[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. **NATIONAL LABOR RELATIONS BOARD**, Respondent.	Case No. 12-1115

REPLY ON MOTION FOR LEAVE TO INTERVENE

Movants seek intervention because both have numerous members facing imminent unlawful Board action and one member, Noel Canning, who has already been subject to such action. The primary issue presented in this proceeding is the Board's general ruling that it possesses a quorum because its purported recess appointments were valid. That ruling is critically important to Movants' members. As a private employer with fewer than 100 employees, Noel Canning lacks the ability and the incentive to fully litigate this complex constitutional question. Participation as *amici curiae* is not enough. Intervention here flows from well-settled principles and should be granted.[1]

[1] Should the Court grant both motions to intervene, Movants agree to file a single, consolidated brief with the other group of intervenors for Petitioner. Also, because thirty days have passed, granting intervention to Movants will not open the

I. MOVANTS HAVE STANDING

Movants have standing to challenge the Board's unlawful adjudication of Noel Canning's appeal. The Board challenges only the first requirement of associational standing—the standing of Movants' members. *See, e.g.*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The Board is wrong. On three independent bases, multiple of Movants' members face "an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision." *New York Regional Interconnect, Inc. v. F.E.R.C.*, 634 F.3d 581, 587 (D.C. Cir. 2011). *First*, many of Movants' members face imminent harm traceable to the Board's decision that it possesses a lawful quorum. *Second*, Noel Canning is a member of both Movants and it clearly has standing. *Third*, Movants' members are burdened by the Board's ruling that verbal agreements are enforceable notwithstanding state law.

A. Movants' Members Face Imminent Harm Due To The Board's Decision That It Possesses A Lawful Quorum.

Movants have multiple members currently undergoing Board proceedings or awaiting a decision from the Board. *See* Supp. Decl. of Johnson, Ex. A. In this proceeding, the Board ruled—a ruling it has explicitly reaffirmed[2]—that it

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door to additional intervenors. *See* Fed. R. App. P. 15(d).

[2] *Center for Social Change, Inc.*, 358 NLRB No. 24, at p. 1 (Mar. 29, 2012) ("[W]e reject the Respondent's arguments that the Board lacks a quorum . . . .").

possesses a quorum and intends to exercise its full powers. That ruling subjects Movants' members to the imminent harm of adjudications by a quorum-less Board.

Under hornbook standing doctrine, Movants' members have standing to challenge the Board's decision: (1) The harm they face is *imminent* because the Board will continue to subject them to unlawful Board action through unlawful adjudication of pending cases, *see Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988) (party has standing to challenge an agency's assertion of authority that creates the possibility of "agency review in future cases involving [similar] disputes," even if no standing otherwise); (2) The harm will invade their *legally protected interest* in adjudication by a Board with a lawful quorum, *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644-45 (2010); (3) The harm is *fairly traceable* to the Board's decision that it possesses a quorum; and (4) the harm would be *redressed* by a ruling in this Court that the Board lacks a quorum.

This Court's recent decision in *Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010), dispels any doubt. The FDA there argued—like the Board does here, Opp. at 7—that a company lacked standing to challenge a rule set forth in an adjudication to which the company was not a party. *Teva* rejected this argument, explaining that standing exists because "[i]t is clear what the [agency] will do absent judicial intervention and what the effect of the agency's action will be." 595 F.3d at 1312. It is likewise "clear" what the Board will do

absent judicial intervention—adjudicate Movants' members' cases without a quorum. Those members have standing to challenge this "imminent threat." *Id*.

The Board also claims that Movants' members lack standing because they have not yet been "aggrieved by a final order issued by the Board." Opp. at 8. But *Teva* specifically rejected this argument too:

> For the purpose of the classic constitutional standing analysis, it makes no difference to the "injury" inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board; provided the projected sequence of events is sufficiently certain, *the prospective injury flows from what the agency is going to do, not how it decided to do it*.

