[ORAL ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, Petitioner	)	
v.	)	No. 12-1115 & 12-1153
NATIONAL LABOR RELATIONS BOARD, Respondent	)	

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO THE MOTION FOR LEAVE TO INTERVENE FILED BY SEVEN INDIVIDUAL CHARGING PARTIES OR PETITIONERS

The National Labor Relations Board ("Board"), by its Deputy Associate General Counsel, opposes the motion filed by John Lugo, Douglas Richards, David Yost, Connie Gray, Karen Medley, Janette Fuentes, and Tommy Fuentes (collectively, "Movants"), requesting that the Court grant them leave to intervene in this proceeding to review the Board's Order against Petitioner Noel Canning, issued on February 8, 2012 and reported at 358 NLRB No. 4.

Movants' request to intervene should be denied because Movants lack standing and have no legally protectable interest in this proceeding warranting intervention.

Movants' intervention is unnecessary to the just adjudication of this labor dispute. Movants state that they "seek to intervene in this case because the Court's decision herein will determine, within this Circuit, whether the Board has the lawful authority to rule on the Movants' cases."[1] Noel Canning, however, has already represented that it will argue exactly this point before the Court.[2] There is thus no need for Movants to intervene in this proceeding in order to address an issue that the petitioner will raise itself.

In the alternative, Movants have asked for leave to participate as *amici curiae* – a request the Board does not oppose.[3] *Amicus* participation represents an established and entirely adequate mechanism for them to be heard on the issue of the President's recess appointments and to present their arguments to the Court before it acts. *Amicus* participation is, moreover, the only mechanism available to Movants because Movants have neither standing to participate nor a legally cognizable interest in this proceeding. There is thus no basis to grant Movants rights beyond those of *amici*, and their Motion to Intervene should be denied.

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[1] Mot. for Leave to Intervene, filed by seven individual charging parties or petitioners, Doc. #1365390 (Mar. 23, 2012) at 2 ("Mot. to Intervene").

[2] *See* Statement of Issues To Be Raised, Doc. #1366288 (Mar. 29, 2012) ("[T]he Petitioner Noel Canning . . . expects to raise in this proceeding . . . [w]hether the National Labor Relations Board's Decision and Order of February 8, 2012 was invalid because at the time the Board did not have a lawful quorum of at least three members and thus, did not have statutory authority to adjudicate the charges against Noel Canning.").

[3] Mot. to Intervene at 9.

BACKGROUND

Petitioner Noel Canning's Case before the Board and This Court

Based on charges filed by Teamsters Local 760, the Board's Regional Director issued a complaint alleging that Noel Canning had committed various violations of the National Labor Relations Act ("the Act"). After a hearing, the administrative law judge issued a decision and recommended order finding that Noel Canning had violated Section 8(a)(5) and (1) of the Act,[4] by refusing to abide by the terms of its agreement with the union and to execute a written contract embodying those terms.

On February 8, 2012, the Board (Members Hayes, Flynn and Block) affirmed the judge's rulings, findings, and conclusions, and adopted the recommended order (with several modifications). The Board's Order required Noel Canning to cease and desist from the unfair labor practices found, to execute the collective bargaining agreement, and to make affected employees and the union pension trust whole for any loss of wages or pension amounts.[5] Two members of the panel issuing the Board's Order, Members Flynn and Block, were appointed on

[4] 29 U.S.C. § 158(a)(5) & (1).

[5] *Noel Canning, a Division of the Noel Corp.*, 358 NLRB No. 4, 2012 WL 402322 (Feb. 8, 2012).

January 4, 2012, pursuant to the President's constitutional authority to appoint federal officers during a recess of the Senate.[6]

Noel Canning petitioned for review of the Board's Decision and Order in this Court on February 24, 2012, pursuant to Section 10(f) of the Act, which allows "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought [to] obtain a review of such order" directly in the Court of Appeals.[7]

On March 15, the Chamber of Commerce and Coalition for a Democratic Workplace filed a Motion for Leave to Intervene in this proceeding,[8] in response to which the Board filed a brief in opposition.[9] On March 23, the Movants filed a Motion for Leave to Intervene in this proceeding ("Mot. to Intervene").

