TESTIMONY OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COALITION FOR A DEMOCRATIC WORKPLACE

by

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The Future of the NLRB: What *Noel Canning vs. NLRB* Means for Workers, Employers, and Unions
U.S. House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions

February 13, 2013 – 10:00 a.m.

Good morning Committee Chairman Roe, Ranking Member Andrews, and Members of the U.S. House Committee on Education and the Workforce's Subcommittee on Health, Employment, Labor, and Pensions. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King,[1] and I am Of Counsel in the Jones Day law firm. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers, with a mix of union and non-union workforces. I have been a member of various committees of The American Bar Association, The Society for Human Resource Management ("SHRM") and The American Society of Healthcare Human Resources Association ("ASHHRA") and I also participate in the work of other trade and professional associations that are active in labor and employment matters. A copy of my CV is attached hereto as Appendix A.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, I am testifying this morning on behalf of The Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace ("CDW").[2] The Chamber is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. The fundamental activity of the Chamber is to develop and implement policy on major issues affecting businesses, including on labor issues and the activities of the

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[1] Mr. King, who is a member of Jones Day's Labor & Employment Practice Group, can be reached at rking@JonesDay.com. He would like to acknowledge R. Scott Medsker, an Associate in the Jones Day Labor & Employment Practice Group, for his assistance in the preparation of this testimony.

[2] Jones Day represents these organizations in the *Noel Canning* litigation. *See Noel Canning v. NLRB*, --- F.3d ----, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). Mr. King is one of the counsel of record in this litigation along with Noel Francisco and James Burnham, also of the Jones Day firm, and Gary Lofland of Lofland and Associates in Yakima, Washington. A copy of the joint brief for Noel Canning, the Chamber, and CDW is attached hereto as Appendix B. A copy of the court's decision in *Noel Canning* is attached as Appendix C.

National Labor Relations Board ("NLRB" or "the Board"). Because the Chamber represents employers in every industry covered by the National Labor Relations Act ("NLRA" or "the Act"), it is particularly qualified to articulate the business community's concerns with the NLRB's recent activity.

The Coalition for a Democratic Workplace is a broad-based coalition that represents employers and associations and their workforces in traditional labor law issues. The Coalition consists of hundreds of members, who represent millions of employers. CDW was formed to give its members a voice on labor issues, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non-employee access, an employee's right to have access to organizing information from multiple sources, unit determination issues, and the validity of rules and regulations promulgated by the Board.

- **The Current NLRB Has Failed To Follow Sound Public Policy, Overturned Important Precedent, And Faces An Uncertain Future**

    - *The Composition of The National Labor Relations Board – Quorum and Recess Appointment Issues*

By statute, the National Labor Relations Board consists of five Members, each nominated by the President for five-year terms subject to the advice and consent of the Senate or, in the case of an appointment to fill a vacant seat, the length of time remaining in unexpired term of the Member who previously held the seat. *See* 29 U.S.C. § 153(a). While the Board is at a full complement with five Members, the NLRA requires that the Board maintain a quorum of at least three Members in order to conduct business. *See id.*; *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

The NLRB under the current Administration has never reached a full complement of five confirmed Members, nor has there been a confirmed General Counsel of the Board. Indeed, the current Board has consistently relied on recess-appointed Members to issue decisions, engage in rulemaking, and undertake other Board actions.[3] Only one of President Obama's recess appointees to the Board—all of whom were appointed while Congress was in Session (i.e., intrasession appointees)—has been confirmed by the Senate: Chairman Mark Pearce, who was recess appointed on March 27, 2010 and confirmed on June 22, 2010. President Obama's other recess appointees Craig Becker, appointed March 27, 2010, and Richard Griffin, Sharon Block, and Terence F. Flynn, all appointed on January 4, 2012, have never been confirmed. President Obama also nominated former Member Brian Hayes, who was confirmed on June 22, 2010.

