No. 04-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THOMAS J. HARRINGTON, ET AL.,

Plaintiffs-Appellees,

v.

ELAINE L. CHAO, Secretary of Labor,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT

OF COUNSEL:

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Senior Appellate Attorney
Department of Labor
Suite N-2700
Washington, D.C. 20210

PETER D. KEISLER
Assistant Attorney General

MICHAEL J. SULLIVAN
United States Attorney

WILLIAM KANTER
(202) 514-4575
JOHN S. KOPPEL
(202) 514-2495
Attorneys, Appellate Staff
Civil Division, Room 9120
Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 to review the determination of the Secretary of Labor ("Secretary") not to file suit against the New England Regional Council of Carpenters ("NERCC"), United Brotherhood of Carpenters and Joiners ("UBC"). See Dunlop v. Bachowski, 421 U.S. 560, 566 (1975). The Secretary's determination was issued in response to an administrative complaint filed under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. 401 et seq.

Under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction to review the final decision of the district court, if the notice of appeal is filed within sixty (60) days of entry

of the district court's final decision. See 28 U.S.C. § 2107(b). The district court's order granting summary judgment to plaintiffs was entered on the docket on October 8, 2003, and the court's final order was entered on November 25, 2003. The notice of appeal was filed on January 20, 2004, in timely fashion under 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

After investigating a complaint that the NERCC violated the LMRDA's election rules requiring a local union to conduct officer elections by direct vote of its members every three years, the Secretary concluded that the NERCC did not violate the LMRDA because it is an "intermediate" labor organization entitled to conduct elections of its officers every four years by a vote of delegates from its member locals. The questions presented are:

1. Whether the Secretary's supplemental statement of reasons announcing and explaining the decision not to sue the NERCC to conduct a local union election was arbitrary and capricious.

2. Assuming arguendo that Question 1 is answered in the affirmative, whether the district court erred as a matter of law in requiring the Secretary to "take appropriate action" prior to exhausting her appeal rights.

STATEMENT OF THE CASE

Thomas J. Harrington -- a member in good standing of a local union that is a member of the NERCC - and seven other members filed timely complaints with the UBC alleging that the NERCC failed to elect its officers directly by the membership in violation of Title IV of the LMRDA, 29 U.S.C. §§ 481-483.[1] After the UBC failed to respond to their complaints, Harrington filed an administrative complaint with the Secretary of Labor. In April 2000, the Secretary issued a Statement of Reasons explaining that the NERCC is an "intermediate bod[y]" within the meaning of Section 401(d) of the Act, 29 U.S.C. § 481(d), and may therefore elect its officers every four years either by secret ballot among the members in good standing or by a vote of delegates who have been elected by secret ballot by the members in good standing of the NERCC's subordinate locals.

The complainants challenged this determination in United States District Court. On the Secretary's motion, the district court dismissed the suit. Harrington v. Herman, 138 F. Supp. 2d 232 (D. Mass. 2001).

The complainants appealed to this Court, which vacated the Secretary's Statement of Reasons and remanded to the district court with instructions to remand to the Secretary to provide an

[1] Messrs. Harrington et al. are referred to collectively herein as "complainants" or "plaintiffs," as appropriate.

opportunity "to better explain" the Secretary's determination that the NERCC is an intermediate body within the meaning of Section 401(d) of the Act. Harrington v. Chao, 280 F.3d 50, 60 (1st Cir. 2002).

On January 31, 2003, having reaffirmed her view of the case, the Secretary issued a lengthy Supplemental Statement of Reasons explaining her determination that the NERCC is an intermediate body under the LMRDA and therefore is not required to follow the election rules applicable to a local labor organization. Dissatisfied with this determination, the complainants filed a motion for summary judgment in the district court, and the Secretary responded with a cross-motion.

On October 8, 2003, the district court ruled for complainants. Harrington v. Chao, 286 F. Supp. 2d 80 (D. Mass. 2003), reproduced in Joint Appendix ("JA") at 19-25. On November 25, 2003, the district court ordered the Secretary "to take appropriate action within thirty (30) days of the date of this Order, consistent with the determination of this Court that the Secretary's failure to treat the New England Council of Carpenters as a statutory 'local labor organization' is arbitrary and capricious." JA 26. By order of December 16, 2003, JA 27, this deadline was extended by an additional thirty (30) days.

On January 20, 2004, the Secretary filed a timely notice of

appeal. JA 29. On February 20, 2004, this Court stayed the district court's decision pending this appeal.

STATEMENT OF FACTS

1. Statutory and Regulatory Framework

Title IV of the LMRDA establishes base standards for the election of union officers. Different election criteria and intervals apply to different types of labor organizations. 29 U.S.C. § 481(a), (b), (d). For "intermediate bodies," section 401(d) of the Act identifies two lawful methods for electing officers:

> Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

29 U.S.C. § 481(d). In contrast, Section 401(b) of the Act requires "[e]very local labor organization" to "elect its officers not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. § 481(b).

The Act provides a definition of "[l]abor organization," but the terms "local labor organization" and "intermediate bodies" are not defined in the Act.[2] Reflecting the statute, the

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[2] "Labor organization" is defined in Section 3(i) of the Act as:

> [A]ny organization of any kind, any agency, or

(continued...)

Secretary's regulations identify -- but do not separately define -- three types of labor organizations that fall within Title IV's election provisions: "national and international labor organizations, except federations of such organizations"; "intermediate bodies such as general committees, conferences, system boards, joint boards, or joint councils, certain districts, district councils and similar organizations"; and "local labor organizations." 29 C.F.R. § 452.11; 38 Fed. Reg. 18,324 (1973); cf. 29 C.F.R. pt. 451 (scope of "labor organizations"); 29 U.S.C. §§ 402(j), 481(a), (b), (d). The same regulation states the Secretary's view that "[t]he characterization of a particular organizational unit as a 'local,' 'intermediate,' etc., is determined by its functions and

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(...continued)

> employee representation committee, group, association, or plan [engaged in an industry affecting commerce] in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

29 U.S.C. § 402(i).

purposes rather than the formal title by which it is known or how it classifies itself." 29 C.F.R. § 452.11.[3]

The Act grants exclusive enforcement authority over Title IV to the Secretary of Labor. 29 U.S.C. § 483; Trbovich v. United Mine Workers, 404 U.S. 528, 536 (1972). The Secretary investigates a union member's complaint, 29 U.S.C. § 482, and if she determines that there is probable cause to believe that a violation of the LMRDA occurred that may have affected the outcome of a union election, the Secretary will file suit in the appropriate district court to set aside the election. 29 U.S.C. § 482; Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 472 (1968).

If, as here, the Secretary determines that no Title IV violation occurred or that it had no effect on the election's outcome, the complaining union member is entitled to a Statement of Reasons from the Secretary, stating her reasons for declining to file suit. Dunlop v. Bachowski, 421 U.S. 560, 568, 571-572 (1975). The Secretary's decision not to sue, as embodied in the

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[3] The LMRDA's legislative history identifies "joint councils" as one type of intermediate body. See S. Rep. No. 86-187, at 47 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2363 (Senate Report accompanying the bill that ultimately became the LMRDA (S. 1555), describing the provision for the election of officers of intermediate bodies as applying to, among others, "joint council[s]" and "other association[s] of labor organizations"). Elsewhere, the Secretary's regulations provide a description of "typical intermediate bodies," which include "joint councils," described as including "councils of building and construction trades labor organizations." 29 C.F.R. § 451.4(f)(4).

