No. 12-1281

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING,
A DIVISION OF THE NOEL CORP., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE, BRIAN W. BULGER, TAMMIE L. RATTRAY AND DAVID A. WIMMER IN SUPPORT OF RESPONDENT NOEL CANNING, A DIVISION OF THE NOEL CORPORATION

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING, A DIVISION OF NOEL CORPORATION

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Brian W. Bulger, Tammie L. Rattray and David A. Wimmer are each attorneys practicing management-side labor-and-employment law. Together they have 75 years of experience with day-to-day labor relations, advocacy before the National Labor Relations Board ("NLRB" or the "Board") and in counseling and advising clients with respect to compliance with the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, and the decisions and regulations of the NLRB.

Amici, and their clients, have a strong and abiding interest in the primary goal of the NLRA – a stable labor-relations climate that avoids undue interruptions of interstate commerce. *See*, 29 U.S.C. §151. The Labor Management Relations Act further clarified Congress' intent that labor policy "prescribe the legitimate rights of both employees and employers in their

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *Amici*, made a monetary contribution for the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court a letter granting blanket consent to the filing of *Amicus Curiae* briefs in support of either or neither party and, accordingly, have consented to the filing of this Brief *Amici Curiae*. *See,* Docket entries September 3, 2013, September 13, 2013 and November 12, 2013.

relations affecting commerce." 29 U.S.C. §141(b). As counselors *Amici* desire to advise clients of their rights and their obligations under the NLRA in the clearest possible manner. However, frequent flip-flopping and changes to the NLRB's interpretations of those rights and obligations hamper the ability of *Amici* to provide meaningful advice and prevent their clients from important business planning, expansion and other activities due to politically charged, unstable interpretations of labor policies from the NLRB. Quite simply, because of constant changes to NLRB precedents from an ever-changing NLRB membership, *Amici* are unable to opine on and clients are unable to institute efficient labor practices that likely will remain lawful for a reasonable period of time.

By constantly changing its interpretations of the NLRA and the legality of employer labor policies, the NLRB makes it impossible for employers and their legal advisors to formulate legal business practices affecting employees with confidence that those practices are and will in the future be lawful. Constant changes to the "rules" imposed on employers by the NLRB, deprive employers (and employees) of the stable labor-relations climate sought by Congress as a primary goal of the NLRA. *Amici* seek more stability in the NLRB's decision-making process by supporting Respondent Noel Canning's position here.

SUMMARY OF ARGUMENT

Amici write in support of Respondent because we believe that largely unfettered recess appointment powers of the President have contributed to the instability of the law under the NLRA. We here present the Court a view of the President's recess appointment powers not addressed by other participants in this case.

According to the Petitioner NLRB Brief's own Appendices A and B, recess appointments appear to have occurred disproportionately with respect to NLRB appointments. Such recess appointees are, by definition, candidates who were unable to obtain the constitutionally required consent of the Senate to their appointments. That consent usually cannot be obtained because such appointees are considered to be extreme in their labor-relations views by a significant part of the Senate. Such unconfirmed appointees also appear to play a substantial role in creating the changes and uncertainty of the law under the NLRA by virtue of the agendas they bring to the NLRB.

Therefore, we submit that restricting and confining the President's recess appointment powers, as the court below ruled, will have the advantageous effect of bringing a greater degree of stability to NLRB decision-making. *Amici* expect that, if the President's recess appointment powers are limited, less extreme, more moderate and more qualified candidates will be nominated to the Senate, because the President will understand that only well-qualified,

less-controversial nominees will be likely to achieve the Senate's consent. The result, we believe, will be a more measured and practical approach by the NLRB to its duties. This will have beneficial effects for employers, employees and unions by creating more stability in the interpretations of the NLRA by the NLRB, thereby ensuring the stable labor-relations climate that Congress intended as the primary goal of the NLRA.

ARGUMENT

A. Stable NLRB Precedent Will Help To Maintain A Stable Labor Climate

Dean Roscoe Pound famously said: "The law must be stable, but it must not stand still." *Interpretations of Legal History*, 1 Cambridge Press (paperback) 2013. The NLRB, since its inception, has often chosen to turn Dean Pound's saying on its head. Because the NLRB interprets the NLRA primarily through its decisions, rather than rule-making, stable precedent is a particular concern and desire of employers, unions and employees subject to the NLRA and their counsel. Stable precedents are particularly necessary at NLRB, because the Board sets national labor policy primarily through adjudication of individual cases, not substantive rule-making. *See*, *American Hospital Association v. NLRB*, 499 U.S. 606 (1991) (upholding NLRB's first, and to date only, substantive rulemaking regarding scope of bargaining units).