Beginning on January 20, 2009—the date of President Obama's inauguration—the Board's composition has consisted of the following Members (Boards with a valid quorum are in bold):

[3] The Board has also had to rely on an Acting General Counsel to carry out the chief enforcement actions of the Board, many of which have engendered the Board in controversy. Lafe Solomon has been serving in an "Acting" capacity since his appointment on June 21, 2010.

- January 20, 2009 through March 26, 2010: Two confirmed Members (Liebman & Schaumber); all decisions invalidated by *New Process Steel*

- March 26, 2010 through June 21, 2010: Two confirmed Members (Liebman & Schaumber) and two intrasession recess appointees (Pearce & Becker)

- **June 22, 2010 through August 27, 2010: Four confirmed Members (Liebman, Schaumber, Pearce, & Hayes) and one intrasession recess appointee (Becker)**

- **August 28, 2010 through August 27, 2011: Three confirmed Members (Liebman, Pearce, & Hayes) and one intrasession recess appointee (Becker)**

- August 28, 2011 through January 3, 2012: Two confirmed Members (Pearce & Hayes) and one intrasession recess appointee (Becker)

- January 3, 2012 through January 9, 2012: Two confirmed Members (Pearce & Hayes)

- January 9, 2012 through July 24, 2012: Two confirmed Members (Pearce & Hayes) and three intrasession recess appointees (Griffin, Block, & Flynn)

- July 25, 2012 through December 16, 2012: Two confirmed Members (Pearce & Hayes) and two intrasession recess appointees (Griffin & Block)

- December 17, 2012 to present: One confirmed Member (Pearce) and two intrasession recess appointees (Griffin & Block)

- *Restraint Exercised by Previous Boards in Overturning Precedent*

As I have previously testified before this Committee, past Boards—during both Democrat and Republican administrations—have exercised considerable restraint in overturning precedent when acting with less than a full complement of five Members. The Board has noted its institutional "well-known reluctance to overrule precedent when at less than full strength (five Members)." *See Teamsters Local 75 (Schreiber Foods)*, 349 N.L.R.B. 77, 97 (2007) (emphasis added). The author of that quote—former Chairman Liebman—addressed the Board's proper role with less than five Members in an open letter to this Committee dated February 25, 2011. In the letter, she noted that "[t]he Board's tradition . . . is not to overrule precedent with fewer than three votes to do so," citing to *Hacienda Resort Hotel & Casino*, 355 N.L.R.B. No. 154, at *2 n.1 (Aug. 27, 2010). *Hacienda* admittedly stands for that proposition, but includes the important qualifier that the Board will reverse precedent on the vote of three Members "where there was a unanimous vote to do so." *Id.* (emphasis added).

A certain degree of policy oscillation by the Board is to be expected given the tradition that three of the five statutory positions on the Board are filled by the political party that controls the White House, while the remaining two positions are filled by the other party. There are undoubtedly examples of Boards under both Republican and Democrat administrations

proceeding to overrule precedent without a full Board. However, the current Board has exercised no restraint and indeed has pursued an aggressive agenda of overturning decades of precedent and greatly expanding the reach of the Act. Proceeding in such a manner raises significant public policy issues regarding how our nation's labor policy should be established and labor laws should be enforced.

In addition to the Board's tradition of refraining from reversing precedent without either a full Board or three unanimous votes for reversal, the Board has also previously exhibited restraint when operating with a quorum of questionable validity. In December 2007, the Board consisted of confirmed Members Liebman and Schaumber and recess-appointed Members Kirsanow and Walsh, whose terms would expire at the end of the year. The Board attempted to delegate decision-making authority to Members Liebman and Schaumber so that they could issue two-Member decisions until a third Member could be confirmed. The minutes of the meeting during which the Board delegated its decision-making authority to two Members included a discussion of the legality of the Board operating with less than two Members.[4]

