In fact, NLRA Section 10(b) granted authority to issue complaints to the *Board* itself, which could designate an official to issue complaints. 29 U.S.C. § 160(b). Later, Congress specified the General Counsel as the Board’s designated agent. 29 U.S.C. § 153(d) (emphasis added) (providing the General Counsel has final authority “on behalf of the Board, in respect of the investigation of charges and the *issuance* of complaints under Section 160”); *see NLRB v. UFCW Local 23*, 484 U.S. 112, 118-19 (1987) (history of Section 153(d)). Thus, whatever authority the General Counsel has is ultimately derived from the Board’s statutory authority.

Moreover, *Independent Stave* makes it clear that *only* the Board—and *not* the General Counsel—can dictate whether or when it is appropriate to discontinue litigation of a pending complaint once the merits are before the Board or an ALJ. Similarly, the Board in *UPMC* rejected the claim that, regarding potential discontinuation of a pending case, its exercise of exclusive authority “improperly infringed on the General Counsel’s prosecutorial discretion.” *UPMC*, 365 NLRB No. 153, slip op. at 2 n.3. The Board adopted the reasoning of the ALJ who stated that “the litigation had progressed to the point” where the General Counsel no longer had unreviewable prosecutorial discretion as to whether the litigation should proceed or be discontinued. *Id.*, slip op. at 25 (ALJ’s opinion). As the Supreme Court stated in *UFCW Local 23*, “decisions *whether to file a complaint* are prosecutorial. In contrast, *the resolution of contested unfair labor practice cases* is adjudicatory.” 484 U.S. at 126 (emphasis added).

The Supreme Court has emphasized that “the Act is not intended to serve either party’s individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.” *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 680-681 (1981). Here, General Counsel Robb authorized the issuance of the complaint because he recognized that this case implicates important Section 7 rights concerning 1) employees’ ability to oversee their union’s contractual “neutrality” arrangements with their employer; and 2) unions and employers’ misuse of “neutrality agreements” to corral employees into unionization with more than “mere ministerial aid” by the employers. *See* G. C. Memo. 20-13; *see generally* *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) (employee has standing to challenge provisions of a neutrality agreement), *further proceedings*, 667 F.3d 1211 (11th Cir. 2012) (organizing assistance can be an unlawful “thing of value” under 29 U.S.C. § 186), *further proceedings*, 571 U.S. 83 (2013) (certiorari dismissed as improvidently granted). Even the AFL-CIO recognizes the importance of this case, as shown by its filing of an unsolicited amicus brief.

More specifically, this case revolves around: 1) NNOC’s refusal to provide Ms. Zamora with a copy of its neutrality agreement with her employer, despite her information request that came after the neutrality agreement was applied to limit her decertification efforts; and 2) NNOC’s bad faith failure to even acknowledge that such an agreement exists despite the employer’s admission that it does. *See* G.C. Ex. 7; *Nat’l Ass’n of Letter Carriers (U.S. Postal Serv.)*, 330 NLRB 667 (2000) (a union’s duty of fair representation includes the obligation to provide employees with requested contractual information pertaining to their employment). Here, Ms. Zamora was told by her employer’s labor representative that the neutrality agreement affected how her employer could deal with her efforts to decertify NNOC, so she had a right to see it under longstanding Board law.

Dismissal is particularly inappropriate here, where the articulated reason for the request—General Counsel Robb’s illegal termination ten months short of the expiration of his Senate-confirmed term, and his replacement by an “acting” official—was described in blatantly political terms in the Acting General Counsel’s Motion. The Motion basically admits that Ms. Zamora’s Section 7 rights are to be given short shrift, even though neither the facts nor the law have changed since briefing closed: the only difference is a change in the General Counsel’s Office’s political calculations.

**B. Ms. Zamora Has an Independent Right to Have the Board Issue a Final and Appealable Decision on Her Exceptions.**

Additionally, this case *must* be decided by the Board, regardless of any particular General Counsel’s changed positions, because Ms. Zamora has her own exceptions from the ALJ’s decision pending before the Board. As the Charging Party who initiated this case under 29 U.S.C. § 160(b), Ms. Zamora has an independent right to have her pending exceptions decided by the Board, *see* NLRB Rules and Regulations Section 102.46(a), and a parallel right to appeal any final order the Board renders in this case. NLRA Section 10(f), 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . .”); *Scofield*, 382 U.S. at 217-22.