Teva, 595 F.3d at 1312 (emphasis added); *see also Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49 (D.C. Cir. 2002) (adjudicating pre-enforcement challenge to an agency policy in a letter addressed to neither the petitioner nor the intervenors).[3]

Finally, the NLRA gives this Court jurisdiction over all Board adjudications. *See* 29 U.S.C. § 160(f). This Court's decision will thus directly redress the imminent harm of unlawful Board action facing those of Movants' members who

[3] The Board never mentions *Teva*. And the case it does cite, *City of Cleveland v. NRC*, 17 F.3d 1515 (D.C. Cir. 1994), is off point. There, the would-be intervenor *did not assert* standing, had *no* pending proceedings before the Agency, had *no* direct interest in the Agency's rule, and was facing *no* imminent harm. *See id.* at 1516 ("AEC asserts that it should be allowed to intervene in support of the agency because petitioners' claims are 'comparable to those which might at some time be asserted by Alabama Power Company . . . .'"). Likewise for the Board's other authorities. *See, e.g.*, *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 537 (D.C. Cir. 1999) (cited in Opp. at 5 n.5, 11 n.21, 20 n.48) ("[I]t is *uncontested* that Longhorn lacks Article III standing . . . ." (emphasis added)).

are currently undergoing Board proceedings. Indeed, the Board itself has previously acknowledged that D.C. Circuit decisions—even in petition for review proceedings—effectively bind the Board nationwide. *See* Pet. for Cert., *NLRB v. Laurel Baye Healthcare of Lake Lanier*, No. 09-377, 2009 WL 3122602 (Sept. 29, 2009) ("Section 10(f) of the NLRA permits any aggrieved person to seek review of a Board order in the D.C. Circuit," such that this Court's pre-*New Process Steel* holding that the NLRA requires a quorum "could prevent the current Board from enforcing the NLRA throughout the country"). Redressability is thus satisfied.[4]

B. Movants Have Standing Because Noel Canning Has Standing And Is A Member Of Both Movants.

Movants also have standing for the simple reason that Noel Canning has standing. It is black letter law that an association has standing if its "members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. Noel Canning is a member of both Movants. Movants thus have standing too.

This straightforward application of *Hunt* makes sense.[5] Standing ensures that there is the "requisite 'case or controversy' between" the litigants, *Hunt*, 432 U.S. at 344, and "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the

[4] *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 187 (2000) (it need only be "likely, as opposed to merely speculative" that the injury will be redressed).

[5] The Board's only contrary authority is a single line of dicta in a twenty-year-old, out-of-circuit opinion. Opp. at 6 n.7.

litigation will be pursued with the necessary vigor," *United Fed. Of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462, 469-70 (D.C. Cir. 1969). There is plainly a live "case or controversy" between Noel Canning and the Board, and Movants' participation furthers *all* of standing's objectives. Movants thus have standing.[6]

C. Movants Have Standing To Challenge The Board's Adjudicative Rule On Verbal Agreements.

Finally, Movants have standing to challenge the Board's adjudicative rule that verbal agreements are enforceable notwithstanding contrary state law. *Noel Canning*, 358 NLRB No. 4, slip op. at 7. Board decisions inform future decisions, *see, e.g.*, *id.* (citing prior Board decisions to support this rule), and both Movants have members who regularly engage in collective bargaining. The Board's rule thus imposes concrete injury on Movants' members, giving Movants standing. *See, e.g.*, *Teva*, 595 F.3d at 1312 (dismissing as "trivial" the uncertainty of whether the Agency will "stick to" a rule adopted in an adjudicative proceeding); *Ass'n of American RRs v. DOT*, 38 F.3d 582, 586 (D.C. Cir. 1994) ("additional regulatory burden" from "a federal agency's unlawful adoption of a rule" confers standing).