Members Liebman and Schaumber, Democrat and Republican nominees, respectively, reached an informal agreement that while acting as a two-Member Board, they would refrain from deciding contentious issues then pending before the Board. *See*, *e.g.*, Steven Greenhouse, *Labor Panel Is Stalled By Dispute on Nominee*, N.Y. Times, Jan. 14, 2010, at A16. Member Schaumber noted that, as a result, the Board produced decisions in which "two people who ideologically differ have reached a decision about imperatives under the statute." *Id.* When those two-Member decisions were invalidated by the Supreme Court's *New Process Steel* decision, a properly constituted three-Member panel of the Board was required to revisit each decision. However, because the decisions had been unanimously decided by Members with opposing philosophical views, the Board was able to expeditiously affirm the two-Member decisions in the vast majority of the Board cases that were subject to reconsideration after the Supreme Court decision in *New Process Steel*.

The Board was faced with a similar issue when recess-appointee Becker's term expired at the end of the First Session of the 112th Congress (2011). President Obama's decision to recess appoint Members Block, Griffin, and Flynn gave the Board two confirmed Members (Pearce & Hayes) and three recess appointees. While Member Flynn's nomination to the Board had been pending in the Senate since early 2011, President Obama did not refer the nominations of Members Block and Griffin to the Senate for consideration until December 15, 2011 and subsequently recess appointed all three Members less than three weeks later on January 4, 2012. Indeed, Members Block and Griffin were recess appointed before the Senate Committee on Health, Education, Labor & Pensions had the opportunity to vet the nominees, including by performing routine background checks.

[4] The minutes of the December 20, 2007 meeting are attached to the brief of Petitioner New Process Steel, L.P., filed in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457, and may be found online at http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief__08-1457__1.pdf.

We now know that these intrasession recess appointments were invalid. The D.C. Circuit's January 25, 2012 decision in *Noel Canning v. NLRB*, --- F.3d ----, 2013 WL 276024, held that recess appointments are only lawful if the appointment is made during an intersession recess of the Senate and fills a position that became vacant during the same intersession recess. *See id.* at *8-16. Because the appointments of Members Block, Griffin, and Flynn were intrasession appointments, the appointments were invalid and the Board lacked the requisite three-Member quorum to act. *Id.* at *23.

While the D.C. Circuit concluded that the appointments were invalid because they were intrasession appointments, the appointments were instantly dubious in light of the fact that the Administration took the unprecedented step of making the appointments while the Senate was convening every three days pursuant to a unanimous consent agreement reached on December 17, 2011. *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Senate conducted important business during these sessions, including passing a temporary extension of the payroll tax cut on December 23, 2011. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Additionally, the Senate convened on January 3, 2012—the day immediately before the recess appointments were made—to fulfill its Constitutional obligation to begin its annual meetings "at noon on the 3d day of January." *See* U.S. Const. am. XX § 2. The Chamber and CDW immediately questioned the validity of the appointments. *See Obama defies lawmakers with recess appointments to labor board*, The Hill, (Jan. 4, 2012), *available at* http://thehill.com/business-a-lobbying/202407-obama-recess-appoints-his-nominees-to-controversial-labor-board (last visited Feb. 11, 2013).

Even the Administration recognized the questionable nature of the recess appointments of Members Griffin, Block, and Flynn. Counsel to the President asked the Department of Justice's Office of Legal Counsel ("OLC") whether the President had the authority to make the appointments between January 3 and January 23. OLC noted that "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." *Memorandum Opinion for the Counsel to the President* at 4*, available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (last visited Feb. 11, 2013). OLC also recognized that "there is little judicial precedent addressing the President's authority to make intrasession recess appointments." *Id.* at 8. Nonetheless, OLC concluded that the President had the authority to make the recess appointments. *Id.* at 1.

Challenges to the recess appointees were also made to the Board as early as March 2012, when an employer argued that the Board lacked a quorum because Members Griffin, Block, and Flynn were not validly appointed. *See Ctr. For Social Change, Inc.*, 358 N.L.R.B. No. 24 (Mar. 29, 2012). The Board "declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act." *Id.* at *1.