Movants' Cases Before the Board

Movants comprise a group of individuals employed by various companies other than Noel Canning. Each Movant is party to a case currently pending before the Board; each has filed a Motion to Disqualify Members Block, Griffin, and Flynn in that case on the grounds that these Board Members were invalidly

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[6] *See* U.S. Const. art. II, § 2, cl. 3. Member Griffin, though not a member of the *Noel Canning* panel, was also appointed to his position on January 4, 2012, during a recess of the Senate.

[7] 29 U.S.C. § 160(f).

[8] *See* Mot. for Leave to Intervene of the Chamber of Commerce and Coalition for a Democratic Workplace, Doc. #1363942 (Mar. 15, 2012).

[9] *See* Opp. to Mot. for Leave to Intervene of the Chamber of Commerce and Coalition for a Democratic Workplace, Doc. #1366144 (Mar. 28, 2012).

appointed[10]; and each is presently awaiting a decision from the Board, on their Motion to Disqualify as well as on the merits.

More specifically, Movants Lugo, Richards, and Yost each filed unfair labor practice charges against the unions representing them, arguing that a nationwide union policy violated the Act, and each was granted relief by the Board in the form of an individual compensatory remedy and a nationwide injunctive remedy.[11] Dissatisfied with the scope of those remedies, Movants filed motions for reconsideration with the Board, seeking an expanded make-whole remedy.[12] Those motions are pending before the Board.

Movants Medley and the Fuentes also filed unfair labor practice charges against the union representing them; the complaint based on those charges was

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[10] *See* Charging Parties' Mot. to Disqualify Members Block, Griffin and Flynn from Ruling On This Case, *United Steel, Paper and Forestry Workers Int'l Union*, Case No. 25-CB-8891, -9254 (NLRB Jan. 30, 2012); Charging Party's Mot. to Disqualify Members Block, Griffin and Flynn from Ruling On This Case, *IBEW, Local Union No. 34*, Case No. 13-CB-18961, -18962 (NLRB Jan. 30, 2012); Charging Parties' Mot. to Disqualify Members Block, Griffin and Flynn from Ruling On This Case, *Fry's Food Stores*, Case No. 28-CB-7048, -7062, -7063 (NLRB Jan. 30, 2012); Charging Parties' Mot. to Disqualify Members Block, Griffin and Flynn from Ruling On This Case, *Coupled Prods., LLC*, Case No. 25-RD-61324 (NLRB Jan. 30, 2012).

[11] *See United Steel, Paper and Forestry Workers Int'l Union*, 357 NLRB No. 48, 2011 WL 3841700 (Aug. 16, 2011) at 4; *IBEW, Local Union No. 34*, 357 NLRB No. 45, 2011 WL 3735520 (Aug. 10, 2011) at 4-5.

[12] *See* Charging Parties' Mot. for Recons. and Mem. in Support, *United Steel, Paper and Forestry Workers Int'l Union*, Case No. 25-CB-8891, -9254 (NLRB Aug. 29, 2011); Charging Party's Mot. for Recons. and Brief in Support, *IBEW, Local Union No. 34*, Case No. 13-CB-18961, -18962 (NLRB Aug. 24, 2011).

dismissed in a recommended decision issued by the administrative law judge.[13] Both the General Counsel and the Movants have filed exceptions to that decision seeking its reversal, and those exceptions are pending before the Board.

Finally, Movant Gray filed a petition to decertify the union representing her, but that petition was dismissed by an NLRB Regional Director on the ground that pending unfair labor practice charges against her employer "blocked" the decertification petition.[14] Gray's request for review is pending before the Board.

ARGUMENT

Movants seek to intervene in this review proceeding under Federal Rule of Appellate Procedure 15(d) and thereby attain the full rights of a party. To justify intervention, a movant must demonstrate both that it has standing to participate in the litigation and that it satisfies the four factors articulated in Federal Rule of Civil Procedure 24(a)(2).

As shown below, Movants cannot do either for the basic reason that Movants' interest in this litigation is that of *amici curiae*, not intervenors. The enforcement of the Board's Order will affect none of the Movants, let alone injure

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[13] *See* Decision, *Fry's Food Stores*, Case No. 28-CA-22836, -22871, -22872, 28-CB-7048, -7062, -7063, 2011 WL 1665271 (NLRB Div. of Judges May 3, 2011).