Indeed, should the Board grant the Acting General Counsel’s Motion to dismiss the complaint and fail to decide *at least* Ms. Zamora’s exceptions (if not those of all parties), she will surely exercise her legal right to file a petition for review with an appropriate U.S. Court of Appeals under NLRA Section 10(f), and the Board’s dismissal will be reversed. Such wasteful delay caused by an intemperate dismissal would satisfy neither justice, due process, nor judicial and administrative economy, because it is outside of the General Counsel’s authority (and especially a

politically and ideologically motivated “Acting” General Counsel) to demand the Board dismiss the case without consideration of Ms. Zamora’s exceptions.

In short, the Board should deny the General Counsel’s Motion and should expeditiously consider and rule on the timely-filed exceptions presented by all parties, including Ms. Zamora.

## **II. The Board Should Deny the Motion Because Acting General Counsel Ohr Has No Legal Authority**

### **A. President Biden Lacked the Authority to Fire General Counsel Robb.**

The General Counsel of the Board does not serve at the pleasure of the President and cannot be removed without sufficient cause.

#### **1. The NLRB is a quasi-judicial agency.**

In discussing whether or not Congress can restrict the President’s removal of a particular officer, the threshold question is whether the agency involved is a purely executive agency, or whether it exercises quasi-executive or quasi-legislative functions. *See, e.g., Wiener v. United States*, 357 U.S. 349, 353 (1958) (“The most reliable factor for drawing an inference regarding the President’s power of removal . . . is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission?”). Here, the NLRB is a quasi-judicial agency designed by Congress to be free from coercive political interference and influence.

When Congress enacted the NLRA, there was substantial debate and competing House and Senate proposals over whether the Board should become part of the Department of Labor or whether it should function as an independent regulatory agency. *See, e.g., H.R. Rep. 74-969 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (“NLRA Hist.”), at 2919-2933; H.R. Rep. 74- 972 (1935), reprinted in 2 NLRA Hist. at 2965-66, 2978-79; H.R. Rep. 74-1147 (1935), reprinted in 2 NLRA Hist. 3059,*

3076, 3077. Not only did Congress decide that the NLRB should be an independent regulatory agency, this was considered central to the NLRA’s constitutionality. Prior to the NLRA’s adoption, the Supreme Court decided *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935), which held the National Industrial Recovery Act unconstitutionally delegated legislative powers. Congress structured the NLRB as an independent agency having “quasi-judicial” authority similar to the Federal Trade Commission, which the Supreme Court identified in *Schechter* as supporting constitutionality. *Id.* at 532-33. Congress “intended the Board to function like a court,” S. Rep. 80-105, 80th Cong. at 9, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 415. This independence is what makes the Board different from conventional (non-judicial) executive agencies.

The Supreme Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020), addressed the structure of the NLRB and similar agencies. There, the Supreme Court held that the “structure” of the Consumer Financial Protection Bureau (“CFPB”)—an agency “run by a single individual” that bears no resemblance to the NLRB—violated the separation of powers required by Article II in the U.S. Constitution. *Id.* at 2193. Specifically, the Court in *Seila Law* held that the CFPB’s structure was unconstitutional because, although it was created by Congress as an executive agency, it was designed to have “leadership [by] a single Director” who could not be removed by the President except for cause. *Id.* The NLRB is different in virtually every respect from the CFPB when it comes to the characteristics that prompted the Supreme Court in *Seila Law* to invalidate the structure of the CFPB. In fact, Supreme Court’s analysis in *Seila Law* establishes that the “structure” of the NLRB *is permissible*, including the fixed terms for Board members and the General Counsel.