In light of the clear challenges to the Board's quorum, the Board under the current Administration should have exhibited restraint in proceeding with a majority of its Members subject to challenge. The Board's tradition of not reversing precedent without a full Board or, at a minimum, three unanimous votes to do so, and the Board's prior prudence of avoiding controversial issues while acting as a two-Member Board, all respected the sound public policy of protecting the enforcement of the nation's labor laws and the promulgation of national labor policy. The Board under the current Administration should have undertaken a similar approach.

To the contrary, however, the Board and its Acting General Counsel continued on their prior activist agenda in case decisions, rulemaking initiatives (including delegations of authority), enforcement initiatives, and Regional Director appointments. Relying on recess appointees, the improperly-constituted Board worked to bring about significant departures from precedent and expanded the reach of the Act in an unprecedented manner, especially regarding employer policies and procedures. In nearly all such cases, these initiatives and decisions operated to the disadvantage of America's employers—particularly small and mid-sized businesses.

- *The Board's Activist Agenda – Recent Decisions*

A number of Board decisions issued since January 4, 2012 either explicitly reversed precedent or amounted to a significant departure from the Board's interpretation of the National Labor Relations Act, despite the fact that the Board had neither a full complement of Members nor three unanimous votes for reversing precedent. For example:

- *WKYC-TV, Inc.*, 359 N.L.R.B. No. 30 (Dec. 12, 2012) – The Board overturned 50 years of its case law to hold that an employer no longer has the unilateral right to stop withholding union dues from employee paychecks after expiration of the collective bargaining agreement. It has been longstanding law that an employer's obligations under dues deduction clauses were like union security and arbitration clauses which become ineffective after contract expiration. In *WKYC–TV, Inc.*, however, the Board found, over the dissent of Member Hayes, that dues deduction clauses should be treated like other provisions of the agreement that relate to mandatory subjects of bargaining and be subject to a "status quo" obligation after contract expiration. As a result of this new decision, an employer may stop deducting dues after the expiration of a collective bargaining agreement only after participating in potentially protracted negotiations which result in "impasse" unless the collective bargaining agreement in question included an explicit waiver by the union of its right to negotiate over this issue (i.e., the union clearly and unmistakably waived its right to negotiation on this issue).[5]

- *Piedmont Gardens*, 359 N.L.R.B. No. 46 (Dec. 15, 2012) – The Board overturned 30 years of case law to hold that an employer may need to furnish to the union relevant witness statements made during the course of an investigation unless the employer proves the existence of a "legitimate and substantial confidentiality interest" that outweighs the union's need for the information. In adopting this approach, the Board overruled *Anheuser-Busch*, in which it held that witness statements obtained during an employer's investigation of workplace misconduct were exempt from the employer's pre-arbitration disclosure obligations. The Board in *Piedmont* held, over the dissent of Member Hayes, that there is no fundamental difference between witness statements and other types of information typically disclosed such that a blanket exemption is warranted. Instead, where an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, the Board

[5] The Board virtually never finds that a union has "clearly and unmistakably" waived its right to bargain on an issue.

apparently will now engage in a subjective analysis and consider the sensitivity and confidentiality of the information at issue based on the specific facts on a case-by-case basis. Under this approach, an employer may not refuse to furnish the requested information but must timely raise any confidentiality concerns and seek an accommodation from the union. This decision, taken together with other recent Board decisions, will make it more difficult for an employer to get written statements from witnesses. When the witnesses realize that their identity will be disclosed and their statements provided to the union, which will in turn share the statements with the employee being disciplined, it is unlikely that witnesses will be as forthcoming. Further, the Board's new subjective standard will undoubtedly result in more litigation and corresponding expense to employers in their attempt to ascertain what their new obligations are in this area under the NLRA.

- *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40 (Dec. 14, 2012) – The Board found that after the union has been selected as the employees' bargaining representative, but before the first contract has been agreed to, the employer must bargain over discretionary discipline before it is imposed. Employers negotiating first contracts will now need to carefully analyze whether a suspension, demotion, or discharge involves any discretion, and if so, unless there are exigent circumstances, the employer must notify the union it is considering imposing discipline and allow the union to request bargaining over the decision to discipline. The practical operational problems with this decision are self evident, including the potential for considerable delay in an employer applying its work rules and ultimately negotiating an initial collective bargaining agreement.