[14] *See* Order Withdrawing Notice of Hearing and Dismissing Petition, *Coupled Products, LLC,* Case No. 25-RD-61324 (NLRB Reg. 25 Dec. 29, 2011) at 1 ("The Complaint specifically alleges, among other things, that the Employer has been . . . in violation of Sec. 8(a)(1) and (5) of the Act. Such conduct, if proven, would condition or preclude the existence of a question concerning representation.").

them. That Order is against Noel Canning alone. Thus, the issue in which Movants are interested – *i.e.*, the validity of the President's recess appointments – may be raised here only insofar as it relates to the Board's authority to issue an order affecting Noel Canning's legal rights.

Movants therefore lack standing to raise that issue in this proceeding because it is Noel Canning that is threatened with injury by the Order under review, not Movants. By the same token, Movants lack a legally protectable interest that would entitle them to intervene as parties to this case.

Movants' request to intervene should therefore be denied.

I. MOVANTS LACK STANDING TO INTERVENE UNDER ARTICLE III OF THE U.S. CONSTITUTION

Under the law of this Circuit, intervenors in agency review proceedings, like petitioners, must possess Article III standing.[15] The Movants seek to intervene in this proceeding despite the fact that none of them are threatened with harm by the enforcement of the Board Order under review. This basic lack of a connection between the Movants and this proceeding deprives them of standing under Article III of the U.S. Constitution.

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[15] *See Fund for Animals v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003); *Ala. Mun. Distribs. Grp. v. FERC*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (stating that company could participate in agency review proceeding only as amicus curiae, not as intervenor, in the absence of Article III standing); *City of Cleveland v. NRC*, 17 F.3d 1515, 1516-18 (D.C. Cir. 1994).

Six of the Movants are individual employees who have filed unfair labor practice charges against the unions that represent them; one of the Movants has filed a petition to decertify the union that represents her.[16] None of them are employed by Noel Canning or have any stake in the particular labor dispute that is the subject of the Board Order under review here.

As non-parties neither injured nor threatened with injury by the Board Order under review, Movants lack the Article III standing necessary to participate in this proceeding as intervenors. The Supreme Court definitively articulated the three-part test for Article III standing in *Lujan v. Defenders of Wildlife*:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical. . . .'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly. . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[17]

The Movants fail to satisfy the *Lujan* test, for they can point to no injury to them traceable to the Board's decision in *Noel Canning* that would be redressed by this Court granting the petition for review. Movants do not seek to intervene because of the Board's assertion of authority in the *Noel Canning* case or its

[16] In addition to bringing charges against the union that represents them in collective bargaining, Movants Medley and Janette and Tommy Fuentes have also brought tandem charges against their employer.

[17] 504 U.S. 555, 560-61 (1992) (citations omitted).

issuance of the Order under review here; instead, Movants seek to intervene "because the Court's decision herein will determine, within this Circuit, whether the Board has the lawful authority to rule *on the Movants' cases*."[18] Movants do not identify any concrete or actual injury they would sustain from enforcement of the Board's Order *in this case*, nor can they.

Movants therefore lack standing to participate in this case because they are not threatened with injury by the Court's enforcement of this Board Order. This Court may consider the issue of the Board's authority only as it relates to the specific order on review, and the only redress this Court can provide on this petition for review is to grant the petition and deny enforcement of the Board's order (with or without remand). This Court lacks jurisdiction on a petition for review to redress any other "injury" claimed by the Movants: in this proceeding the Court cannot, for example, review other orders issued by the Board, or prospectively enjoin the Board in other cases. Granting this petition for review would provide relief solely to Noel Canning.

Movants further lack standing because their claimed injury is speculative at this point. Each of the Movants is presently awaiting a decision by the Board, as noted above at pp. 4-6. Their claimed injuries are therefore predicated upon

[18] Mot. to Intervene at 2 (emphasis added).

hypothetical adverse Board decisions that may never occur.[19] If and when any Movant is aggrieved by a final order of the Board, that individual will be able to seek review of that order under Section 10(f) of the Act. But at present, Movants lack a cognizable injury-in-fact.

In this respect, Movants' position is similar to that of the putative intervenor in *City of Cleveland v. NRC*.[20] A company sought to intervene in a petition for review of agency action that concerned antitrust conditions written into the operating licenses of several nuclear power plants. The company "d[id] not operate in petitioners' geographic market or have any other economic relationship with petitioners or their direct competitors," but had moved to intervene "because petitioners' claims are 'comparable to those which might at some time be asserted'" by a competitor of the company, and it was "concern[ed] about the precedential effect of an adverse decision." This Court held that concern to be "unduly remote and too academic to cloak [the movant] with standing" and so denied the motion to intervene, while noting that the company "may, however, participate as *amicus curiae*."[21] The same result is proper here.

