



June 17, 2024

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

308393

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Office of Proceedings
June 17, 2024
Part of
Public Record

Re: Docket No. AB-1305 (Sub-No. 1)—*Great Redwood Trail Agency—Adverse Abandonment—Mendocino Railway in Mendocino County, California*

Dear Ms. Brown:

Pacific Legal Foundation (“PLF”) submits these comments urging denial of the April 12, 2024 Application for Adverse Abandonment (the “Application”) filed by Great Redwood Trail Agency (“GRTA”). After providing background information on PLF, this comment letter proceeds by explaining why the Surface Transportation Board (the “Board”) lacks statutory authority to consider so-called “adverse abandonment” applications, such as the one currently before it. Although there is some older authority for the proposition that Congress authorized the Interstate Commerce Commission (“ICC”) to entertain adverse abandonment applications, the statutes at issue in those authorities are no longer in effect. In contrast, pursuant to the currently controlling ICC Termination Act of 1995, Congress has authorized the Board to consider applications filed only by rail carriers whose lines are to be abandoned. Thus, to prevent this action—which has been initiated by an entity who does not own or operate the railroad lines to be abandoned—from constituting an impermissible *ultra vires* action, the Board should deny the Application.

If the Board does not deny the Application on the aforementioned statutory grounds, it will be forced to confront constitutional concerns regarding the Board’s structure. As discussed below, Board members are “Officers of the United States,” yet they have not been properly appointed as

such pursuant to the Constitution's Appointments Clause. Additionally, Board members are insulated from presidential removal in violation of the Constitution's Executive Vesting and Take Care Clauses. Because these infirmities render the Board's structure unconstitutional, they provide an additional reason why GRTA's Application should be denied.

Further, granting the Application would allow a government agency to impair Mendocino Railway's investment-backed expectations and hinder the free enterprise system that allows those expectations to thrive. If the Application is granted, this will not only cause Mendocino Railway to shut down, but it will also deter other railways from creating lines. Citizens of Mendocino Railway will not only lose their only connection to the national rail network, but also first responders and forestry personnel will lose their ability to be quickly transported to where they are needed (which is increasingly important due to increased California forest fires in recent years). Thus, the public interest clearly favors allowing this line to continue, especially when GRTA could simply build its trail next to the line, as it is doing in Marin and Sonoma Counties.

Pacific Legal Foundation

Pacific Legal Foundation is a nonprofit law firm whose attorneys have extensive experience in administrative and constitutional law. PLF attorneys have been counsel of record in many significant cases concerning administrative law, property rights, and the separation of powers.¹ PLF attorneys have also generated substantial scholarship on the need for respecting property rights and the separation of powers. *See, e.g.,* Luke Wake & Damien Schiff, *Practical*

¹ *See, e.g.,* *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024); *Sackett v. EPA*, 598 U.S. 651 (2023); *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012).

Applications of the Major Questions Doctrine, 47 Harv. J.L. & Pub. Pol’y (2024) (forthcoming); Michael A. Poon, *Ratification of Rules as Retroactive Rulemaking*, 21 Geo. J.L. & Pub. Pol’y 425 (2023); Damien M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause—A Question of “Significance”*, 74 Rutgers U.L. Rev. 469 (2022).

***The Board Should Deny the Application Because It Lacks
Statutory Authority to Consider Adverse Abandonment Applications***

The Board should deny the Application because Congress authorized the Board to consider abandonment applications filed by rail carriers wishing to abandon their own railroad lines and by no one else. Congress did not authorize the Board to consider so-called “adverse abandonment” applications; thus, this proceeding is *ultra vires*.

The statute governing the filing and procedure for an abandonment application states:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to--

(A) abandon any part of *its railroad lines*; or

(B) discontinue the operation of all rail transportation over any part of *its railroad lines*,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out *only as authorized under this chapter*.²

49 U.S.C. § 10903(a)(1) (emphases added). The plain language of this subsection allows for applications filed just by a “rail carrier” who wishes to abandon “its railroad lines.” There is no language giving those with no interest in the railroad lines proposed for abandonment the ability to file abandonment applications. In fact, the absence of any such language is what led then-Judge

² The reference to “this chapter” is to Chapter 109 of the ICC Termination Act of 1995. *See* 49 U.S.C. §§ 10901–10910. Nothing in Chapter 109 authorizes adverse abandonment applications.