When the Supreme Court in *Seila Law* explained that the CFPB’s “single Director” structure was unconstitutional (*i.e.*, making the Director subject to removal by the President), the Court contrasted the CFPB with agencies like the NLRB that were entirely permissible even though their senior officials had fixed terms that could *not* be overridden by the President. According to the Court, such arrangements were entirely proper when the agency consisted of “a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions . . .” with “staggered” terms, and where the agency’s senior officials were expected to be “non-partisan” and “act with entire impartiality.” *Id.* at 2199. When describing this permissible structure, the Supreme Court in *Seila Law* was referring specifically to the Federal Trade Commission (“FTC”) (*id.*), but the Court’s description is equally applicable to the NLRB, which includes the role of the General Counsel. In fact, Congress intentionally modeled the NLRB in 1935 after the FTC, and Justice Kagan in *Seila Law* specifically named the NLRB as an example of agencies whose structure the Court had “repeatedly approved” under Article II. *Id.* at 2224-25 (Justice Kagan, dissenting in part).

**2. The position of General Counsel has a fixed term, during which he is not subject to removal.**

Pursuant to the text of the NLRA, the position of General Counsel has a term of four years, during which time he is not subject to removal from office. General Counsel Robb’s term is scheduled to end on November 15, 2021. Given that General Counsel Robb declined to resign and was terminated by President Biden, as was the case with his principal deputy Alice Stock, the position of General Counsel does not become “vacant” until on or about November 15, 2021. Presidents are not dictators and cannot arbitrarily fire federal officers who were confirmed by the Senate with fixed terms, and then declare the position “vacant” in order to fill it with cronies lacking Senate confirmation. Indeed, the constitutional mandate of advice and consent “is more

than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme.” *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks omitted). Thus, the designation of an “acting” General Counsel on or about January 25, 2021 was impermissible under NLRA Section 3(d) and the U.S. Constitution, Art. II, Sec. 2.

Under the 1947 Taft-Hartley Amendments, the General Counsel is nominated by the President and confirmed by the Senate for a fixed four-year term. 29 U.S.C. § 153(d) (emphasis added) (“There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, *for a term of four years.*”). Section 3(d) permits the President to name an “acting” General Counsel, but this is only authorized when the position of General Counsel is vacant. Section 3(d) states: “*In case of vacancy* in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel *during such vacancy* . . . .” *Id.* (emphases added). Section 3(d)’s creation of a four-year term and the absence of language providing that the position serves at the pleasure of the President shows the existence of a “for cause” termination requirement. “While section 3(d) does not explicitly set forth criteria and procedures governing this situation, the practice since 1947 has been that the General Counsels serve four-year terms, and not at the pleasure of the President. Thus they can only be removed for cause.” John E. Higgins, Jr., *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 *Cath. U. L. Rev.* 941, n. 82 (1998).<sup>3</sup>

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<sup>3</sup> Claiming Acting General Counsel Ohr was appointed pursuant to the Federal Vacancies Reform Act (“FVRA”) does not save his appointment. That statute only provides for appointments if the previous officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. § 3345(a). None of these situations is applicable here. General Counsel Robb refused to resign after being contacted by White House personnel and is willing and able to perform the functions and duties of his office, so Mr. Ohr’s appointment is not an appropriate use of the FVRA.

Supreme Court precedent further supports the conclusion that for-cause removal applies to term-limited political appointees at quasi-judicial agencies, even if they perform certain executive functions within those agencies. In fact, the very year the NLRB was established, the Supreme Court unanimously held that:

[t]he authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

*Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

Perhaps even more relevant is *Wiener v. United States*, 357 U.S. 349, 356 (1958), where the Court rejected “the claim that the President could remove a member of an adjudicatory body . . . merely because he wanted his own appointees on such a Commission.” The Court further found that “we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.” *Id.*

*Humphrey's Executor* and *Wiener* severely limit President's Biden's power to terminate a General Counsel and declare a “vacancy,” given that the Supreme Court has drawn “a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body to exercise its judgment without the leave or hindrance of any other official or any department of the government, as to whom a power of removal exists only if Congress may fairly be said to have conferred it.” *Wiener*, 357 U.S. at 353 (cleaned up). The position of General Counsel was

established to be a neutral overseer of NLRB complaints and Board representation in court, not a policymaking confidant of the President.