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[19] *See J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996) ("It is not enough for the Foundation to assert that it might suffer an injury in the future, or even that it is likely to suffer an injury at some unknown future time. Such 'someday' injuries are insufficient.").

[20] 17 F.3d 1515 (D.C. Cir. 1994).

[21] *Id.* at 1515-16, 1518 (internal quotation marks omitted).

II. THE MOVANTS ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 15(d) BECAUSE THEIR CLAIMED INTEREST IN THIS PROCEEDING IS INSUFFICIENT, THEIR INTEREST IS NOT AT RISK OF BEING IMPAIRED, AND NOEL CANNING WILL ADEQUATELY REPRESENT THAT INTEREST

Movants' lack of standing is dispositive, but in any event they fail to meet the requirements to be entitled to intervene under Rule 15(d).

Although Rule 15(d) does not provide explicit guidance on the "interest . . . and the grounds" needed to support intervention, the Courts of Appeals have applied the factors articulated in Federal Rule of Civil Procedure 24(a)(2) when determining whether to grant intervention at the appellate level.[22] According to Rule 24(a)(2), four factors determine whether intervention as of right is justified:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties.[23]

A failure to satisfy even one of these elements defeats a motion to intervene.[24]

There is no dispute that Movants satisfy the timeliness requirement. However, as explained below, Movants' interest in this litigation is of such a

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[22] *See Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994). *See also UAW v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004).

[23] *Fund for Animals*, 322 F.3d at 731 (internal quotation marks omitted).

[24] *Jones v. Prince George's County*, 348 F.3d 1014, 1019 (D.C. Cir. 2003).

tenuous nature that they cannot satisfy the remaining three factors of Rule 24(a)(2). Movants' request to intervene in this proceeding is thus inconsistent with the policies underlying Federal Rule of Civil Procedure 24(a)(2), and should be denied for this independent reason.

a. The Movants lack an interest in the subject of this action – namely, the enforcement of the Board's Order against Noel Canning

Under the second requirement of Federal Rule of Civil Procedure 24(a)(2), the Movants must "claim[] an interest relating to the property or transaction that is the subject of the action." "The rule impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one."[25]

The petition for review in this proceeding makes clear that the "transaction that is the subject of the action" is the Board's Order against Noel Canning, and, as explained above, Movants lack any "legally protectable" interest affected by that Order. None of the Movants is or will be subject to the Board's Order at issue in this case, should it be enforced. Nor will enforcement of the Order affect Movants' rights under the Act or be res judicata against them.

Movants' "interest" in this proceeding is thus not the interest of intervenors; it is the interest of *amici curiae.* In seeking to provide the Court with additional research and argument on a wholly legal issue, the Movants state the typical plea

[25] *S. Christian Leadership Confer. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984).

for participation as *amici curiae*.[26] By framing their request as a motion to intervene, however, Movants seek to claim for themselves additional rights to which *amici curiae* are not entitled.

Movants' request to intervene therefore must be denied. The integrity and efficiency of judicial proceedings depend upon maintaining the distinction between intervenors and *amici curiae*, and this Court draws that line carefully "for the sake of clarity, simplicity, and administrative rationality."[27] Moreover, as Judge Easterbrook has explained:

> Trade associations, labor unions, consumers, and many others may be affected by (and hence colloquially "interested" in) the rules of law established by appellate courts. To allow them to intervene as of right would turn the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously). Participation as *amicus curiae* will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option. Perhaps the right question to ask is: when will participation as *amicus curiae* be inadequate to present claims to the tribunal?[28]

Because Movants have failed to satisfy the second prong of Rule 24(a)(2), their request to intervene must be denied.

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[26] *See Rio Grande Pipeline Co.*, 178 F.3d at 539 ("Longhorn is not a proper intervenor. It appears that Longhorn is really seeking to appear as an amicus.").
[27] *Id.* at 539.
[28] *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532-33 (7th Cir. 1988).

b. No legal interest of the Movants will be impaired if the Movants participate in this proceeding as *amici curiae* instead of as parties

Under the third factor of Rule 24(a)(2), the court is to consider "whether the applicant [for intervention] is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest."

