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.	No. 12-1115 & 12-1153

REPLY ON MOTION FOR LEAVE TO INTERVENE

Movants Connie Gray, Karen Medley, Janette Fuentes and Tommy Fuentes seek to intervene in this action because each has a case currently pending before the National Labor Relations Board ("Board").[1] In *Noel Canning*, 359 NLRB No. 4 (February 8, 2012), the Board implicitly held that it possesses a quorum to adjudicate cases notwithstanding that three of its ostensible members were appointed without the advice and consent of the Senate and during a time in which the Senate was not in recess. As a result of *Noel Canning*, the Movant employees are under imminent risk that their cases will be adjudicated by a Board that lacks a

[1] John Lugo, Douglas Richards and David Yost no longer seek to intervene in this case. On April 18, 2012, the Board issued final decisions in their cases, and Messers. Lugo, Richards, and Yost thereafter filed petitions for review in the Seventh Circuit, Case Nos. 12-1973 and 12-1984.

proper quorum and by one or more individuals appointed to the agency in violation of the Constitution of the United States.

Contrary to the Board's arguments, Movants enjoy Article III standing. Each has a legally protected interest in having his or her case adjudicated by a Board that possesses a lawful quorum. *See NewProcess Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644-45 (2010). *Noel Canning* places this interest at risk because it makes clear that the Board intends to adjudicate the cases before it, such as the Movants' cases,[2] notwithstanding its lack of a lawful quorum. *See also Center for Social Change, Inc.*, 358 NLRB No. 24, * 1 (March 29, 2012) ("reject[ing] the Repondent's arguments that the Board lacks a quorum…."). A decision in this action holding that the Board does not possess a quorum will redress Movants' threatened injury because they can thereafter petition this Court to review any decisions issued by the ersatz Board in their cases. *See* 29 U.S.C. § 160(f).

That Movants were not parties in *Noel Canning* when it was pending before the Board does not diminish their standing. *See Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010). In *Teva*, this Court held that a company that was not a party to two agency adjudications had standing to challenge a statutory interpretation adopted by the agency in those adjudications

[2] The Board's own actions prove that this risk is imminent. On April 18, 2012 the Board adjudicated the cases filed by John Lugo, Douglas Richards and David Yost, who were previously Movants in this case, notwithstanding the Board's lack of a proper quorum.

because it was clear that the agency would also apply that interpretation to the company's detriment. *Id*. This Court stated that:

> 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.

Id. Here, *Noel Canning* makes clear "what the agency is going to do." *Id*. The Board is going to adjudicate the cases before it even though it lacks a proper quorum. Movants' interests are thereby subject to an imminent risk.[3]

Movants should be permitted to intervene for the reasons stated in their motion, namely: (1) their timely intervention will not delay these proceedings; (2) Movants' interest in having their cases heard by a lawfully constituted Board directly relates to the subject of this action; (3) the Court's decision in this case will impair Movants' ability to protect that interest if the Court holds that the Board possesses a proper-quorum; and (4) Noel Canning, as an employer, cannot

[3] The Board's reliance on *City of Cleveland v. NRC*, 17 F.3d 1515 (D.C. Cir. 1994) is inapposite because the proposed intervenor did not have an action pending before the agency and, hence, was not under an imminent threat of harm. *Id.* at 1516. The Board's reference to *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525 (7th Cir. 1988) is distinguishable for a similar reason—the party's only interest in the action was that the "precedential effect of a decision on the merits *may influence* the state's conduct in the future." *Id*. 530 (emphasis added). By contrast here, the Board has unambiguously indicated that it believes that it has a quorum to adjudicate cases, which necessarily includes Movants' cases. *See also Center for Social Change*, 358 NLRB No. 24 at * 1.

adequately represent the Movant employees' interests. Moreover, Movants agree to submit a joint brief with the other proposed intervenors.

In response, the Board primarily argues that intervention is inappropriate because the Court's decision in this action will have only a *stare decisis* effect on Movants, and that they could file a petition for review in another Circuit if *Noel Canning* is decided in the Board's favor. Such arguments were rejected decades ago in *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), which held that "stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right" and that "the opportunity to raise the same issue in another forum was no bar to intervention as of right." *Id*. at 702.

Here, the precedential effect of this Court's future decision in *Noel Canning* regarding the constitutionality of the President's appointments to the Board of January 4, 2012 will not merely supply a "practical disadvantage" or advantage to those petitioning for review from the agency's decisions. *Id*. A ruling on this distinct question of law will finally resolve the matter within this Circuit. Given that Movants' cases could be reviewed by this Court, *see* 29 U.S.C. § 160(f), they each have a direct and cognizable interest in the outcome of *Noel Canning*. Accordingly, Movants should be permitted to intervene.

Dated: April 26, 2012

Respectfully submitted:

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I hereby certify that on this 26th day of April, 2012, on behalf of Movants, 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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