Kavanaugh, joined by then-Chief Judge Sentelle, to opine that the statute “seems to indicate that abandonment can occur only when the railroad files for it.” *City of South Bend v. STB*, 566 F.3d 1166, 1172 n.2 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quoting 49 U.S.C. § 10903(a)(1)). That conclusion is bolstered by § 10903(b)(1), which states: “Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.” 49 U.S.C. § 10903(b)(1). Nothing in either § 10903(d) or § 10904 provides for adverse abandonment.

Reading § 10903(a)(1) alongside § 10907(b)(1) also supports the interpretation that § 10903(a)(1) allows for abandonment applications only from the rail carriers that operate on the railroad lines to be abandoned. Section 10907(b)(1) states:

When the Board finds that--

(A)(i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10903 of this title, but *the rail carrier owning such line has not filed an application to abandon such line under section 10903 of this title* before an application to purchase such line, or any required preliminary filing with respect to such application, is filed under this section; and

(B) *an application to purchase such line has been filed by a financially responsible person, the Board shall require the rail carrier owning the railroad line to sell such line to such financially responsible person at a price not less than the constitutional minimum value.*

49 U.S.C. § 10907(b)(1) (emphasis added). This subsection allows the Board to force a rail carrier to sell its railroad when the rail carrier does not want to sell, but a “financially responsible person”³ files an adverse application to purchase. This “adverse sale” process is analogous to the existing

³ This term is defined in 49 U.S.C. § 10907(a).

“adverse abandonment” process authorized by the Board’s regulations. The only difference is that Congress expressly authorized adverse sale applications but did not authorize adverse abandonment applications. Congress’s inclusion of language in § 10907(b)(1) allowing for adverse applications for sales indicates that Congress’s omission of adverse abandonment language in § 10903(a)(1) was intentional. *See Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (“We generally presume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”) (cleaned up).

To be sure, there is some authority for the proposition that predecessor statutes to the ICC Termination Act of 1995 allowed for adverse abandonment. But differences in the language of those statutes compared to the current operative text make those earlier rulings inapposite.

In *Thompson v. Texas Mexican Railway Co.*, the Supreme Court interpreted the Transportation Act of 1920, Pub. L. No. 66-152, § 1(18), 41 Stat. 456, 477–78 (1920), to hold that “[t]here is no requirement in § 1(18) that the application be made by the carrier whose operations are sought to be abandoned”; rather, “persons other than carriers ‘who have a proper interest in the subject-matter’ may take the initiative.” 328 U.S. 134, 145 (1946) (citation omitted). At the time *Texas Mexican Railway* was decided, § 1(18) stated that “no carrier . . . shall abandon all or any portion of a line of railroad . . . unless and until there shall first *have been obtained from the Commission a certificate* that the present or future public convenience and necessity permit of such abandonment.” Transportation Act of 1920, Pub. L. No. 66-152, § 1(18), 41 Stat. 456, 477–78 (1920) (emphasis added). The language “have been obtained” is passive and thus plausibly contemplates an abandonment certificate obtained by someone other than the rail carrier who had been operating on the railroad lines to be abandoned. Such language contrasts markedly with the

now-operative active voice, namely, “[a] rail carrier . . . must file an application.” The Board should consider this “statutory history,” *see Sackett v. EPA*, 598 U.S. 651, 673 (2023), which confirms that the current statutory language allows for only the pertinent rail carrier to file.

In *Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, the Interstate Commerce Commission ruled that “any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line,” including “noncarrier applicants,” when applications are “opposed by the rail carrier”; but the then-operative text also contained certain passive-voice phrasing that could be construed as allowing for adverse abandonment. 363 I.C.C. 969, 971 (1981). As it existed in 1981, the relevant text stated: “A proceeding to grant authority under subsection (a) of this section [regarding authorization of abandonment] *begins on application filed with the Commission.*” Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 10903(b)(1), 92 Stat. 1337, 1403 (emphasis added). Unlike the active language now in § 10903 specifying that it is the operating rail carrier which files an application, this passive language does not identify the filer, which means that it could plausibly be construed as allowing for applications from an entity other than the rail carrier operating on the railroad lines for which abandonment is sought. This interpretation is bolstered by the then-operative section at issue in *Modern Handcraft*, which placed the burden “*on the person applying for the certificate* to prove that the present or future public convenience and necessity require or permit the abandonment or discontinuance.” *Id.* § 10904(b), 92 Stat. at 1404 (emphasis added). This subsection (b) referenced “the person applying,” whereas other subsections used the term “rail carrier.” *Id.* § 10904(a)(2), (a)(3), (c)(1), (d)(2), 92 Stat. at 1404–05. Congress’s varying use of “rail carrier” and “the person applying” indicated that Congress knew how to use the term “rail

carrier” when it wanted to and, thus, the statute’s use of the broader “person applying” in subsection (b) was, one may presume, intentional.