Precedent, and its nature, have been a somewhat amorphous concept at NLRB. In reality, and often recently, the Board has changed direction in significant policy areas on a number of occasions by reversing its prior decisions as the composition of the Board has changed. Such precedential changes often have not been accompanied by detailed analysis demonstrating changed circumstances or a compelling need for a new interpretation of the nation's labor laws. Rather, such changes often occur simply due to a new political majority on the Board.

As Dean Pound declared, change may be necessary to prevent legal stagnation. However, unprincipled change, change for its own sake, or change based simply on a change in which party controls the majority of NLRB members, simply cannot be condoned. Such change, unaccompanied by any real change in underlying circumstances, directly contradicts Congress' mandate to the NLRB to *promote* stability in labor relations, and such constant changes undermine a stable labor-relations climate.

B. Recess Appointments Are Made Disproportionately To The NLRB

Petitioner NLRB's Appendices A and B make clear that recess appointments have increased dramatically over the last 40 years. It appears to us that such appointments have disproportionately been made to the NLRB. Petitioner's Appendix B lists "Illustrative Recess Appointments Made To Fill Vacancies That

Pre-Existed The Recess During Which They Were Made." Appendix B shows:

> 2 of 4 such recess appointments by President Obama were to NLRB.
>
> 3 of 6 such recess appointments by President G.W. Bush were to NLRB.
>
> 1 of 3 such recess appointments by President Clinton was to NLRB.
>
> 1 of 3 such recess appointments by President G.H.W. Bush was made to NLRB.
>
> 4 of 4 such recess appointments by President Reagan were made to NLRB.

NLRB Brief at 84a to 89a.

Thus, Appendix B shows that over the last five Presidential Administrations, three Republican and two Democratic, 11 of 20 such recess appointments, *over 50%*, were to the NLRB. Given the small size of NLRB relative to that of the United States Government as a whole, the rate of recess appointments to NLRB is astonishing. While this list may be only an illustration, it is telling that so many of the illustrations affect the make up of the NLRB.

Why does this occur? As Petitioner's Appendix B shows, these appointments were made to fill vacancies that existed before the recess in which the appointment was made. NLRB's Appendix A also shows a large number of NLRB recess appointments in other circumstances. NLRB Brief at 33a to 64a. We do

not think the Court would appreciate or profit from a detailed accounting of each appointment's circumstances. However, we can assert with confidence that the vacancies existed because the nominees submitted to the Senate by the President could not obtain consent – generally because the nominee was viewed as being either too pro-labor or pro-management in their views.

C. Recess Appointees Are Often Involved In Unnecessary Changes To NLRB Interpretations Of The NLRA

As noted above, NLRB recess appointments are common in both Republican and Democratic Administrations. Both kinds of Administrations have made recess appointees who changed existing NLRB precedent without, we believe, any principled basis or changed circumstances requiring such changes. We concentrate here on some recent examples.

As Petitioner NLRB notes, in August 2011, the Board's membership fell to three members, one of whom was a 2010 recess appointment. On January 4, 2012, the President made *three* recess appointments to the Board. Petitioner NLRB's Brief at 2-3. Some dramatic reversals of NLRB precedent occurred under the 2012 Board and the 2011 Board. As discussed, *infra*, the recess-appointee filled 2012 NLRB has reversed its view on very important issues such as the continuation of dues checkoff after contract expiration and requirements to provide witness statements in arbitration. The 2012 Board also

imposed new obligations on *all* employers, with and without employee representation, by barring, for example, employer requests for confidentiality from employee witnesses during internal investigations absent specific circumstances. The 2011 Board reversed precedent on the long-standing "community of interest" test for determining bargaining units and on the "recognition bar" and "successor bar" doctrines previously approved by the Board. It also created new law applicable to all employers forbidding requests for waivers of "class" arbitration in employment arbitration programs.

In *WKYC-TV, Gannet Co.*, 359 NLRB No. 30 (2012), the Board, with its recess appointees, reversed 50 years of precedent, and held that employers now have a continuing duty to collect dues under a contractual dues-checkoff provision even after expiration of the collective bargaining agreement. Checkoff must be continued until a new contract or impasse is reached. This reduces unions' financial incentive to timely reach a new collective bargaining agreement, as they no longer will have to use their own resources to collect dues. The precedent for not continuing dues collection after expiration dates to the *Bethlehem Steel* case of 1962, 136 NLRB 1500. We believe that no good reason has been provided for this reversal, nor have changes occurred compelling this reversal.

In *American Baptist Homes d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012), the Board reversed its 1978 holding in *Anheuser-Busch, Inc.*, 237 NLRB 982, that witness statements are excluded

from an employer's general obligation to provide relevant information to unions during grievance processing. Now, the Board will apply a balancing test to weigh a union's need for information against an employer's "legitimate and substantial" confidentiality interests. This new test creates a new obligation for employers in the grievance process and subjects them to the risk of an unfair labor practice if they cannot "balance" union demands to the satisfaction of the NLRB, as opposed to the previous clear test on this issue.