Statement of Reasons, is subject to judicial review pursuant to 5 U.S.C. §§ 702 and 704, under the "arbitrary and capricious" standard set forth in 5 U.S.C. 706(2)(A). Bachowski, 421 U.S. at 566. The statement of reasons accordingly must inform the court and the complaining union member of the grounds of the decision and the essential facts supporting these grounds; detailed findings of fact are not required so long as the findings are sufficient to enable the reviewing court to determine whether the Secretary's decision was reached for an impermissible reason. Id. at 573-74.

The Secretary's determinations, and any subsequent judicial review, must effectuate the LMRDA's twin purposes of remedying abuses in union elections and avoiding unnecessary interference in internal union affairs. See Hodgson v. Local Union 6799, United Steelworkers, 403 U.S. 333, 339 (1971); see also Local No. 82, Furniture & Piano Moving v. Crowley, 467 U.S. 526, 539 (1984); S. Rep. No. 86-187, at 5 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2322 ("[i]n providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees").

2. The Instant Litigation

a. In 1996, the United Brotherhood of Carpenters and Joiners implemented an organizational restructuring in which state and district councils, as well as independent local unions, were combined to form larger regional councils. Supplemental Statement of Reasons ("Supp. Stm't") 1, JA 9.[4] In New England, the restructuring resulted in the creation of the NERCC, a single, regional council overseeing 27 pre-existing local unions, which together have over 25,000 members. Id. As a result of this reorganization, the NERCC performs a number of important responsibilities, some of which may have been traditionally performed by or associated with local unions. Id. at 9, JA 17.

The NERCC negotiates collective bargaining agreements within the New England region, to which the local unions are parties. The agreements must then be approved through ratification votes held by the affected locals among local members. Id. at 8-10, JA 16-18. The NERCC, through its Executive Secretary-Treasurer, hires, directs, supervises, disciplines, promotes, and fires organizers and business representatives and appoints all trial committees. Id. at 9-10, JA 17-18. The NERCC representative appoints local union stewards, who report job site problems to the NERCC representative and serve at the representative's

[4] For the Court's convenience, the Supplemental Statement of Reasons is also reproduced in the Addendum to this brief.

discretion. Id. at 9, JA 17. The NERCC determines and levies a portion of the members' dues not determined and levied by the locals, and approves monthly dues levied by the local unions. Id. at 9-10, JA 17-18.

Separate from and subordinate to the NERCC, the union locals are independently chartered labor organizations, which have identifiable memberships and elect their own officers. Id. at 7, JA 15. The locals pass their own bylaws, which must comport with the UBC constitution and bylaws. Id. The locals hold meetings periodically where the membership is informed of union activities and business. Id. In addition, the locals maintain their own offices, have clerical employees and budgets, and manage separate bank accounts. Id. The locals also determine and collect monthly dues, and they charge and collect all fines for working dues or fees that are in arrears to "'any other Local Union, District Council, Industrial Council or Regional Council.'" Id. at 8.

A worker joins the UBC by becoming a member of a local union, and the worker can withdraw or sever connection with the union only "'by submitting a clear and unequivocal resignation in writing to the Local Union.'" Id. at 7. Local stewards, although appointed by a NERCC representative, are local members, and they resolve most grievances without the participation of or input from the NERCC representative. Id. at 8, JA 16.

Disciplinary matters are first referred to the local's executive board for an informal hearing with the goal of an informal resolution. Id. If unsuccessful, charges are then filed with the NERCC. Id. Each local union is also responsible for the carelessness or negligence of its officers and must procure bonds to protect against such action. Id. at 7, JA 15. As mentioned on p.9 supra, the locals hold ratification votes among local members to approve collective bargaining agreements. Finally, the locals engage in voluntary organizing drives and lobbying, and administer scholarship and disability funds. Id. at 8, JA 16.

b. Complainant Harrington filed a complaint with the Secretary concerning the failure of the NERCC to comply with the direct election and secret ballot requirements of 29 U.S.C. § 482(d). Following an investigation, the Secretary issued a Statement of Reasons that explained her determination that the NERCC is an "intermediate labor organization," which therefore is not required to follow the election rules established for a "local labor organization."[5] In so deciding, the Secretary concluded that, although the NERCC possessed some of the powers and functions previously held by the union's locals, nothing in the LMRDA or its legislative history permitted her to treat the

[5] The Secretary's initial Statement of Reasons is set forth in its entirety in the Appendix to this Court's prior opinion, Harrington v. Chao, 280 F.3d. 50, 63-65 (1st Cir. 2002).

NERCC as a local rather than an intermediate labor organization. Accordingly, the Secretary found no violation of law in the NERCC's election of its officers and no cause to bring suit against it.

c. Complainants then brought this action challenging the Secretary's determination in the United States District Court for the District of Massachusetts. The district court dismissed the case. Harrington v. Herman, 138 F. Supp. 2d 232 (D. Mass. 2001). Complainants contended that the Secretary's ruling was arbitrary and capricious because it relied on the NERCC's structure and failed to distinguish Donovan v. National Transient Div., Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, 736 F.2d 618 (10th Cir. 1984) ("Boilermakers"), cert. denied, 469 U.S. 1107 (1985), and Schultz v. Employees' Fed'n of the Humble Oil & Refining Co., 74 L.R.R.M. (BNA) 2140 (S.D. Tex. 1970) ("Humble Oil"). The court rejected this contention.

The district court determined that Boilermakers was not controlling because the challenged union there, lacking any subordinate locals, could not be an intermediate or national labor organization. 138 F. Supp. 2d at 236. The court further found that complainants had "unfairly characterize[d]" the Department's Statement of Reasons as focusing exclusively on the structure of the union, because -- unlike the situation in Boilermakers -- the Department found that the NERCC's subordinate

locals were not "mere titular appendages of the Regional Council but performed at least some of the traditional functions of local unions." Id. at 236 n.9.

By contrast, the district court further noted that the subordinate divisions in Humble Oil performed "no functions at all." Id. at 236. The court also rejected the argument that the Secretary's decision was arbitrary and capricious because her Statement of Reasons failed to discuss the Boilermakers and Humble Oil decisions; the court stated that Bachowski does not require a discussion of the relevant case law. Id. at 236 n.10. Thus, the district court concluded that it had no authority to substitute its own judgment for that of the Secretary. Id.

d. Complainants appealed to this Court, which vacated the district court's dismissal because it found the Secretary's Statement of Reasons "insufficient to permit meaningful judicial review." Harrington v. Chao, 280 F.3d 50, 52 (1st Cir. 2002). The Court concluded that the Secretary's Statement of Reasons left two questions unanswered: whether the Secretary disavowed a "functional" analysis in determining whether a local labor organization is a local or an intermediate labor organization, and whether the Secretary's approach was consistent with the Department's position in relevant prior cases. Id. at 57-58, citing Boilermakers and Humble Oil. The Court directed that, if the Secretary again chose to close the case without filing suit,

she must supplement her Statement of Reasons to address specifically the functions and purposes test of 29 C.F.R. § 452.11, and to explain how her decision is consistent with the position the Department of Labor took in Boilermakers and Humble Oil. 280 F.3d at 60-61.

e. On remand to the agency, the Secretary reaffirmed her decision not to sue. Issuing an extensive Supplemental Statement of Reasons on January 31, 2003, she explained in detail her view that the NERCC was properly characterized as an intermediate body under the LMRDA, and thus not subject to the LMRDA's requirements for local union elections.