Although *Modern Handcraft* may have been correct when it held that adverse abandonment applications were permissible under the then-existing statute, Congress in 1995 changed the statutory language, which, as explained above, can no longer be read to allow for adverse abandonment applications. Besides respecting the change in statutory text, that outcome furthers Congress’s policy “to ensure the development and *continuation* of a sound rail transportation system . . . to meet the needs of the public and the national defense.” 49 U.S.C. § 10101(4) (emphasis added). Prohibiting parties other than the operating rail carrier itself from seeking abandonment of its own lines helps ensure the continuation of the nation’s rail system.

Therefore, for all of the foregoing reasons, the Board should deny GRTA’s Application as *ultra vires*.

Constitutional Infirmities Regarding the Board’s Structure

If the Board does not deny the Application as *ultra vires*, it will be forced to grapple with difficult constitutional questions regarding the Board’s structure. As outlined below, recent Supreme Court decisions indicate that, in establishing the Board, Congress likely violated the separation of powers by (1) allowing for Board member appointments in a manner that violates the Appointments Clause, and (2) restricting the President’s ability to remove Board members.

The Partisan Balancing Requirement for Board Members and Procedure for the Chairman's Appointment of Officers Violate the Constitution's Appointments Clause

The Appointments Clause is a key structural component of the Constitution, helping to ensure separation and division of the federal government's powers. It provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Clause thus “prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.” *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991). And by “limiting the appointment power, [the Framers] could ensure that those who wielded it were accountable to political force and the will of the people.” *Id.* at 884. Although the federal government requires many officers to execute the law and presidential policies, the officers’ “power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.” *United States v. Arthrex*, 594 U.S. 1, 11 (2021) (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010)). To protect such accountability, the Clause reserves the exercise of significant and continuing federal authority, see *Buckley v. Valeo*, 424 U.S. 1, 126, 140–41 (1976) (per curiam), to those properly appointed as “Officers of the United States.” See *Lucia v. SEC*, 585 U.S. 237, 244–45 (2018).

Board members are “Officers of the United States” because they “exercise significant discretion” “[i]n the course of carrying out . . . important functions.” *Freytag*, 501 U.S. at 881–82. However, they are not properly appointed because the partisan balancing requirement (“PBR”) in § 1301(b)(1) impairs the chain of command and prevents the accountability mechanism from properly functioning. *See* 49 U.S.C. § 1301(b)(1) (“Not more than 3 members may be appointed from the same political party.”). Although the constitutionality of PBRs has been questioned for decades, *see, e.g., Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 250 (1989) (“Congress also imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements also violate the Appointments Clause.”), their incompatibility with the Appointments Clause has come into sharper focus following recent Supreme Court opinions. *See* Ronald J. Krotoszynski, Jr., et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 948 (2015) (“If *Free Enterprise Fund* proves to be a major landmark decision . . . the constitutional status of partisan balancing requirements will need to be reassessed . . .”).

The Court’s recent precedents have focused on the ability of the President to control agencies through his appointment and removal powers. For instance, the Court has held that the “President must be able to remove . . . those who have ‘different views of policy’ [and] those who come ‘from a competing political party who is dead set against the President’s agenda.’” *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (citations omitted). Although *Collins* concerned the removal power, its reasoning is relevant here because “[t]he power to appoint is the mirror image of the power to remove; if undue limitations on the removal power violate the separation of powers,

so too should undue restrictions on the appointment power.” Krotoszynski et al., *supra* at 996 (footnote omitted). PBRs thus violate the Appointments Clause because they “quite literally force Presidents to rely on political enemies to carry out their executive duties.” *Id.* at 991. This is especially true when a President is from a different political party than his predecessor. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459, 470 (2008) (“New Presidents from the same party as the prior President obtain a party majority in one to two months on average compared to thirteen to fourteen months for a new president from a different party.”). Thus, even if the Board finds that it has the statutory authority to consider adverse abandonment applications, this matter still must be denied and cannot be heard until the Board is properly appointed free of § 1301(b)(1)’s taint. *Lucia*, 585 U.S. at 251 (stating “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official” (citation omitted)).