A decisive question in Presidential removal cases like this is whether the inability to remove the NLRB General Counsel would frustrate the President's ability to execute his constitutional duties. Here, the answer is no, as the General Counsel's main functions are to process charges of unfair labor practices, to present cases to NLRB administrative law judges, to bring enforcement actions of NLRB decisions, to defend the Board's position in legal challenges, and to supervise subordinates. These duties are performed in furtherance of the NLRB's mission as an apolitical, quasi-judicial independent agency, and as such, are fully separate from the President's policymaking responsibilities under the Constitution.

The General Counsel does not serve in a policy making role such that a President has the right to fire him at will. The General Counsel cannot promulgate regulations (which Section 6 of the NLRA reserves for the Board). He cannot initiate or decide cases (since all NLRB cases can be initiated only by private parties who file a charge or petition, and the merits of every case are decided by the Board, not the General Counsel). *See* NLRA Section 10(b); *NLRB v. Fant Milling Co.*, 360 U.S. 301, 306 (1959) (a charge filed by a private party is "a condition precedent" to the General Counsel's issuance of a complaint); *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943) ("The Act requires a charge before the Board may issue a complaint . . ."). Nor can the General Counsel unilaterally settle cases, reject settlements or otherwise discontinue Board proceedings once the merits are pending before the Board or an ALJ. Similarly, the General Counsel does not control the remedies issued against violators even when his complaints are found to be meritorious. *Kaumagraph Corp.*, 313 NLRB 624 (1994); *Local 58, IBEW (Paramount Indus., Inc.)*, 365 NLRB No. 30, n.17 (Feb. 10, 2017). Finally, when seeking injunctive relief in federal courts under NLRA

Section 10(j), the General Counsel functions at the direction of the Board, whose members must vote to authorize the filing of any Section 10(j) petition; and when the General Counsel participates in appellate court proceedings, the General Counsel similarly functions at the direction of the Board, his client, not the President. NLRA §§ 10(e), (f). In all of these respects, the NLRB General Counsel falls within a separate exception—recognized in *Seila Law* as passing constitutional muster under Article II—which renders permissible fixed terms assigned to “officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2200.

This conclusion is further evidenced by seventy years of Presidential practice. Since Congress created the “modern” General Counsel, fourteen Presidents have taken office and partisan control of the White House has changed no less than ten times. Many incoming administrations have had vastly different labor policies from their predecessors, yet none ousted an NLRB General Counsel before the end of the prescribed term.

### **3. The General Counsel’s independence is integral to the structure of the NLRB.**

Allowing the President to fire the General Counsel at will would do irreparable damage to the NLRB’s function as an independent agency responsible for the neutral and even-handed resolution of unfair labor practice and representation cases.

As discussed above, the General Counsel is an integral part of the Board. Section 3(d) vests the General Counsel with “final” authority with respect to issuing and prosecuting complaints on behalf of the Board. 29 U.S.C. §§ 153(d), 160(b). But even this “final” authority is subject to the Board’s control through rulemaking and regulation, and to review, at least in part, through decisions and orders.

While the focus of the inquiry has been on what the General Counsel has final approval over, the General Counsel has another critical duty—namely, the General Counsel litigates on

behalf of and enforces all orders of the Board. In so doing, the General Counsel acts as an arm of the Board. The General Counsel's neutrality and independence are central to the Board's adjudication of unfair labor practice cases and enforcement of its orders.

NLRB decisions are not self-enforcing, which means that the General Counsel plays an essential role in *every* Board decision. If a respondent fails to voluntarily comply with a Board order, the Board must initiate enforcement proceedings in the appropriate U.S. Court of Appeals. Similarly, if a party exercises its statutory right to appeal a Board order, the Board must defend its order on appeal. In these instances, the General Counsel serves as the Board's designated legal representative. Only when the General Counsel *succeeds* in that representation can parties be required to comply with the Board's decisions and orders.

Thus, the General Counsel is not wholly independent from the Board. Much of his role is enforcing and litigating orders of the Board, and even his "final" authority is derived from the powers delegated to the Board by Congress and is, at least in part, subject to Board review. These critical factors militate in favor of considering the General Counsel as an arm of the quasi-judicial Board, with a four-year fixed term, rather than an arm of the executive branch at large, subject to at-will removal.