The nature of Movants' interest ensures that it will not be impaired or impeded by denying them intervention. Movants request intervention on the basis that "[t]his Court's decision on whether the Board actually possesses a valid quorum in this case will determine, within this Circuit, if the Board can lawfully rule on Movants' cases."[29]

Such an "impairment" by *stare decisis* normally does not suffice to justify intervention. This Court has held that a "concern about the precedential effect of an adverse decision is not sufficient to confer standing"[30]; thus there is no protectable interest warranting intervention. Where factual development of the record is not required because the issue under consideration is wholly legal in character, intervention is unnecessary because the non-party can adequately serve its interests by participating as *amicus curiae*.[31]

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[29] Mot. to Intervene at 7.

[30] *City of Cleveland*, 17 F.3d at 1515-16.

[31] *See Bethune Plaza, Inc.*, 863 F.2d at 533 ("We conclude that *stare decisis* effects may satisfy the standard of Rule 24(a)(2) only when the putative intervenor's position so depends on facts specific to the case at hand that participation as *amicus curiae* is inadequate to convey essential arguments to the tribunal.").

In any event, any *stare decisis* effect of this Court's decision need not affect Movants, because they are not limited to obtaining judicial review of future Board orders in this Circuit. Under Section 10(f) of the Act, parties aggrieved by a final order of the Board can seek review in any Circuit in which the union or employer resides or transacts business or where the alleged unfair labor practices occurred, so Movants may choose to petition for review of any future adverse final orders. [32]

c. If Noel Canning challenges the validity of the President's recess appointments, it will adequately represent Movants' position on this issue

Finally, Movants fail to establish that their "interest is not adequately represented by existing parties."[33] In support of their claim of inadequate representation, Movants claim that employees like themselves can never be adequately represented by an employer, such as Noel Canning; Movants additionally argue that Noel Canning cannot adequately represent their interests since they are all employed by companies besides Noel Canning and therefore have "diverse and substantial interests" that are not shared by Noel Canning.[34]

By emphasizing their identity as employees of companies besides Noel Canning, Movants miss the mark: as Rule 24(a) itself emphasizes, a court considering the adequacy of representation is to examine the stated "*interest*" of

[32] 29 U.S.C. § 160(f).
[33] *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972).
[34] Mot. to Intervene at 8-9.

the movant, not its identity, in relation to the existing parties.[35] And, "where the putative intervenor and a named party have the same ultimate objective," "the movant to intervene must rebut the presumption of adequate representation by the party already in the action."[36] This requires that the movant present "evidence of collusion, adversity of interest, nonfeasance, or incompetence" by the existing party.[37] "A mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party."[38]

By their own admission, Movants' ultimate objective in this litigation is identical with that of Noel Canning. According to Movants, they "have each filed motions to recuse Ms. Block and Messrs. Griffin and Flynn from participating in their cases because of their unconstitutional appointments to the Board," and their

[35] Fed. R. Civ. P. 24(a)(2) (emphasis added). *See also Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the *interest* compares with the *interests* of existing parties.") (emphasis added).

[36] *Butler, Fitzgerald, & Potter v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001). *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950-51 (9th Cir. 2009); *United States v. Mich.*, 424 F.3d 438, 443-44 (6th Cir. 2005); *In re Community Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005); *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996); *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994); *The Moosehead Sanitary District v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); *Int'l Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.3d 964, 967 (5th Cir. 1978); *Com. of Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976).

[37] *Butler*, 250 F.3d at 180.

[38] *Jones*, 348 F.3d at 1020 (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909, at 344 (2d ed.1986)).

"direct and immediate interests in this proceeding" stem from the fact that "[t]his Court's decision on whether the Board actually possesses a valid quorum in this case will determine, within this Circuit, if the Board can lawfully rule on Movants' cases."[39] Movants' objective is therefore the same objective as Noel Canning's, i.e., contending that three members of the Board were invalidly appointed and that therefore the Board lacks authority to issue final orders for lack of a quorum.[40]