But this is not the only constitutional infirmity in the Board’s structure. Section 1301(c)(2)(A) is unconstitutional because it allows for the appointment of officers by an individual who does not constitute the “Head[] of [a] Department[].” U.S. Const. art. II, § 2, cl. 2. This subsection states: “The Chairman shall—appoint and supervise . . . *the officers* and employees of the Board, including attorneys to provide legal aid and service to the Board and its members, and to represent the Board in any case in court.” 49 U.S.C. § 1301(c)(2)(A) (emphasis added). Although the text does not specify what “officers” are being referenced, its differing use of the terms “officers” and “employees” indicates that “officers” likely refers to “Officers of the United States” within the meaning of the Appointments Clause. *See Lucia*, 585 U.S. at 241 (noting that

“‘Officers of the United States,’ [are] a class of government officials distinct from mere employees” (citation omitted)).

Congress, however, may not vest the appointment of these officers in the Board’s Chairman because the Chairman is not the “Head[] of [a] Department[].” U.S. Const. art. II, § 2, cl. 2. The relevant Department is the Surface Transportation Board, and its “Head” is the Board comprised of “5 members to be appointed by the President and with the advice and consent of the Senate.” 49 U.S.C. § 1301(b); *see Free Enter. Fund*, 561 U.S. at 511–13 (holding “the full Commission” of the Securities and Exchange Commission (“SEC”) was the Department Head for appointments purposes). In *Free Enterprise Fund*, the petitioner argued that members of the Public Company Accounting Oversight Board were improperly appointed because they were appointed by the full SEC Commission and “only the Chairman of the Commission is the Commission’s ‘Hea[d].’” *Free Enter. Fund*, 561 U.S. at 511–12 (alteration in original). The Court rejected this argument, holding the multimember full SEC Commission to be the Head. *Id.* at 512–13. *Cf. Lucia*, 585 U.S. at 244 n.3 (discussing parties’ “acknowledge[ment] that the Commission, as a head of department, can constitutionally appoint” administrative law judges as officers). Thus, Mendocino Railway would have a valid Appointments Clause argument if any § 1301(c)(2)(A) officers⁴ were to exercise executive power against it.

⁴ Section 1301(c)(2)(B) allows the Chairman to “appoint the heads of offices with the approval of the Board.” 49 U.S.C. § 1301(c)(2)(B). This subsection appears to contemplate the appointment of certain officers who are distinct from those mentioned in § 1301(c)(2)(A). If Section 1301(c)(2)(B) officers are appointed by all members of the Board, their appointment likely is proper, unlike Section 1301(c)(2)(A) officers. *Free Enter. Fund*, 561 U.S. at 511–13.

The Removal Restriction Violates the Constitution’s Executive Vesting and Take Care Clauses

In addition to appointment under the Appointments Clause, officers are subject to a second accountability mechanism: they must be removable, whether by the President personally or by some other officer directly accountable to the President. This power stems from the Constitution’s Executive Vesting and Take Care Clauses.

Article II of the Constitution vests “the” executive power in “a” President. U.S. Const. art. II, § 1. The Take Care Clause requires the President to “take Care that the Laws be faithfully executed.” *Id.* § 3. But because no single individual can personally execute all of the laws, the President must work through assistants—and must take care that they execute the laws faithfully. Therefore, the President must have control over those who help execute government policy. An important means of control—“perhaps *the* key means”—is the power to remove executive-branch officers from their positions. *Free Enter. Fund*, 561 U.S. at 501; *see also id.* at 483 (“Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”).

The Board’s structure runs afoul of the Constitution because, once the Senate has confirmed a Board member, the “President may remove a member [only] for inefficiency, neglect of duty, or malfeasance in office.” 49 U.S.C. § 1301(b)(3). Although the Supreme Court has upheld a similar removal restriction concerning the Federal Trade Commission, *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935), the Court recently clarified that the *Humphrey’s Executor* exception to the President’s removal power applies only to “multimember expert agencies that do not wield substantial executive power.” *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 591 U.S.