- *The Finley Hospital*, 359 N.L.R.B. No. 9 (Sept. 28, 2012) – The Board held that an employer was obligated to continue giving wage increases despite that the collective bargaining agreement providing the wage increases had expired. The hospital and union entered into a one-year contract with a provision stating that "for the duration of this Agreement, the Hospital will adjust the pay for Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement, will be three (3) percent." Chairman Pearce and Member Block, over Member Hayes's dissent, held that the hospital, pursuant to a new "dynamic status quo" doctrine, was required to continue giving wage increases after the contract expired until a new agreement had been reached. As a result, the employer was required to continue providing increases long after it had completed its agreement to give each employee an annual 3% increase during the life of the agreement.[6]

- *Fresenius USA Manufacturing, Inc.*, 358 N.L.R.B. No. 138 (Sept. 19, 2012) – A Board majority consisting of recess appointees Griffin and Block held, over the dissent of Member Hayes, that an employer violated the Act when it terminated an employee who lied during an internal investigation. Fresenius received complaints that someone was writing threatening and harassing messages on newsletters

[6] Jones Day represents The Finley Hospital in its petition for review of the Board's Order. That appeal is pending in the U.S. Court of Appeals for the D.C. Circuit.

circulated during a decertification campaign. The employer had reason to believe that employee Grosso wrote the statements and questioned him about them. While he denied making the statements, he admitted that they could be viewed as improper. Grosso subsequently unwittingly admitted his role in writing the statements. Fresenius discharged Grosso both for writing the statements and for his false denials. The Board held that the statements could be protected activity in support of the union. The Board also found that Grosso's lies could not be a basis for discipline. The Board wrote that "Fresenius' [sic] questioning of Grosso put him in the position of having to reveal his protected activity, which Board precedent holds that an employee may not be required to do where, as here, the inquiry is unrelated to the employee's job performance or the employer's ability to operate its business. As a result, although Fresenius had a legitimate interest in questioning Grosso and lawfully did so, *Grosso had a Sec. 7 right not to respond truthfully.* We therefore find that Grosso's refusal to admit responsibility for the comments cannot be a lawful basis for imposing discipline." (Emphasis added, internal citation omitted). The *Fresenius* case puts employers in a quandary. Title VII of the Civil Rights Act of 1964 holds employers liable for sexual harassment in the workplace if they know of the harassment and fail to take steps to eliminate the harassment. Unfortunately, under *Fresenius*, employers who attempt to comply with Title VII may run afoul of the Board's current interpretation of the NLRA.

- *Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (July 30, 2012) – The Board, consisting of recess appointees Griffin and Block, held that an employer violated Section 8(a)(1) of the Act by asking for confidentiality during company investigations. Banner Estrella had a policy of routinely asking employees who complained to human resources, and thereby triggered a company investigation, to refrain from discussing the matter with coworkers while the investigation was ongoing. The Board majority, over the dissent of Member Hayes, held that an employer seeking to prohibit employees from discussing ongoing investigations bears the burden of showing that it has "a legitimate business justification that outweighs employees' Section 7 rights." The Board noted that to meet this burden, an employer may show that (a) a witnesses needs protection, (b) evidence is in danger of being destroyed, (c) testimony was in danger of being fabricated, or (d) there was a need to prevent a cover up. The Board rejected a "blanket approach" to confidentiality as clearly failing to meet the new *Banner Estrella* test. As a result of the Board's decision in *Banner Estrella*, employers' ability to conduct an efficient, effective investigation may be significantly limited. The Board's case-by-case approach for determining whether confidentiality may be required, or even suggested, as was the case in *Banner Estrella*, provides employers with no guidance regarding potential liability under the NLRA.