First, the Secretary addressed the Department's regulations, specifically 29 C.F.R. § 452.11, which expressly provides that whether an entity is a local or intermediate body is dependent upon its "functions and purposes" as opposed to "'the formal title by which it is known or how it classifies itself.'" Supp. Stm't 3, JA 11 (quoting 29 C.F.R. § 452.11). In construing this language, the Secretary reasoned, "the critical inquiry in determining whether an entity designated by the union as an intermediate body should instead be considered a local body is whether the intermediate body has taken on so many of the traditional functions of a local union that it must in actuality itself be considered a local union." Id.

The Secretary explained that Congress expected intermediate organizations and local unions alike to perform important functions and further elaborated:

> If the subordinate organizations in fact continue to perform functions and exist for purposes traditionally associated with local labor unions, the union's characterization of an entity placed structurally between such organizations and the international union as an "intermediate body" will be upheld even though the intermediate body also performs some other functions traditionally associated with local unions.

Id. at 4, JA 12.

Second, the Secretary analyzed the legislative history of the LMRDA, the actual practices of unions when the LMRDA was enacted, and National Labor Relations Board cases bearing on the collective-bargaining powers of intermediate, national, and international labor organizations at that time. This history reveals that such labor organizations at that time engaged in important representational activity both in conjunction with, and in lieu of, subordinate local organizations, and makes it clear that Congress expected intermediate bodies to wield "'responsible governing power'" within a labor union without being considered local unions under the LMRDA. Id. (citation omitted).

Third, the Secretary looked to the statutory text for guidance to conclude that the organization's placement within the structure of a union is "highly relevant in determining whether it is a 'local' or 'intermediate' union." Id. at 5, JA 13. The

statute itself identifies intermediate bodies by their structural placement within the union hierarchy, or by a name historically associated with a particular tier within the union. The very term Congress used to denominate these entities -- "intermediate" bodies -- suggests the relevance of an organization's placement within the overall structure of the union. Id. (citing 29 U.S.C. § 481(d)). Indeed, the Secretary observed, the statute identifies "joint councils," like the NERCC, as "intermediate bodies," and joint councils have historically appeared at the middle tier of the union hierarchy. Id. (citing 29 U.S.C. § 402(i)). The Secretary thus construed the language of the statute as authorizing her to take into account the entity's structural placement in making the determination whether it is an intermediate body or a local union. Id.

Fourth, the Secretary reviewed the case law for consistency with the analysis of the regulation, legislative history, and statute. Id. at 5-8, JA 13-16. Responding to this Court's concerns, she concluded (parallel with the district court's original ruling) that her predecessors previously employed similar analyses in Boilermakers and Humble Oil, and that the dispositions in those cases were fully consistent with her analysis in this case.

Boilermakers is readily distinguishable, the Secretary explained, because there were simply no labor organizations

subordinate to the defendant union, National Transient Division ("NTD"); the issue thus was whether the NTD was a local or a national labor organization, and not whether it was an intermediate organization. Id. at 6, JA 14. In resolving this question, it was relevant that the NTD engaged in negotiations, enforcement of collective bargaining agreements, and the handling of grievances, which the court deemed the "functions of a local." Id. But neither the court nor the Secretary in that case purported to delineate a litmus test of the respective functions of local and intermediate bodies.

Boilermakers thus provided no direct guidance concerning the application of the "functions and purposes" test to the instant case. Id. On the other hand, the Secretary found support for her consideration of structure in applying the "functions and purposes" test in Boilermakers' holding that the NTD, which had no subordinate labor organizations, was both "'functionally and structurally a local labor organization.'" Id. (emphasis added; citation omitted). In contrast to the NTD, the Secretary noted that the NERCC is clearly structurally intermediate within the overall union. Id.

The Secretary similarly distinguished Humble Oil on the basis that the Employees Federation, determined there to be the local labor organization, was also structurally closest to the union members. Id. The divisions that the union argued were

locals had no charters, bank accounts, offices, membership records, among other attributes; thus, at most they were "'merely administrative arms'" of the Employees Federation itself. Id. (citation omitted). Here, by contrast, the NERCC locals, which are indisputably distinct labor organizations, are independently chartered, have separate offices, bank accounts, and budgets, and determine and collect monthly dues, among numerous other attributes that were lacking in the divisions at issue in Humble Oil. Id. at 7-8, JA 15-16.

Accordingly, the Secretary found ample legal justification to adhere to her original determination that the NERCC is an intermediate labor organization. "To be sure," she concluded, "the NERCC performs a number of important responsibilities, some of which may be traditionally associated with local unions," such as negotiation of collective bargaining agreements, hiring and firing authority over organizers and business representatives, and appointment of stewards, among other functions. Id. at 9-10, JA 17-18. But because the NERCC locals themselves perform numerous functions and have distinct identities, the Secretary found that they are not "merely administrative arms" of the NERCC, but rather play a significant role in dealing with their members. Id. at 10, JA 18. The Secretary listed the important functions performed by the NERCC locals, including the levying of

dues, the disciplining of members, and the ratifying of collective bargaining agreements by local members. Id.

The Secretary thus ruled that under these circumstances the NERCC, as an intermediate labor organization, was not required to hold direct elections and adhere to the three-year election cycle. Given this ruling, the Secretary again declined to bring suit against the NERCC to force it to conduct a direct election of its officers. Id.

f. The parties returned to district court and filed cross-motions for summary judgment; on October 8, 2003, the district court issued a Memorandum and Order granting plaintiffs' motion and holding the Secretary's Supplemental Statement of Reasons to be arbitrary and capricious. Harrington v. Chao, 286 F. Supp. 2d 80, 86 (D. Mass. 2003). The court rejected the Secretary's explanation of her own "functions and purposes test of section 452.11," because the court believed the test had been previously "defined" by this Court in its Harrington decision as permitting analysis only of the entity in question and whether that entity, i.e., an intermediate body like the NERCC, had "taken on so many of the traditional functions of a local union that it must in actuality itself be considered a local union." Id. at 85 (quoting Supp. Stm't 3, JA 11).

The district court thus ruled that the Secretary's construction of the test, which considered the role of

subordinate local unions in addition to the intermediate body at issue, was inconsistent with and constituted an unexplained departure from what it understood to be this Court's test. Id. at 85-86. It further concluded in a footnote that the two cases, Boilermakers and Humble Oil, could not be reconciled with the Secretary's approach of considering the overall union structure (which includes the local unions), because when those cases considered structure they were "referring to the structure of the challenged entity itself and not the union as a whole." Id. at 86 n.9.[6] The court accordingly granted plaintiffs' motion for summary judgment, although it made no finding that the NERCC is a local labor organization.