The presumption that Noel Canning will adequately represent Movants' asserted interests therefore fully applies to this case, and Movants have done nothing to rebut that presumption. In their efforts to explain how Noel Canning will not represent their interests in this proceeding, Movants rely upon the fact that they are employees whom the Act protects as against employers such as Noel Canning. Though that assertion is true, it is irrelevant for the purposes of Rule 24. In litigation, disparate entities with different goals, interests or rights often find that their objectives happen to be aligned in the context of a particular case or issue. Indeed, as Movants' preview of their argument demonstrates here, they seek to make a legal argument based solely on the Constitution.[41] In short, Movants share Noel Canning's ultimate objective in this litigation, and there is no "evidence of

[39] Mot. to Intervene at 5, 7.
[40] *See* Statement of Issues To Be Raised, Doc. #1366288 (Mar. 29, 2012).
[41] Mot. to Intervene at 2-5. Movants' argument is identical to the argument made by the Chamber of Commerce and the Coalition for a Democratic Workplace in their motion to intervene. *See* Mot. for Leave to Intervene, Doc. #1363942, at 2-6.

collusion, adversity of interest, nonfeasance, or incompetence" on the part of Noel Canning.

In sum, Movants have no stake in the Board Order before the Court. If granted intervention, however, Movants will have the rights of a party, including the right to appeal this local labor dispute to the Supreme Court, irrespective of—and perhaps despite—Noel Canning's interests. No reason exists to inject into this litigation a non-party intent on addressing a decision on this constitutional issue. "The prospect that a new party might string out a case that the original parties want to resolve usually is a compelling objection to intervention rather than a reason to allow it."[42] Movants' request to intervene should be denied.

III. MOVANTS' REQUEST FOR PERMISSIVE INTERVENTION SHOULD BE DENIED SINCE MOVANTS CAN ADEQUATELY PRESENT THEIR VIEWS ON THE RECESS APPOINTMENTS ISSUE AS AMICI CURIAE

Movants conclusorily assert that, since they have satisfied the requirements for intervention as of right, they "*a fortiori* also satisfy the more lenient standard for permissive intervention under Rule 24(b)(1)(B)."[43] Movants' argument fails because, as shown, they are not entitled to intervene as of right. Moreover, Movants' conclusory assertion fails to preserve any other claim for permissive

[42] *Bethune Plaza, Inc.*, 863 F.2d at 531. *See also Sierra Club*, 358 F.3d at 518 ("Officious intermeddlers ought not be allowed to hijack litigation that the real parties in interest can resolve to mutual benefit.").

[43] Mot. to Intervene at 6.

intervention, including that the standard for permissive intervention is "more lenient." Having failed to present argument in support of permissively intervening, Movants have waived the issue.[44]

In any event, Movants' request for permission to intervene should be denied. Under Rule 24(b), a court must exercise its discretion in considering the non-party's request to intervene and evaluate, *inter alia*, any delay or prejudice that would result.[45] As *amici curiae*, Movants can contribute additional briefing and argument to the Court without the procedural complications that would result from their intervention, as well as intervention by any similarly interested entity.[46]

Movants also lack Article III standing, as explained above at pp. 7-10. It may be that "[w]hether standing is required for permissive intervention in this Circuit is an unresolved issue."[47] Exactly because this issue is unsettled, however, this Court should act prudently and decline to exercise its discretion in granting intervention to a non-party that lacks Article III standing.[48]

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[44] *See N.Y. Rehab. Care Mgmt., LLC v. NLRB,* 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.").

[45] *See* Fed. R. Civ. P. 24(b)(3).

[46] *See, e.g.*, Mot. for Leave to Intervene by the Chamber of Commerce and the Coalition for a Democratic Workplace, Doc. #1363942 (Mar. 15, 2012).

[47] *Safari Club Int'l v. Salazar*, __ F. Supp. 2d. ___, 2012 WL 983550, at *10 n.9 (D.D.C. Mar. 23, 2012). *But see Rio Grande Pipeline Co.*, 178 F.3d at 538-39.

[48] *See In re Vitamins Antitrust Class Actions,* 215 F.3d 26, 32 (D.C. Cir. 2000) (declining to exercise pendent appellate jurisdiction over request for permissive intervention because of unsettled law concerning standing requirements).

CONCLUSION

Movants' asserted interest in the validity of the recess appointments of Members Flynn, Block, and Griffin justifies their participation as *amici curiae.* That interest falls short of justifying intervention under Rule 15(d), however, and does nothing to overcome their lack of standing. Their request to intervene should be denied.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 5th day of April 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent	Nos. 12-1115 & 12-1153

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who are registered users:

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Dated at Washington, D.C.
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