These decisions—issued by a Board on notice of its questionable validity—not only created greater uncertainty in the law for employers, employees, and unions, but also incurred significant legal fees by both private parties and the government to litigate contentious issues that must now be revisited by a differently constituted Board. That Board will, at a minimum, be required to again expend the time and effort to carefully consider the record and analyze the issues that were unnecessarily decided by a quorumless Board. The Board's decision to proceed

in this manner, contrary to Board tradition, has resulted in a significant, needless amount of controversy, confusion, and waste.

The Board's post-January 4, 2012 conduct is but a continuation, albeit an egregious one, of its prior disregard for Board restraint when acting with less than a full complement of five Members or, at a minimum, three unanimous votes to reverse precedent. In addition to these decisions, the Board, including recess-appointee Becker, and its Acting General Counsel have initiated a results-oriented trend of focusing on employers' policies and, by tortured reading of the policies, finding that the policies violate the National Labor Relations Act. Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), a five-Member Board held that "an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Id.* at 646. Workplace rules or policies are unlawful under *Lutheran* if they explicitly restrict Section 7 activity or if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

The *Lutheran* majority was concerned about whether a "reasonable employee" reading an employer's rules would interpret the rules as prohibiting Section 7 activity. *Id.* The Board majority noted that "[w]here . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." *Id.* (emphasis added). The Board further noted that "[w]ork rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law. We will not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected by . . . Section 7." *Id.* at 648.

The current Board and its Acting General Counsel have failed to follow the *Lutheran* majority test and have formulated a subjective climate of uncertain labor law which even experienced practitioners are having difficulty explaining to their clients. For example, over Member Hayes's dissent, a Board majority relying on recess appointee votes found unlawful a policy stating that employees were expected to be "courteous, polite and friendly" to customers, vendors, suppliers and co-workers and should not be "disrespectful or use profanity or any other language which injuries the image or reputation" of the employer. *See Knauz BMW*, 358 N.L.R.B. No. 164, at *1 (Sept. 28, 2012).

Among countless other policies, the Board through the votes of its recess appointees and its Acting General Counsel have also found unlawful policies:

- Prohibiting "walking off the job and/or leaving the premises during working hours without permission," *Ambassador Servs., Inc.*, 358 N.L.R.B. No. 130, at *1-2 (Sept. 14, 2012);

- Prohibiting "any type of negative energy or attitudes," *The Roomstores of Phoenix, LLC*, 357 N.L.R.B. No. 143, at *1 (Dec. 20, 2011); and

- Requiring employees to agree to arbitrate employment-related claims individually, rather than in court or as part of a class proceeding, *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012); *24 Hour Fitness*, Case No. 20-CA-35419 (N.L.R.B. Div. of Judges Nov. 6, 2012).[7]

Employers, especially small- and medium-sized entities, are having great difficulty attempting to draft policies that will comply with the Board's recent decisions. The above recent Board decisions and others make it very difficult to determine what is the state of the law. This leads to the unfortunate conclusion that the current Board, through the votes of its recess appointees, is engaging in a subjective, overreaching, and results-oriented campaign to find both union and non-union employers guilty of violations of the National Labor Relations Act.

- *The Board's Activist Agenda – Rulemaking Initiatives*

While the Board should have refrained from addressing such significant issues until the validity of the recess appointees could be resolved, its failure to do so is not surprising for those who have been watching the Board during the current Administration. As I have previously testified before the U.S. House Committee on Education and the Workforce, the current Board's rulemaking efforts revealed the agency's intent to rush its initiatives to completion, regardless of policy or legal concerns to the contrary.

The Board's Final Rule on Representation Case Procedures was published on December 22, 2011—just days before recess-appointee Member Becker's term expired. *See* 76 Fed. Reg. 80,138 (Dec. 22, 2011). The Board rushed the entire rulemaking proceeding by failing to comply with Executive Order 13,563's directive that the Board "shall seek the views of those who are likely to be affected . . . before issuing a notice of proposed rulemaking." For example, the Board failed to solicit input from common sources of review and advice, such as the American Bar Association's bipartisan Committee on Practice and Procedures Under The NLRA, or the Board's own Standing Rules Revision Committee.