The Board never really contests this point. Rather than argue that Movants'

[6] *Hunt*'s requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," 432 U.S. at 343, bars associational standing only when the member *needs to be* a party but is not. This ensures that Associations cannot bring impossible claims—such as claims for individualized money damages that cannot be adjudicated without the members as parties. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 515 (1975). This requirement does not bar associational standing when, as here, the member is already a party.

members are not harmed, the Board notes that "this Court is without jurisdiction" to consider the verbal contract rule because "Noel Canning failed to raise the issue to the Board." Opp. at 18. But that incorrectly conflates standing with the merits. Standing depends solely on whether the rule *harms* Movants' members. *Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005). If so, Movants can challenge it on *any* ground, including the Board's lack of authority to adopt it.[7]

II. INTERVENTION IS PROPER

The Board opposes intervention, but its reasons fail.[8] *First*, the Board claims that Movants lack an interest in this proceeding. Not so. Beyond the interests outlined in Movants' motion, "standing is [] sufficient to establish . . . an interest relating to the . . . transaction which is the subject of the action." *See, e.g.*,

[7] The Board's assertion that the rule is old, Opp. at 18-19, is likewise irrelevant to the question of whether it harms Movants' members.

[8] In both Oppositions, the Board acts as though Fed. R. Civ. P. 24(b) (district court intervention) governs here. It does not. While Rule 24(b) *informs* the inquiry under Fed. R. App. 15(d), it is clear that the intervention bar is lower in Rule 15 petition for review proceedings. For example, to the extent that Rule 15(d) even has an inadequacy of current parties requirement (none appears in the Rule's text), it is plainly diminished. Unlike district court intervenors—who may raise additional arguments or claims, *e.g.*, *Wright, Miller & Kane, Federal Practice and Procedure*: Civil 3d at § 1921 (district court interveners can bring compulsory and permissive counterclaims)—petition for review intervenors may address *only* "matter[s] that [have] been brought before the court by another party." *Illinois Bell Telephone Co. v. F.C.C.*, 911 F.2d 776, 785-86 (D.C. Cir. 1990). Rule 15(d) intervenors thus *always* have the same objective as a current party. That constant overlap distinguishes most of the Board's arguments, as well as the Rule 24(b) intervention cases cited in its Opposition to the NRTW Intervenors at 16 n.36.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003).[9]

Second, the Board erroneously suggests that intervention is improper with respect to a "wholly legal issue." *Id.* at 11, 13. To support the odd suggestion that parties may not intervene on questions of law, the Board cites *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999). But *Rio Grande* never says that. Rather, it holds that parties "who possess standing . . . can . . . intervene." *Id.*

Third, the Board attacks Movants' reliance on the stare decisis effect of this Court's decision as a basis for intervention. But this Court long ago held that "stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967).[10] And it is irrelevant that "Movants' members may choose to petition for

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[9] The Board's principal authority on this point is the Seventh Circuit's decision in *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525 (7th Cir. 1988). The Board neglects to mention, however, that the Seventh Circuit then-employed a stricter standard for intervention than the D.C. Circuit's, *see, e.g.*, *Rio Grande*, 178 F.3d at 538 (Seventh Circuit's intervention doctrine "requires interest greater than that of standing"), and, in any event, the Seventh Circuit's pre-*Lujan* intervention cases may no longer be good law, *see, e.g.*, *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000). Regardless, *Bethune Plaza* is plainly different from this case because *that* intervenor *both* lacked standing *and* had no direct interest: "The Council's 'interest relating to the . . . transaction' . . . is that the precedential effect of a decision on the merits *may influence* the *state's* conduct in the future." *Id.* at 530 (emphasis added).

[10] *See also, e.g.*, 3B *Moore's Federal Practice* ¶ 24.07[3], at 24-65 (2d ed. 1987) ("[T]he adverse impact of stare decisis standing alone may be sufficient to satisfy the [practical impairment] requirement."). The Board's lone authority is inapposite. *See American Nat'l Bank & Trust Co.*, 865 F.2d 144, 148 (7th Cir. 1989) ("[T]he Union has failed to assert a direct, legally protectable interest . . . .").

review of future orders elsewhere if they are dissatisfied with the result here." Opp. at 14. Movants' members have a right to review in this Circuit, and this proceeding will determine whether the Board can continue acting without a proper quorum. Movants' legal rights will thus be directly affected whether or not they could later go "elsewhere." *See, e.g.*, *Nuesse*, 385 F.2d at 702 ("[T]he opportunity to raise the same issue in another forum [is] no bar to intervention as of right.").