The 2012 Board also reversed its approach to witness confidentiality requests in *Banner Health Systems*, 358 NLRB No. 93 (2012). The employer had asked employee witnesses to maintain confidentiality in all investigations. The Board found this "blanket approach" interfered with employee rights by banning them from speaking with co-workers about matters of mutual concern. Even though no threat of discipline was made, the Board found an employer "request" for silence was unlawful, absent a business justification for the request. At a minimum, employers must now provide a strong justification for any such request or face possible Board action. *Banner Health* imposes yet another new obligation on all employers, regardless of union representation. Once again, employers are largely left to guess whether requesting witness confidentiality, a generally accepted practice in sensitive human resources investigations, will pass muster with the NLRB or subject the employer to liability.

In 2011, up to January 3, 2012, the Board majority, which then included recess appointee Craig Becker, issued a number of significant decisions. In a case likely to make its way to this Court, the Board for the first time announced a very broad rule against class-action waiver agreements in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). *D.R. Horton* gave a very narrow reading to the Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011). In *D.R. Horton*, the employer required employees to sign an arbitration agreement as a condition of employment. The agreement precluded class claims, and permitted the arbitrator to hear only the individual's claim. The Board majority found the agreement contravened substantive NLRA Section 7 rights. "Collective pursuit of a workplace grievance in arbitration is equally protected [like any concerted legal action addressing wages, hours or working conditions] by the NLRA." Thus, the agreement was struck down.

D.R. Horton imposes a brand new obligation (not to seek class-action waivers) on employers *whether or not* their employees are represented by a union. The Court following *Concepcion* recently upheld the validity of a class waiver in a different context. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, 133 S.Ct. 2304 (2013). The Court knows well that removal of the ability to seek class waivers is likely to lead to more litigation, and also undermines the Court's continuing teachings that arbitration is a forum which should not be unduly restricted when

agreed to by the parties. *See*, *e.g.*, *Nitro-Lift Technologies, LLC v. Eddie Lee Howard*, 568 U.S. ___, 133 S.Ct. 500 (2012).

In *Specialty Healthcare and Rehabilitation*, 357 NLRB No. 83 (2011), an August 26 decision with recess appointee Becker in the majority, the Board established a new test for determining the appropriate size of a prospective bargaining unit. The issue was whether an employer could challenge the make-up of the unit of employees seeking a representation election. The Board established a new test raising the employer's burden from the traditional "community of interest" requirement (which dates from 1962) to an "*overwhelming* community of interest" requirement. "Community of interest" was first discussed in detail in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). The community of interest principle was later expanded to other types of representation cases, including cases involving unrepresented employees. *See*, *NLRB v. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969). Other courts and this Court generally have approved the Board's community of interest test, so no need for a change in the standard is apparent. *See*, *e.g.*, *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985).

Yet, 50 years later, when interpreting *Specialty Healthcare* at the end of 2011, the Board majority, still including a recess appointment, decided that a unit of service agents was appropriate, even though other employees who work with them at the same location were excluded from the unit. The decision

reversed a Regional Director's finding that the proposed unit was too narrow. The Board said that, although all the employees clearly shared a "community of interest," this sharing was not "overwhelming," as required by *Specialty Healthcare*. *DTG Operations, Inc.*, 357 NLRB No. 175 (2011).

Specialty Healthcare has caused great confusion and concern among employers. The decision opens the way for multiple "micro-units" involving small numbers of employees within a facility, indeed even within a department. By dumping the long-established "community of interest" standard, the Board is heading down a road toward approval of multiple bargaining units within any employer's facilities. This approach can only lead to unit proliferation and to the inefficiencies which flow from that. Moreover, permitting very small groups to organize in this manner runs afoul of the prohibition of Section 9(c) of NLRA, 29 U.S.C. §159(c), that bargaining-unit decisions must not be dictated by the extent of the organization among a particular group of employees.

Although the precedents overturned are of more recent vintage than those recounted above, the Board also took actions restricting employee rights to oppose unionization in two other August 26, 2011 decisions, again including recess appointee Becker. In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board reversed a 2007 Board decision, *Dana Corp.*, 351 NLRB 434 (2007). The *Dana* decision established modifications to the Board's "recognition bar." Specifically, it created a 45-day exemption period to the recognition

bar when an employer voluntarily recognizes a union. This exemption period permitted employees and other unions to challenge an employer's unilateral recognition of the union through Board processes instituted by the employees shortly after such recognition.