Further, the Board, over the objection of a number of employer groups, including the Chamber, CDW, HR Policy Association, SHRM, and others, required all interested parties to file comments regarding the proposed rule changes within only a 60-day period and refused to extend the comment period. The 60-day period—the minimum amount of time under EO 13,563—was woefully inadequate given the extensive and technical nature of the proposed rule changes.

The Board also rushed the final decision-making process by attempting to implement eight controversial changes, mostly designed to unsettle long-standing election hearing proceedings by limiting the scope of such hearings solely to "questions of representation," restricting pre-election appeals to the Board, prohibiting litigation of individual eligibility issues

[7] Jones Day represented the Chamber as *amicus curiae* in *24 Hour Fitness*.

to pre-election hearings, and most importantly, substantially shortening the time between the petition for an election and the holding of an NLRB election, thereby depriving employees of the opportunity to learn of the issues associated with unionization.

The Board's haste has, at least temporarily, resulted in the failure of its election rulemaking. On May 14, 2012, a federal district court judge invalidated the rule on procedural grounds, finding that the Final Rule was published without being voted on by Member Hayes and, because only two Members voted, the Board failed to satisfy its quorum requirement. *Chamber of Commerce v. NLRB*, No. 11-2262, 2012 WL 1664028, at *8-9 (D.D.C. May 14, 2012).[8] That decision is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. Of course, in light of the D.C. Circuit's decision in *Noel Canning*, it appears that the rule is also invalid because Member Becker—an intrasession recess appointee—who was a Member of the Board at the time, could not have been validly serving and thus the Board had only two lawfully-seated Members and could not, pursuant to *New Process Steel*, lawfully conduct any business.

- **Legal, Policy, And Practical Consequences Of The D.C. Circuit's *Noel Canning* Decision**

    - *The Overturning of Approximately 1,000 Board Decisions Since August 27, 2011*

In response to the D.C. Circuit's *Noel Canning* decision, Chairman Pearce indicated that the decision "applies to only one specific case, Noel Canning" and that "similar questions have been raised in more than a dozen cases pending in other courts of appeals." As a result, he stated that the Board "will continue to perform [its] statutory duties and issue decisions." *See* Statement by Chairman Pearce on recess appointment ruling (Jan. 25, 2013), *available at* http://www.nlrb.gov/news/statement-chairman-pearce-recess-appointment-ruling. Chairman Pearce's comments on behalf of the Board were, at best, ill-advised.

The Chamber and CDW are well aware of the Board's policy of administrative non-acquiescence under which it ignores circuit court decisions that disagree with Board law, thereby allowing the Board to maintain its position in other circuits until the issue is addressed by the Supreme Court.[9] That policy, however, is particularly ill-advised when, as here, the unfavorable decision comes from the D.C. Circuit, which has jurisdiction over all petitions for review of Board orders. *See* 29 U.S.C. § 160(f). As a result, *Noel Canning* has a clear impact on virtually every decision taken by the Board because any party adversely impacted by a Board order can appeal to the D.C. Circuit, which will apply *Noel Canning* to invalidate quorumless actions. The Board's policy of ignoring unfavorable court decisions is also inappropriate where, as here, the decision addresses a matter as fundamental as the Board's ability to function.

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[8] Jones Day represented the American Hospital Association, the American Society for Healthcare Human Resources Administration, the American Organization of Nurse Executives, HR Policy Association, and the Society for Human Resource Management as *amici curiae* in the litigation.

[9] *See*, *e.g.*, John L. Radder, *Agency Nonacquiescence: Implementation, Justification, And Acceptability*, 42 Wash. & Lee L. Rev. 1233, 1246-50 (1985).

Notwithstanding Chairman Pearce's statements and similar statements from the White House, the Board faces a number of practical consequences from the *Noel Canning* decision. For instance, any Board decision made with less than three valid, confirmed Members stands to be invalidated in light of *Noel Canning*. By our initial estimates, there may be nearly 1,000 invalid decisions since former Chairman Liebman's term expired on August 27, 2011.