Practically speaking, treating the General Counsel as a political appointee who promotes and adheres to *the President's* policies and priorities, rather than upholding and defending *the Board's* decisions, would leave the Board's independent adjudicatory role in shambles. This would produce anarchy regarding whose or what interests the General Counsel serves when Board decisions are enforced and appealed in the courts. Until now, every President has recognized this and maintained the General Counsel's independence. This includes President Trump allowing former General Counsel Richard Griffin to remain in office and even argue a Supreme Court case

on behalf of the Board, despite his taking positions that were contrary to the Administration's positions. *See Murphy Oil USA*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed sub nom., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

In short, President Biden's termination of Peter Robb and his principal deputy Alice Stock, in defiance of more than seven decades of Supreme Court precedent and Presidential practice, undermines the ability of the National Labor Relations Board to function as the meaningfully independent entity Congress designed it to be.

#### **B. Acting General Counsel Ohr's Appointment Violates the Appointments Clause.**

If the General Counsel is a principal officer under the Constitution, Mr. Ohr's appointment violates the Appointments Clause. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) (calling the determination whether the General Counsel is a principal officer "a closer question"). The elevation of a non-Senate confirmed individual to the role of Acting General Counsel in the absence of any exigent circumstances raises "grave constitutional concerns, because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *SW General, id.* at 946 (Thomas, J., concurring). The constitutional mandate of advice and consent "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks omitted); *see also Dep't of Transp. v. Ass'n of Am. R.R.'s*, 575 U.S. 43, 63-64 (2015) (Alito, J., concurring) ("Unless an 'inferior officer' is at issue, Article II of the Constitution demands that the President appoint all 'Officers of the United States' with the Senate's advice and consent. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people . . . accountability demands that principal officers be appointed by the President.").

The Constitution’s “Appointments Clause provides the exclusive process for appointing ‘Officers of the United States.’” *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas J., concurring) (quoting U.S. Const. art. II § 2, cl. 2). This provision plainly requires that the President appoint such officers “by and with the Advice and Consent of the Senate,” except that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone,” or in “the Courts of Law” or “the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2. The purported elevation of Acting General Counsel Ohr thus poses the question of whether this provision applies to the General Counsel (it does) and whether Ohr’s appointment complies with its mandate (it does not).

Without stating any reason, President Biden fired General Counsel Robb and appointed then-Regional Director Ohr to serve as General Counsel on an acting basis. The President thereby designated a non-Senate confirmed officer to serve in a Senate-confirmed position, despite the fact that the President himself created this vacancy for no apparent purpose other than politics and ideology. No President has ever fired a General Counsel, let alone immediately installed a non-Senate confirmed pick in order to reverse many of the General Counsel’s decisions. “Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.” *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). There are two reasons why a non-Senate confirmed officer may not serve indefinitely in a Senate-confirmed position: the text of the Constitution and Supreme Court precedent.<sup>4</sup>

*First*, the text of the Appointments Clause itself suggests employees cannot serve as Senate-confirmed officers. U.S. Const. art. II, § 2, cl. 2. The Clause distinguishes between

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<sup>4</sup> We understand President Biden has now nominated Jennifer Abruzzo to serve as General Counsel, subject to Senate confirmation.

“officers” who must be appointed and ordinary “employees” who can be hired. *Id.* An officer is someone who holds a continuing position in which he exercises significant discretion in administering the laws of the United States. *Lucia*, 138 S. Ct. at 2051-52. The Clause further distinguishes between principal officers (who require Senate confirmation) and inferior officers (who Congress can allow to be appointed by the President, Courts, or department heads). *Id.*

The text supports the conclusion that the President cannot designate a non-Senate confirmed officer to perform the functions of a principal, Senate-confirmed officer on a continuing basis—at least absent a true exigency. Tellingly, the Constitution does not recognize a power to designate a temporary principal officer, suggesting that the process of Senate confirmation must be followed barring true exigent circumstances. If the President can unilaterally discharge a Senate-confirmed official and assign that officer’s responsibilities to someone who lacks Senate confirmation, this critical legislative check on executive power is largely illusory and no longer plays any role in preserving the separation of powers.