The 2011 *Lamons Gasket* decision described the 2007 *Dana Corp*. decision as " . . . reject[ing] long-standing principle . . . " and as " . . . flawed, factually, legally, and as a matter of policy." The result is that employees or rival unions who wish to challenge actual majority support after an employer voluntarily grants recognition to a union cannot do so for a "reasonable period of time." *Lamons Gasket* defines reasonable time as being a period of at least six months from an initial bargaining session. As a result of the *Lamons Gasket* decision, an employer may unilaterally recognize a union as a bargaining representative *without* the consent of the employees. The employer and union may then agree on a contract, effectively denying employees the ability to challenge such representation until the expiration of the contract under the Board's "contract-bar" policy. Only if no contract is reached within six months after the unilateral recognition will the employees have an opportunity to challenge unilaterally-imposed representation.

In *UGL-UNICCO*, 357 NLRB No. 76 (2011), the Board reestablished the "successor bar." UGL-UNICCO overruled a 2002 Board decision, *MV Transportation*, 337 NLRB 770 (2002). Like *Lamons Gasket*, this 2011

Board decision in support of "bar doctrines" is based on a belief that an established bargaining relationship with an incumbent union should be required to "exist and function for a reasonable period." This requirement prohibits challenges to union majority support by the employer or a rival union – but also by the *employees themselves*. In successorship scenarios – usually the result of a merger or acquisition – the Board now finds a bar to challenges of incumbent union support necessary to mitigate the destabilizing consequences of successorship situations. Board Member Brian Hayes dissented from this reasoning on grounds that there is no stability in a bargaining relationship where the union may not have majority support. In Member Hayes' view, allowing an election does nothing to destabilize "industrial peace" – it either confirms majority support or it exposes a lack of initial stability because the incumbent union no longer maintains employee majority support. Once again, no good reason exists for these changes in precedents determined with recess appointees.

Precedential reversals are not unique to this Administration. In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board held that unrepresented employees were entitled to assistance from a fellow employee in disciplinary interviews, extending the *Weingarten* rights shared by represented employees. *See*, *NLRB v. J. Weingarten*, 420 U.S. 251 (1975); *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975). Yet, just three years later, a Board including President Reagan's recess appointee, Robert P.

Hunter (later confirmed), reversed *Materials Research* in *Sears Roebuck Co.*, 274 NLRB 230 (1985). The *Sears Roebuck* Board said it had earlier misread the Act, and that unrepresented employees were not entitled to assistance in the absence of a union.

The Board clarified its *Sears* theory under pressure from a Court of Appeals in *E.I. DuPont DeNemours & Co. (III)*, 289 NLRB 627 (1988). A new Board then overruled *DuPont* and returned to the *Materials Research* standard in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). In the *Epilepsy* majority were Chairman Truesdale, who originally had been a recess appointee and was later confirmed, and Member Fox who was serving as a recess appointee at the time. *Epilepsy Foundation* was itself reversed in *IBM Corp.*, 341 NLRB 1288 (2004). The *IBM* majority included Member Meisburg serving as a recess appointee. Thus, the law in this area, and the obligations of non-union employers, *changed four times* in a 22-year period. Recess appointees were deeply involved in these changes. This cannot demonstrate the kind of stable labor climate that Congress sought to promote under the NLRA.

Although legal ethics dictate advising our clients to comply with any new Board precedent, it is not always readily apparent what an employer must do to be compliant. Moreover, if splits develop among the Circuits regarding the interpretation of a particular Board decision, employers are subject to differing standards depending on geography. Well-reasoned, and rare, reversals of precedent, even if adverse to a

party's interest, may at least permit counsel and their clients to know what the law requires. If NLRB precedents are reasonably stable, an employer can plan and institute appropriate labor policies knowing that frequent modifications to those policies likely is unnecessary. Reducing the number of NLRB recess appointees will, we believe, promote more consistent Board decisions and respect for precedent. This will enhance business efficiency and also stability in labor relations practices.

CONCLUSION

We submit that, while anecdotal, the analysis above demonstrates that recess appointees often are at the heart of precedential shifts involving unnecessary changes and bad policy determinations made through NLRB decision-making. We submit that curtailment by this Court of the President's recess appointments powers could help to reduce the NLRB's capricious decision-making, and this will contribute to the NLRA's goal of a stable labor-relations environment. If the President cannot, or only rarely can, make recess appointments, we believe the most extreme advocates of some particular approach to labor relations will not be nominated. In the absence of broad recess appointment powers, the President will of necessity propose more moderate candidates who have a reasonable chance of confirmation. Such appointees are less likely to make the abrupt policy reversals we now see, and the stable

labor-relations environment that Congress desired will be the result.[2]

Dated: November 25, 2013

Respectfully submitted,

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[2] The *Amici* do not reside in the Washington, D.C. area. But, we are well aware of the feeling throughout the country that party politics and partisanship have led to a "broken" government. We foresee that the recent confirmation of three NLRB nominees in an apparent bi-partisan package deal accurately illustrates the likely outcome if our argument is accepted. More middle-of-the-road nominees clearly can obtain the Senate's consent for appointment.