Plaintiffs then moved for an entry of judgment directing the Secretary to "order, direct, and if necessary, require" the NERCC to conduct a direct election of its officers. See Pl. Mot., Docket Entry ("DE") 41; Proposed Order, DE 42. In response, the Secretary, relying upon Bachowski, 421 U.S. at 574-75, raised both statutory and constitutional concerns regarding a court order directing the Secretary to institute suit. Secretary's Opp., DE 45.

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[6] The district court made no attempt to reconcile this conclusion with its conclusion in the first decision that these cases were distinguishable. Compare 286 F. Supp. 2d at 86 n.9 with 138 F. Supp. 2d at 236.

After considering these filings, the district court ordered the Secretary "to take appropriate action, within thirty (30) days of the date of this Order, consistent with the determination of this Court that the Secretary's failure to treat the New England Council of Carpenters as a statutory 'local labor organization' is arbitrary and capricious." November 25, 2003 Order, JA 26. The court subsequently extended the prescribed period by an additional thirty (30) days. Order of December 16, 2003, JA 27.[7]

SUMMARY OF ARGUMENT

The district court fundamentally misunderstood both this Court's prior ruling in the instant case, and the very limited scope of judicial review in actions under the LMRDA. Accordingly, its orders of October 8, 2003, and November 25, 2003, should be reversed, and the case remanded for entry of summary judgment in favor of the Secretary. Moreover, in the unlikely event that the Court were to affirm the order of October 8, 2003, the order of November 25, 2003, should nonetheless be modified, to avoid serious constitutional and practical concerns.

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[7] The district court thereafter refused to act on the Secretary's motion for a stay pending appeal, on the ground that the Secretary's notice of appeal had divested it of jurisdiction. Order of January 23, 2004, JA 30. By orders of January 26, 2004, and February 20, 2004, this Court granted the Secretary's motion for a stay pending the instant appeal, and expedited the case.

1. Contrary to the district court's assumptions, this Court did not previously adjudicate the merits of the Secretary's interpretation of the "functions and purposes" test of 29 C.F.R. § 452.11, and the Secretary was not bound to adopt on remand the construction of the test that the district court erroneously imputed to this Court. Rather, the Secretary's task on remand was simply to explain her application of the "functions and purposes" regulation, and to explain how that application is consistent with (or deviates from) the prior case law (the Boilermakers and Humble Oil decisions). It was not her task, as the district court believed, to fit her decision into an already-decided legal construction that excluded any consideration of "structure" (other than the internal structure of the entity in question) from the analysis.

Thus, the sole question that the district court was to decide -- and that this Court must now decide on appeal -- is whether the Secretary's reasoning set forth in her Supplemental Statement of Reasons "evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious." Dunlop v. Bachowski, 421 U.S. 560, 573 (1975); Harrington v. Chao, 280 F.3d 50, 56 (1st Cir. 2002). In light of the thorough explanation of the basis for the Secretary's decision in the Supplemental Statement of Reasons, the answer to that question must be no. The Supplemental Statement

painstakingly details the plain language of the Act, its legislative history, the Department's regulations, judicial precedent, and the historical evolution of labor organizations in general, and reaches the reasonable conclusion that the NERCC's exercise of some functions of a local did not render it a local union under Title IV of the LMRDA. See 29 U.S.C. § 481(d).

The Secretary's conclusion is based on the eminently reasonable and common sense view that in considering an entity's functions and purposes (as required by 29 C.F.R. § 452.11) to determine whether an entity is a local or an intermediate labor organization, she may also consider that entity's placement within the overall structure of the labor organization. The regulation does not by its terms exclude such a vertical structural analysis, and the statute virtually compels it, inasmuch as the term used in the statute -- "intermediate" bodies -- denotes an entity whose defining characteristic is its middle-tier existence in a hierarchy.

It is thus neither surprising nor unreasonable for the Secretary, when examining a middle-tier entity such as the NERCC, to permit the union to treat such entities as "intermediate" bodies under the statute when its subordinate entities perform some meaningful functions that are traditionally carried out by local unions. That is particularly true since the legislative history demonstrates Congress's expectation that intermediate

bodies would perform significant governing powers. In those circumstances, there is nothing in the text, history, or purposes of the Act or the regulations that requires the Secretary to reclassify the NERCC as a local union because it performs functions formerly associated with the UBC local unions, where the local unions involved also continue to perform meaningful functions.

The Secretary's position also is not a departure from prior practice. The Boilermakers and Humble Oil decisions simply did not involve middle-tier organizations -- like the NERCC - that had subordinate unions with their own autonomy and significant and distinct functions. Significantly, the Secretary explained that an enforcement action in this case "would be unprecedented." Supp. Stm't 9 n.2, JA 16. "In the 44-year history of the LMRDA, the Department has never brought suit contending that an intermediate body that supervised other entities that were indisputably labor organizations was itself a local labor organization subject to the direct election requirements." Id. at 8, JA 16. Thus, at most, the position taken by the Secretary here is merely an articulation of her policy as applied to facts that have not heretofore confronted the Secretary, and the Supplemental Statement more than adequately explains this policy application to current facts.

2. Furthermore, assuming arguendo that the Court nonetheless overturns the Secretary's determination, the Court should also rule that in cases where the Secretary's decision not to sue has been found to be arbitrary and capricious, she need not execute on the judgment or obtain a stay of the order while she pursues further judicial review. Such a holding is consistent with the Supreme Court's ruling in Bachowski, and is essential to avoid the manifest constitutional concerns that would arise if the Secretary were required to take action prior to fully exhausting her right to seek further review.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. Rankin v. Allstate Ins. Co., 336 F.3d 8, 11 (1st Cir. 2003). De novo review in this context means that the Court must decide for itself whether the Secretary's Supplemental Statement of Reasons "is so irrational as to constitute the decision arbitrary and capricious," without giving any deference to the district court's decision that it was. Dunlop v. Bachowski, 421 U.S. 560, 572-573 (1975); Harrington v. Chao, 280 F.3d 50, 56 (1st Cir. 2002).

The scope of review of such a Statement is exceedingly narrow: "since the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the

decision of the Secretary not to bring suit." Bachowski, 421 U.S. at 571; see also id. at 573 ("it is not the function of the Court to determine whether or not the case should be brought" (citation omitted)), 574 ("[if] the district court determines that the Secretary's statement of reasons adequately demonstrates that [the] decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed"). The scope of review set forth by Bachowski is thus "much narrower than applies . . . in most other administrative areas." Id. at 590 (Burger, C.J., concurring).

Moreover, to the extent that the Supplemental Statement of Reasons includes an interpretation of the Secretary's own regulation, 29 C.F.R. § 452.11, that interpretation is entitled to "substantial deference." Thomas Jefferson Univ. Hosp. v. Shalala, 512 U.S. 504, 511 (1994); see also Udall v. Tallman, 380 U.S. 1, 16 (1965) ("[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"). The agency's interpretation must be upheld unless it is "'plainly erroneous or inconsistent with the regulation.'" Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). And such deference is particularly compelling where the matter, as here, is bound up in the agency's expertise and policymaking power. Thomas Jefferson Univ. Hosp., 512 U.S. at 511.