Fourth, the Board claims that Noel Canning will adequately represent Movants' interests. Opp. at 15-16. But Noel Canning has limited resources and may be unable to continue litigating after a loss (or a victory). Movants, in contrast, represent hundreds of thousands of members—some facing imminent unlawful Board action—and have broad interests that Noel Canning cannot adequately represent. Just as the Board does not adequately represent the Teamsters—who will likely be granted intervention to avoid the "'circuit shopping' and useless proliferation of judicial effort" that flows from multiple appeals on the same issue, *AFL-CIO v. Scofield*, 382 U.S. 205, 212-13 (1965)—Noel Canning does not adequately represent Movants. *See, e.g.*, *NRDC v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (similar associations may separately intervene because "while the overall point of view might be shared, appellants' interest in the regulation of particular industries may not be represented by existing parties").[11]

[11] *See also, e.g.*, *Federal Practice and Procedure* at § 1909 ("[A]ll

Finally, the Board asserts that Movants should not be allowed to intervene because "the Court could find merit in Noel Canning's arguments under the Act and grant the petition without reaching the constitutional issue." Opp. at 16. But Noel Canning raises only three issues—the quorum issue, the verbal contract issue, and a claim regarding review of the ALJ's credibility determination. If the Board is correct that the Court cannot even address the verbal contracts issue, then Noel Canning will *certainly* be "intent on addressing the constitutional issue." Opp. at 16. Movants thus "inject" only a broader perspective and additional resources.

The Board's arguments opposing intervention should be rejected. At bottom, the Board seeks to litigate "a sweeping constitutional attack on Executive action" with only a small employer from Yakima, Washington for an opponent. Opp. at 16. A party's desire to retain a titled playing field is not a basis to deny intervention, particularly given the broad consequences of this Court's resolution of this critical constitutional question. Movants should be granted intervention.[12]

(continued…)
reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene . . . .").

[12] To the extent that the Court has any doubt, it should analogize to permissive intervention under Fed. R. Civ. P. 24(b)(1)(B), which requires only that an intervenor "has a claim or defense that shares with the main action a common question of law or fact"—a standard Movants easily satisfy. The Board asserts that Movants "waived" their "claim" for permissive intervention, Opp. at 19, but the Board is wrong. Movants expressly relied on the permissive intervention analogy and made all relevant supporting points. And in any event, Movants' "claim" is for intervention under Fed. R. App. P. 15(d). Movants plainly did not waive *that*.

Dated: April 23, 2012

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2012, on behalf of Movants the Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace, 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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DECLARATION OF RANDEL K. JOHNSON

I, Randel K. Johnson, hereby state and declare as follows:

1. My name is Randel K. Johnson, and I currently serve as the Senior Vice President for Labor, Immigration, and Employee Benefits with the Chamber of Commerce of the United States of America (the "Chamber"). In that capacity, I am familiar with the Chamber's membership.

2. As a matter of public record, numerous of the Chamber's members are currently awaiting decisions from the Board. This is clear from a comparison of the Chamber's publicly available Board of Directors (all companies with officers listed are members of the Chamber), available here: http://www.uschamber.com/about/board/board-directors, and the Board's public docket, available here: http://www.nlrb.gov/cases-decisions/casesearch. The Board will and could issue these decisions any day.

3. In addition, numerous Chamber members—such as those with representatives on the Chamber's publicly available Board of Directors—engage in collective bargaining and are thus subject to the Board's rule that verbal labor agreements are enforceable notwithstanding contrary state law.

4. The Chamber is a member of the Coalition for a Democratic Workplace.

I hereby declare under penalty of perjury that the forgoing is true and correct.

Signed this April 23, 2012.

Randel K. Johnson