197, 218 (2020). For the following non-exhaustive reasons, the Board wields “substantial executive power” and, thus, falls outside the exception.⁵

First, although the administrative adjudication that the Board is currently performing may take a “judicial form,” this is an “exercise[] of—indeed, under our constitutional structure [it] *must be* [an] exercise[] of—the ‘executive Power.’” *Arthrex*, 594 U.S. at 17 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013)); *see also Seila Law*, 591 U.S. at 219 (discussing how “awarding legal and equitable relief in administrative adjudications” constitutes executive power). Second, the “Board may prescribe regulations in carrying out” the statutes giving the Board its powers. *See* 49 U.S.C. § 1321(a) (referencing chapter 13 of subtitle II and subtitle IV of title 49). This “authority to promulgate binding rules” constitutes executive power. *Seila Law*, 591 U.S. at 218. Third, the Board possesses the “quintessential[] executive power” to “seek daunting monetary penalties against private parties on behalf of the United States in federal court.” *Id.* at 219; *see* 49 U.S.C. §§ 11702, 11901–11904; *see also* 49 U.S.C. § 11906 (discussing prison term that may be sought in addition to fines). Fourth, the “Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States,” 49 U.S.C. § 1321(c)(1), which is also executive power. *Collins*, 141 S. Ct. at 1786.

When the Supreme Court decided *Humphrey’s Executor*, it stressed that the removal question “will depend upon the character of the office” and allowed the restriction there at issue because an FTC Commissioner “exercise[d] no part of the executive power vested by the

⁵ The Court has also affirmed removal restrictions for some inferior officers. *See Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988). But given the substantial final decision-making authority enjoyed by the Board, *see, e.g.*, 49 U.S.C. § 10903(e); 28 U.S.C. § 2321(a), its members are non-inferior officers. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021).

Constitution in the President.” *Humphrey’s Ex’r*, 295 U.S. at 628, 631. In contrast, given that the Board wields substantial executive power, its character is clearly different from the FTC structure at issue in *Humphrey’s Executor*. This difference takes the Board outside of the *Humphrey’s Executor* exception, as clarified in *Seila Law*, and the for-cause removal restriction is unconstitutional.⁶

Conclusion

For these reasons, the Board should deny GRTA’s Adverse Abandonment Application. Under the plain language of the ICC Termination Act of 1995, the Board does not have authority to consider abandonment applications filed by any entities other than the rail carriers that operate the lines to be abandoned. This proceeding therefore constitutes an impermissible *ultra vires* action. Additionally, the Board’s structure violates the Constitution’s separation of powers. The PBR in § 1301(b)(1) infringes on the President’s ability to appoint officers of his choosing. Further, any officers appointed pursuant to § 1301(c)(2)(A) were invalidly appointed by the Board’s Chairman, who does not constitute a Head of a Department. Finally, § 1301(b)(3) violates

⁶ The PBR and removal restriction are independently unconstitutional. However, even if these restrictions on the President’s appointment and removal powers were constitutionally permissible when standing alone, their combination certainly renders them unconstitutional. *See* Krotoszynski et al., *supra* at 997 (“*Free Enterprise Fund* teaches that statutory devices that impede the President’s ability to direct and oversee a federal independent agency must be considered in conjunction. When considered together, partisan balance requirements greatly exacerbate the independence-enhancing effects of fixed terms of office and limitations on removal. Quite plainly, the cumulative effect, or whole, of these devices is greater than the sum of the parts.”). The Supreme Court found a constitutional violation in *Free Enterprise Fund* because there were two removal restrictions “working together, [that] produce[d] a constitutional violation.” *Free Enter. Fund*, 561 U.S. at 509. Although there is only one removal restriction here, it works together with an appointment restriction to produce the same result: an unconstitutional restriction on the President’s Article II power.

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the Executive Vesting and Take Care Clauses because it limits the President's ability to remove Board members.

Sincerely,

A handwritten signature in blue ink that reads "Sean Radomski". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Sean Radomski
Attorney
Pacific Legal Foundation

Certificate of Service

I certify that I have this day served copies of this document upon all parties of record in this proceeding, via email or first-class U.S. mail.

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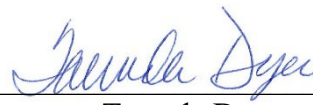
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Dated: June 17, 2024.



Tawnda Dyer