ARGUMENT

I. THE SUPPLEMENTAL STATEMENT OF REASONS FULLY ADDRESSES THIS COURT'S PREVIOUS CONCERNS AND RATIONALLY EXPLAINS THE SECRETARY'S CONCLUSION THAT THE NERCC IS NOT A "LOCAL LABOR ORGANIZATION" UNDER 29 U.S.C. § 481(b).

The district court misunderstood both this Court's prior decision remanding the case to the Secretary, and the narrow scope of judicial review of decisions of the Secretary under the LMRDA. The Secretary's Supplemental Statement of Reasons satisfies both this Court's ruling and the requirements of the LMRDA. Accordingly, the district court's orders of October 8, 2003, and November 25, 2003, must be reversed.

A. This Court Expressed No Opinion On The Merits Of The Secretary's Decision That The NERCC Is Not A Local Union, But Remanded For The Secretary To Provide A Fuller Explanation Of the Decision.

In the first appeal, this Court expressed concern with the Secretary's assertion in her initial Statement of Reasons that there was no basis in either the statute or its legislative history for concluding that if an intermediate body possesses certain powers and functions, it must directly elect its officers. The Court considered the Statement to be "seemingly inconsistent" with the functions and purposes test of 29 C.F.R. § 452.11, which the Statement did not address. Harrington v. Chao, 280 F.3d 50, 57 (1st Cir. 2002).

The Court was also concerned that the Statement failed to discuss and distinguish two cases, Donovan v. National Transient

Div., Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, 736 F.2d 618 (10th Cir. 1984) ("Boilermakers"), cert. denied, 469 U.S. 1107 (1985) and Schultz v. Employees' Federation of the Humble Oil & Refining Co., 74 L.R.R.M. (BNA) 2140 (S.D. Tex. 1970) ("Humble Oil"). Harrington, 280 F.3d at 57-58. Accordingly, this Court found "substantial questions" raised by the case and left unanswered by the initial Statement. The Court therefore regarded the Statement as "inadequate" for judicial review -- and thus "arbitrary" in that sense alone. Id. at 58.

The opinion emphasized this precise point at the outset: "[w]e do not now decide whether any refusal by the Secretary to bring suit as sought by Harrington would be arbitrary or capricious." Id. at 52. The Court then explicitly stated it was not rejecting the Secretary's analysis:

> Decisions about the proper meaning of LMRDA statutory terms, and the proper application of the Act's mandate, are for the Secretary to make, so long as they do not contravene the Act. These decisions are not up to the courts; thus, it is more appropriate for us to refrain from taking any judicial view at this point on the underlying interpretive issues in this case. Respect for her authority requires a remand, rather than final court resolution of the issue now. Moreover, a finding that the Secretary has acted arbitrarily and capriciously as to the ultimate issue would be premature, as it is not clear on this record that the Secretary is in fact repudiating her prior interpretations here.

Id. at 59-60 (emphasis added). Consequently, the Court remanded for the Secretary to "file a sufficient Statement of Reasons, which addresses both the application of the functions and purposes test of 29 C.F.R. 452.11, and whether her decision is consistent with her precedents," should she again decide against filing suit. Harrington, 280 F.3d at 60-61.

B. The District Court Erroneously Believed That This Court Opined On The Merits Of The Secretary's Test.

Despite this Court's express admonition that it was "refrain[ing] from taking any judicial view at this point on the underlying interpretive issues in this case," id. at 59-60, the district court's decision is permeated with the mistaken belief that the Court had ruled that the Secretary's interpretation contravened 29 C.F.R. § 452.11. The district court thus stated that the "[structural analysis] is precisely the rationale that the Court of Appeals found wanting"; and it referred to "the traditional test, as defined by the Court of Appeals," as mandating an inquiry into the functions of only "'the entity in question.'" Harrington v. Chao, 286 F. Supp. 2d 80, 85 (D. Mass. 2003) (citing Harrington, 280 F.3d at 57). Due to its misinterpretation of the nature of the remand, the district court's decision was fundamentally flawed.[8]

[8] The district court's decision is of limited import for purposes of the instant appeal in any event, because the Court reviews de novo the grant of summary judgment, Rankin v. Allstate (continued...)

C. The Secretary's Statement Of Reasons Fully Addresses The Concerns Raised By This Court In The First Appeal.

Notwithstanding the district court's confusion, the Secretary in fact did precisely what the remand required. Her Supplemental Statement of Reasons presents a voluminous, detailed and thorough analysis that considers the plain language of the Act, its legislative history, the Department's regulations, judicial precedent, and the historical evolution of labor organizations in general. In particular, it addresses the import of 29 C.F.R. § 452.11 and the Boilermakers and Humble Oil decisions. In doing so, the Supplemental Statement of Reasons fully and specifically responds to this Court's concerns raised in its initial decision and is rationally supported. Therefore, it clearly satisfies the highly deferential standard of review applicable here. See Bachowski, 421 U.S. at 572-73 (Secretary's decision must be upheld unless statement of reasons "is so irrational as to constitute the decision arbitrary and capricious"); accord, Harrington, 280 F.3d at 56.

1. In response to the Court's concern that the Secretary had disavowed the interpretative regulation at 29 C.F.R. § 452.11, the Secretary's Supplemental Statement of Reasons

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[8](...continued)
Ins. Co., 336 F.3d 8, 11 (1st Cir. 2003), and must affirm the Secretary's decision not to sue unless it is so irrational as to be arbitrary and capricious. Dunlop v. Bachowski, 421 U.S. at 572-73.

closely analyzed that regulation. Supp. Stm't 3, JA 11. The Supplemental Statement of Reasons first observes (as the regulation itself makes clear) that an entity's "formal title or nominal placement" in the union is not determinative of its status as a local or intermediate. Id. Rather, a labor organization's status will be determined based on its "functions and purposes." Id.

Interpreting this language, the Supplemental Statement of Reasons explains that "the critical inquiry . . . is whether the intermediate body has taken on so many of the traditional functions of a local union that it must in actuality itself be considered a local union." Id.[9] It also sets forth an essential corollary of this test, i.e., consideration must also be given to whether the subordinate organization retains such functions and purposes to "continue to play a meaningful role." Id. at 4, JA 12; see also id. at 7-8, JA 15-16; id. at 9-10, JA 17-18 (describing functions and purposes of NERCC and locals).

In interpreting the statutory distinction between intermediates and locals, the Supplemental Statement of Reasons reasonably relies on the LMRDA's actual statutory text, its legislative history, and the common historical practice at the

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[9] The district court and plaintiffs accepted this formulation of the regulation. See 286 F. Supp. 2d at 85; Pl. Mem. in Support of Mot. for Summary Judgment, DE 30, 10.

time of the LMRDA's passage. Id. at 2-5, JA 10-13.[10] It notes that the LMRDA identifies labor organizations according to their placement in the union hierarchy, see 29 U.S.C. §§ 402(i), 481(d), suggesting in addition to functions and purposes, the relevance of "the structure of [the] union." Supplemental Stm't 5, JA 13. Indeed, the most common meaning of the adjective "intermediate," 29 U.S.C. § 481(d), is "being or occurring at the middle place . . . or between extremes." Webster's Ninth New Collegiate Dictionary 632 (1990).