*Second*, Supreme Court jurisprudence is not to the contrary. In *United States v. Eaton*, 169 U.S. 331 (1898), a vice consul was designated in advance to temporarily perform the functions of an unavailable consul general. The consul general was a Senate-confirmed official and the vice consul was not. *Id.* The Supreme Court held that the Appointments Clause did not require the vice consul to be confirmed by the Senate as a principal officer, reasoning:

Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of Congress in classifying and defining the grades of consular offices . . . was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of the word.

*Id.* at 343. While *Eaton* upheld the temporary appointment of a non-Senate confirmed officer, its reasoning supports the conclusion that the President cannot assign all of a Senate-confirmed officer’s powers to a subordinate, non-Senate confirmed officer, absent a true exigency. The Court’s opinion makes clear that it was *not* sufficient that the vice consul acted “for a limited time,” but rather the fact that the vice consul’s service responded to “special and temporary conditions.” *Id.* The Court only indicated that an inferior officer could serve in the exigency that a principal officer was unavailable.<sup>5</sup> *Eaton* never blessed the President’s ability to unilaterally terminate a Senate-confirmed official in an independent agency in order to install an “acting” non-Senate confirmed official to permanently overturn the Senate-confirmed official’s decisions.

In conclusion, the Constitution does not vest the President with the power to create vacancies by arbitrary and unilateral discharges, and then appoint an employee or inferior officer to act as a principal officer, because this would enable the President to circumvent the Appointments Clause. As the Supreme Court has noted:

The manipulation of official appointments had long been one of the American revolutionary generation’s greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion.

*Freytag v. Comm’r*, 501 U.S. 868, 883 (1991) (cleaned up). Allowing a President to circumvent the Senate’s advice and consent responsibilities is inconsistent with the Appointments Clause and its role in maintaining the separation of powers. The President could pick any employee to take

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<sup>5</sup> In *Eaton*, Congress designated the vice consul position in advance. This substantially reduces the prospect that the President would use the position to evade the Senate’s role in confirming appointments. In contrast, President Biden fired both the General Counsel and the Deputy General Counsel (who would generally assume “acting” status) presumably so he could appoint whoever he wished as “acting” General Counsel.

over the responsibilities of the Nation’s most sensitive offices, which the Constitution expressly requires to be subject to Senate confirmation. Nor is it any argument to claim that the Acting General Counsel is only exercising these powers on a “temporary” basis. Any outer time limitation would be illusory, because if a President has the power to fire a Senate-confirmed General Counsel at will, the President could simply fire the next Senate-confirmed General Counsel and reinstall another non-Senate confirmed official and start the clock over again, seriatim. The Senate’s critical check on the President’s appointment power would be rendered nugatory.

### CONCLUSION

The Acting General Counsel’s Motion to have this case dismissed should be denied.

Respectfully Submitted,

March 2, 2021

/s/ Glenn M. Taubman  
Aaron B. Solem  
Alyssa Hazelwood  
c/o National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA  
703-321-8510  
gmt@nrtw.org  
abs@nrtw.org  
akh@nrtw.org

*Attorneys for Marissa Zamora*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2021, a true and correct copy of the foregoing Charging Party's Opposition was filed with the NLRB Executive Secretary using the NLRB e-filing system, and was also served via e-mail on that same date to:

Roberto Perez  
Counsel for the General Counsel, NLRB Region 16  
Roberto.perez@nlrb.gov

Micah Berul, Legal Counsel  
National Nurses Organizing Committee/NNU Legal Department  
MBerul@CalNurses.org

Craig Becker  
Maneesh Sharma  
AFL-CIO Office of the General Counsel  
815 Sixteenth Street, NW  
Washington, DC 20006  
cbecker@aflcio.org  
msharma@aflcio.org

Paul Beshear  
Ford & Harrison LLP  
21 17th Street, NW, Suite 1900  
Atlanta, GA 30363-6202  
pbshears@fordharrison.com

/s/ Glenn M. Taubman

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Glenn M. Taubman  
*Attorney for Charging Party*