Only with a vertical structural analysis, encompassing the entire hierarchy, can one ascertain whether an entity "sits in the middle place" within the larger organization. The "functions and purposes" test thus incorporates a structural component.

As further support for the Secretary's construction, the Supplemental Statement of Reasons explains that the statute and regulations contain no definition whatsoever of a local labor

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[10] Resort to these tools was hardly objectionable. See Penobscot Air Servs., Ltd. v. FAA, 164 F.3d 713, 722 (1st Cir. 1999) (agency interpretation of own rule consistent with its statutory interpretation); see generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (where statute is silent or ambiguous on specific issue, court will uphold agency construction "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned'") (citation omitted); 2A Sutherland Statutes and Statutory Construction § 48.03 (6th ed. 2000) ("[i]t is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be construed and applied").

organization. Supp. Stm't 2, JA 10. Moreover, the regulations provide a "description of typical intermediate bodies," one of which is "joint councils" that include "councils of building and construction trades labor organizations," but do not define them by functions or purposes. See 29 C.F.R. § 451.4(f).

In fact, in the history of the LMRDA, the Secretary has never attempted to devise a list of functions unique to each tier of a labor organization. Rather, as the Supplemental Statement explains, "[w]hen the LMRDA was enacted, as today, unions varied in the manner in which representational activities were carried out," and the division of responsibilities "was, and is, a matter of internal union organization." Supp. Stm't 4, JA 12; see also id. at 9, JA 17 (detailing agreement among commentators that line between local and intermediate bodies is not fixed or immutable). Thus, the absence of fixed attributes for each type of labor organization in the LMRDA or its regulations strongly supports the flexible comparative analysis employed by the Secretary.[11]

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[11] The Secretary's initial Statement of Reasons explained that there is no basis for concluding that "if intermediate bodies possess certain functions and powers" they must be considered local labor organizations. Harrington, 280 F.3d at 64. According to Judge Torruella's concurring opinion, this statement evidenced a "merely 'structural' [] approach." Id. at 62. It was that position -- the disavowal of any functional analysis -- that Judge Torruella believed could not be squared with the regulation and the case law.

The Supplemental Statement now before the Court contains no suggestion of a purely structural analysis, and expressly adopts

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Moreover, the Supplemental Statement appropriately takes into account Congress' stated intent to refrain from unnecessary interference with internal union affairs. Id. at 4, JA 12; see S. Rep. No. 86-187, at 5 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2322; see also Hodgson v. Local Union 6799, United Steelworkers, 403 U.S. 333, 339 (1971); In re Lane Wells Co., 79 N.L.R.B. 252, 254-255 (1948) (describing "not an uncommon practice" of some international unions to seek certification, to contract, and to assume responsibility for collective bargaining and observation of agreements, but refusing to consider the wisdom of such procedures "lest Government intrude too deeply into the affairs of labor organizations"). In fact, as the Supplemental Statement explains, Supp. Stm't 4, JA 12, when the LMRDA was enacted, Congress was well aware of the common practice of investing intermediate bodies with "responsible governing power," S. Rep. No. 86-187, at 20 (1959), reprinted in 1959 U.S.C.C.A.N. 2336, yet it explicitly allowed intermediate bodies holding such power to elect their officers indirectly every four years by delegate. 29 U.S.C. § 481. Mandating direct, triennial elections for intermediate bodies simply because they employ such

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a test that makes the "functions and purposes" of the entity "the critical inquiry," Supp. Stm't 3, JA 11, while also honoring the plain language of the statute and its legislative history, which compel reference to the union's structure, id. at 5, JA 13. Accordingly, the Secretary has now addressed Judge Torruella's concerns about the language in the initial Statement of Reasons.

power would therefore be directly contrary to congressional intent and understanding.

2. Finally, the Supplemental Statement explains that the Secretary's analysis is consistent with the positions the Department took in Boilermakers and Humble Oil. Supp. Stm't 6, JA 14. This explanation amplifies the conclusion that the district court reached in its first decision, but abandoned (without explanation) in its second decision. Compare Harrington v. Herman, 138 F. Supp. 2d at 236 & n.9, with Harrington v. Chao, 286 F. Supp. 2d at 86 n.9.

a. In Boilermakers, the NTD had no subordinate locals, and the question before the Eighth Circuit was whether the NTD was a national organization, as the trial court found, or a local organization, as the Secretary contended. 736 F.2d at 622.[12] The court of appeals agreed with the Secretary that it "must focus on NTD's function and structure." Id. at 623.

In looking at structure, the court made two distinct findings: first, it observed that the "NTD is subordinate to the International and has no subordinate organizational units"; and second, it noted that NTD itself had a "relatively simple organizational structure." Id. Thus, the court indisputably

[12] The district court in the instant case erroneously believed the NTD was an intermediate body. 286 F. Supp. 2d at 86 n.9.

examined both the NTD's placement within the union hierarchy and the NTD's own organizational structure.[13]

To be sure, the Boilermakers court found "[m]ost important" the fact that the "NTD perform[ed] the functions of a local." 736 F.2d at 623. But this emphasis on function is generally consistent with the Secretary's approach, Supp. Stm't 3, JA 11, and specifically comports with the Secretary's comparative analysis of the functions and structure of the NERCC vis-a-vis the functions and structure of the local, because in Boilermakers there were no structurally-distinct subordinate bodies with which to make any comparison functional or otherwise.

The primary difference between Boilermakers and the instant case is that here ongoing subordinate locals exist, mandating this comparative analysis of functions and structure. In Boilermakers, by contrast, the NTD, unlike four other divisions of the international union, had no such subordinate bodies, and hence no functions and purposes to compare. Id. at 619, 623.

Significantly, however, the Boilermakers court in fact employed a structural component in its analysis (as urged by the

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[13] The district court here was therefore clearly wrong in asserting that the Boilermakers court was "referring to the structure of the challenged entity itself and not the union as a whole." Harrington, 286 F. Supp. 2d at 86 n.9. Moreover, the fact that the Eighth Circuit in Boilermakers agreed with the Secretary's approach and rendered this finding strongly supports the Secretary's view that the structure of the union as a whole has always been a relevant factor.

Secretary) when it found no such subordinate bodies to exist. If structure plays no role in distinguishing intermediate unions from locals, as urged by plaintiffs, then there would have been no reason for the Boilermakers court's agreement with the Secretary that it must also "focus" on structure along with functions and purposes. Thus, the emphasis of Boilermakers on function in no way diminishes the court's consideration and reliance on structure as well. Its conclusion plainly bears this out: "We therefore find that NTD is functionally and structurally a local labor organization." 736 F.2d at 623 (emphasis added).

b. The only other relevant decision, Humble Oil, likewise utilized a structural component in its analysis. There, the union claimed it had subordinate locals, but the district court agreed with the Secretary that these divisions were not separate labor organizations, but "merely administrative arms" of the union. 74 L.R.R.M. (BNA) at 2143.

In so ruling -- and in finding that the divisions at issue did not possess even the most rudimentary characteristics of distinct labor organizations, such as charters, offices, bank accounts, or dues or membership records, and performed only minimal representational functions, id. -- the Humble Oil court actually foreshadowed the Secretary's comparative analysis in the instant case. The court found that those attributes of a local

were held by the defendant union, which additionally performed "the basic local union functions." Id.

The court therefore ruled the defendant union was properly characterized as a local. Thus, Humble Oil, rather than undermining the Secretary's comparative analysis, clearly supports it: like Boilermakers, Humble Oil considered and applied a structural element first, then considered function.

In light of Humble Oil, the district court below found "puzzling" the Secretary's statement that the Department had "never before found an organization at the middle of a union's structure to be a 'local' labor organization." Harrington, 286 F. Supp. 2d at 84 & n.6 (citing Supp. Stm't 3, JA 11). The court's confusion, however, is more semantic than real.

The Secretary alleged and the district court found in Humble Oil that the divisions of the defendant union were merely its "administrative arms," and not separate, subordinate bodies subject to the LMRDA. See 74 L.R.R.M. (BNA) at 2140, 2143 (union has not "chartered any subordinate labor organization or subordinate affiliate"); id. at 2141 ("[d]efendant is subdivided into 26 geographical divisions which have no separate autonomy"); id. at 2142 (union's constitution does not provide for "chartering of any subordinate bodies"); id. at 2143 (divisions are "merely administrative arms" of union). Thus, the Secretary's view of Humble Oil is that the defendant union there

simply was not (and never had been) an intermediate body with subordinate locals under it. See Supp. Stm't 6, JA 14 ("no labor organization" under defendant union). Consequently, the comment in the Supplemental Statement that the district court found "puzzling" accurately reflects the holding of Humble Oil.

Finally, we note the district court below mischaracterized Humble Oil in restricting the divisions' lack of "autonomy" to collective bargaining. Harrington, 286 F. Supp. 2d at 84 n.6. The Humble Oil court ruled without limitation that the divisions lacked separate autonomy in any area.

3. Plaintiffs and amicus Association for Union Democracy, Inc. ("AUD") have also suggested mistakenly that the treatment of the International Union of Security Officers in 1991 by an area administrator in the Department's Office of Labor-Management Standards is inconsistent with the position here. See, e.g., Response of AUD to Motion for Stay Pending Appeal (lodged in this Court on or about Feb. 2, 2004). First, that decision is not binding on the Department and would not reflect the Secretary's official views if inconsistent. See, e.g., Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742-43 (1996); see also South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 103 n.7 (1st Cir. 2002), and cases cited therein.

In any event, however, the decision is not inconsistent. Rather, it makes clear that the Department will consider, among

other factors, "[t]he relationship to subordinate and superior bodies" and "[w]hat sort of hierarchy exists." See 1991 Letter from Office Labor-Management Standards (attached to AUD Response, supra).

In that particular case, the international union's constitution made the international union the "local" for all members who were not within the jurisdiction of a local, and the facts revealed that 87% of the international union's members were not in a local. Thus, the international constituted the local and accordingly performed local functions for the overwhelming majority of its membership. Certainly it was appropriate under those circumstances to view the international as a local and require direct elections.

Conversely, to characterize the international as an intermediate simply because 13% of its membership belonged to a local would be a case of the tail wagging the dog. This example, if anything, points to the great variety in union organization and practices, as well as the need for the flexible comparative approach and respect for the union's own organizational choices that the Secretary advocates here.

* * * *

In sum, the Secretary faithfully complied with this Court's instructions remanding the case to better explain her position. Harrington, 280 F.3d at 60-61. Her ten-page, single-spaced

statement comprehensively and more than adequately explains her approach to the "functions and purposes" test, which incorporates a structural component. At a minimum, her legal test and the underlying reasoning easily satisfy the applicable, highly deferential standard of review, given that they plainly are not "so irrational as to constitute the decision arbitrary and capricious." Bachowski, 421 U.S. at 573; Harrington v. Chao, 280 F.3d at 56. Indeed, as shown above, her determination is eminently reasonable.

D. The Secretary Has Adequately Explained The Reasons For Her Position As Applied To The Novel Facts Of This Case.

As the foregoing discussion of the relevant precedent makes clear, the Secretary's position here represents a legitimate articulation of a policy as applied to facts not confronted before. In particular, the agency had previously considered remotely similar circumstances on only two occasions, and had never previously applied the "functions and purposes" test to an organization truly at the middle tier of a union hierarchy, i.e., one that includes subordinate labor organizations. The Secretary's position here is therefore not a departure from past interpretation or practice, but rather an elaboration of it as necessary to apply the general principles to new facts. See Harrington, 280 F.3d at 59 ("[i]t is up to the agency in the

first instance to interpret the statute and apply those interpretations to the facts").

Because the district court incorrectly ruled that the Secretary employed an incorrect analysis in her decision not to sue, and erroneously held that the Secretary's position was altered "without explanation," Harrington, 286 F. Supp. 2d at 86, it did not reach her application of the test.[14] However, this Court's de novo review of the Supplemental Statement of Reasons, permits it to review fully the Secretary's findings. Such review, pursuant to the highly deferential standard required by Bachowski, leads inexorably to the conclusion that the Secretary's affirmation of the NERCC's status as an intermediate labor organization is rational, and certainly is not arbitrary and capricious.

In applying the test in the Supplemental Statement of Reasons, the Secretary recognized that on the one hand, "the NERCC performs a number of important responsibilities, some of

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[14] In fact, the district court never even applied the narrow, alternative test it believed was correct to the facts of this case. Rather, after setting forth the regulatory test and ruling the Secretary's determination "arbitrary and capricious," the court did not take the next step of actually deciding if the NERCC was a local under the particular facts here. Instead, it left it to the Secretary "to take appropriate action" (Order of November 25, 2003, JA 26) consistent with the court's holding that the Secretary's failure to treat the NERCC as a local union was arbitrary and capricious. An "arbitrary and capricious" ruling, however, even if based on an underlying presumption of local-union status, is no substitute for real findings.

which may be traditionally associated with local unions," such as negotiating collective bargaining agreements, hiring and firing authority over organizers and business representatives, appointing stewards, levying members' dues not determined and levied by the locals, approving the locals' levy of dues, and appointing trial committees. Supp. Stm't 9-10, JA 17-18. On the other hand, the Secretary found that the NERCC locals themselves perform important local functions, including conducting ratification votes on NERCC-negotiated collective bargaining agreements, levying and collecting dues, informally resolving grievances and disciplining members, withdrawing members from the union upon their written request, administering job referrals and scholarship and disability funds, lobbying, and engaging in voluntary organizing drives. Id. at 10, JA __. The Secretary thus ruled that because the locals continue to perform traditional local functions and purposes and play a significant role in dealing with their members, there was no basis to find that the NERCC had "taken over" so many of the locals' functions that it "must also be considered a local to carry out the purpose of the [Act]." Id.

Under Bachowski, this Court may overturn the Secretary's comparative assessment of the respective functions of the NERCC and the locals only when the analysis is so irrational as to be arbitrary and capricious. 421 U.S. at 573. As demonstrated

above, the Secretary carefully reviewed the NERCC's and locals' functions and came to a reasoned conclusion that is more than amply justified by the record. This Court therefore should uphold the Secretary's analysis and her decision not to sue.

II. ASSUMING ARGUENDO THAT THE COURT AFFIRMS THE DISTRICT COURT'S ORDER OF OCTOBER 8, 2003, IT SHOULD MODIFY THE RELIEF ORDER OF NOVEMBER 25, 2003.

As we have demonstrated in Section I, supra, the district court erred in holding that the Secretary's determination concerning the NERCC was arbitrary and capricious, and the district court's entire judgment should therefore be reversed. If the Court concludes otherwise, however, the district court's relief order of November 25, 2003, should be modified, because it is inconsistent with Bachowski and raises serious constitutional and practical concerns.

1. Following the district court's grant of their summary judgment motion, plaintiffs moved for an entry of judgment directing the Secretary to "order, direct, and if necessary, require" the NERCC to conduct a direct election of its officers. See DE 41, 42. The Secretary opposed that request (see DE 45) by raising statutory and constitutional concerns regarding a court order directing the Secretary to institute suit. See Bachowski, 421 U.S. at 574-75. After considering these filings, the district court ordered the Secretary "to take appropriate action within thirty (30) days of the date of this Order [subsequently

extended by Order of December 16, 2003, JA 27], consistent with the determination of this Court that the Secretary's failure to treat the New England Council of Carpenters as a statutory 'local labor organization' is arbitrary and capricious." November 25, 2003 Order, JA 26.

The Supreme Court in Bachowski discussed at length "the question of remedy" in two distinct types of cases. 421 U.S. at 574-76. In the first type of case, the court determines that the Secretary's statement of reasons for not suing "inadequately discloses [the Secretary's reasons], [and] the Secretary may be afforded opportunity to supplement his statement." Id. at 574. This Court's prior decision remanding the case to the Secretary to provide a more complete explanation was precisely this type of order. See Harrington, 280 F.3d at 59-60.

In the second type of case, by contrast, where the court rules on the merits that the statement is "so irrational as to constitute the decision arbitrary and capricious," the Supreme Court "assume[d] that the Secretary would proceed appropriately without the coercion of a court order when finally advised by the courts that [her] decision was in law arbitrary and capricious." Bachowski, 421 U.S. at 573, 576 (emphasis added). Thus, the Court expected the Secretary to act only after she was "finally advised by the courts" of her erroneous decision. The district court's decision on remand is exemplary of this second type of

order, but full exhaustion of all avenues of appellate review must occur before it can be said the Secretary has been "finally advised."

Obviously, the courts have not given their "final" advice on the matter until the appellate process has run its course, and the use of the term "finally advised" suggests the Secretary must be given the opportunity to resort to and exhaust her appeal rights before proceeding with an enforcement action against the union. Otherwise, the Court would have omitted the qualifier "finally" and expected Secretarial action once she was merely "advised" by the courts of her incorrect decision, namely, once an adverse decision had been rendered.

Thus, the LMRDA, as interpreted by the Supreme Court, permits the Secretary to exhaust her appeal rights before proceeding with an enforcement action that she believes is contrary to law. Such a view is fully consistent with congressional recognition of the Secretary's special knowledge in this area and its grant of exclusive enforcement authority. See Bachowski, 421 U.S. at 571. That expertise and authority would be undermined if the Secretary were required to execute the district court's judgment before she has completely exhausted her right to seek further judicial review.

2. The Supreme Court reached this conclusion after considering, but declining to answer, the question "whether the

district court is empowered to order the Secretary to bring a civil suit against the union." Bachowski, 421 U.S. at 575. That question, the Court stated, "obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary." Id. The Court also noted (without resolving the issue) that the defendant union had argued that such a court order would be constitutionally infirm, on the ground that it would violate the separation of powers doctrine and the Article III "case or controversy" requirement. Id. at 575 n.12.

Article II, Section 3 of the Constitution charges the President with the duty to faithfully execute the laws. A court order directing the executive branch to file a lawsuit it did not wish to bring would invade and usurp that authority. The federal court would become, in essence, both prosecutor and judge, deciding the allegations to be brought and then passing judgment on them. The consequent absence of a case and controversy under Article III would stem from the lack of genuine adverseness between the Secretary and the union (here, the NERCC), because the Secretary has already concluded that the requested lawsuit to hold an election is without merit.

To avoid these serious constitutional questions, the Court should hold that, under Bachowski, the Secretary need not take

enforcement action while further judicial review is still available to her.

3. Moreover, resolution of this issue will also clarify whether it will be necessary for the Secretary to request a stay pending appeal whenever a district court finds that her decision not to sue in an LMRDA case is arbitrary and capricious. She will have to do so to protect her appeal rights and to obviate the possibility of mootness, if she is required to take action before she has exhausted all avenues of appellate review.[15]

This burdensome prospect is not in the interests of the courts, the government or the private sector. Accordingly, to preserve judicial, administrative and private resources, the Court should hold that the Secretary need not take any enforcement action unless and until the issue of whether she has acted arbitrarily and capriciously has been fully and finally adjudicated by the courts.

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[15] See, e.g., Hodel v. Irving, 481 U.S. 704, 711 (1987) ("the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations"); North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("[m]ootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions'"; judiciary's "impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy'") (citations omitted)).

CONCLUSION

For the foregoing reasons, the district court's orders of October 8, 2003, and November 25, 2003, should be reversed, and the case should be remanded for entry of summary judgment in favor of the Secretary. Assuming arguendo that the Court upholds the order of October 8, 2003, the order of November 25, 2003, should be modified to clarify that the Secretary need not "take appropriate action" prior to full exhaustion of her right to seek further judicial review.

Respectfully submitted,

OF COUNSEL:

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Senior Appellate Attorney
U.S. Department of Labor
Suite N-2700
Washington, D.C. 20210

PETER D. KEISLER
Assistant Attorney General

MICHAEL J. SULLIVAN
United States Attorney

WILLIAM KANTER
(202) 514-4575
JOHN S. KOPPEL
(202) 514-2495
Attorneys, Appellate Staff
Civil Division, Room 9120
Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2004, I served the Brief for Appellant upon counsel both by e-mail transmission and by causing two copies to be mailed, via Federal Express overnight mail, postage prepaid, to each of the following counsel:

Michael A. Feinberg, Esquire
Feinberg, Campbell & Zack, PC
177 Milk Street
Boston, MA 02119

Alan Hyde, Esquire
Rutgers University School of Law
123 Washington Street
Newark, NJ 07102-3094

Daniel J. Hall, Esquire
DeCarlo, Connor & Selvo, PC
533 South Fremont Avenue, 5th Floor
Los Angeles, CA 90071-1706

The requisite number of copies of the Brief, as well as the disk required by 1st Cir. R. 32(a), were sent to the Clerk's Office by Federal Express overnight mail, on the same date.

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JOHN S. KOPPEL
Attorney