- *Invalid Delegations of the Board's Section 10(j) Injunction Authority*

Noel Canning also has potential reach beyond the Board's case law. For example, Section 10(j) of the NLRA gives the Board authority to seek injunctive relief from violations of the Act. When the Board is operating with a quorum, the General Counsel is authorized to, upon approval of the Board, institute litigation in federal court seeking injunctive relief under Section 10(j) of the Act. However, when the Board has anticipated a loss of membership that results in the loss of quorum, the Board has often given the General Counsel the ability to institute Section 10(j) litigation without Board approval. *See*, *e.g.*, 66 Fed. Reg. 65,998-99 (Dec. 21, 2001); 67 Fed. Reg. 70,628 (Nov. 25, 2002). Those delegations of authority, however, are temporary and explicitly state that the "delegation shall be revoked whenever the Board has at least three Members." 66 Fed. Reg. 65,998-99; 67 Fed. Reg. 70,628 ("shall cease to be effective whenever the Board has at least three Members.").

The current Board attempted to delegate its Section 10(j) authority to Acting General Counsel Solomon on November 9, 2011. *See* 76 Fed. Reg. 69,798 (Nov. 9, 2011). However, because the Board lacked a valid quorum at the time, that order appears to be invalid. As a result, the Acting General Counsel must find some other authority for instituting Section 10(j) proceedings without the approval of a valid Board, as he has done four times in January 2013.[10] However, the next most recent delegation of authority was made when the Board anticipated losing quorum in December 2007. That delegation specifically noted that it "shall be revoked when the Board returns to at least three Members following the adjournment of the 1st Session of the 110th Congress."[11] As a result, the delegation would have been revoked on June 22, 2010 when the Board had four confirmed Members (Liebman, Schaumber, Pearce, and Hayes).

- *Invalid Appointments of Regional Directors By Quorumless Boards*

Noel Canning may also impact the authority of the Board's Regional Directors, who are responsible for overseeing the Board's 28 Regional Offices. Since the early 1960s, the Board has delegated its appointment power to the General Counsel's office, allowing the General Counsel to appoint, transfer, demote, or discharge employees in the Board's field offices. However, each delegation notes that "[t]he appointment, transfer, demotion, or discharge of any

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[10] *See Blossom View Nursing Home & Rehab. Ctr.*, Case No. 3-CA-89876 (authorized Jan. 29, 2013); *Santa Fe Tortilla Co.*, 28-CA-87842 (authorized Jan. 29, 2013); *Nova Servs., Inc.*, 8-CA-87640 (authorized Jan. 24, 2013); *Colossal Contractors, Inc.*, 5-CA-88965 (authorized Jan. 10, 2013).

[11] This delegation was also recorded in the minutes of the Board's December 20, 2007 meeting. *See* Br. of Petitioner New Process Steel, L.P., Case No. 08-1457, a*vailable at* http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief__08-1457__1.pdf. This delegation may also be invalid because only two confirmed Members participated along with two recess appointees.

Regional Director or of any Officer-in-Charge of a Subregional office shall be made by the General Counsel only upon the approval of the Board." *See*, *e.g.*, 77 Fed. Reg. 45,696 (Aug. 1, 2012) (emphasis added).[12] A list of potentially affected Regional Directors is attached as Appendix D.

- *The Potential Impact on Other Periods of NLRB History*

Noel Canning's impact may also affect other periods of the Board's history. For example, a chart maintained by the NLRB reflecting the Board's composition since 1935 shows that the Board frequently relied on recess appointees to maintain a three-Member quorum. *Noel Canning* may render invalid some of those recess appointments and, if the invalid appointment deprives the Board of a quorum, the corresponding actions taken by the quorumless Board. A chart attached as Appendix E shows all changes in Board composition since December 30, 2000 and, where recess appointees were seated on the Board, addresses whether the appointment was intersession or intrasession and if the appointment was intersession, whether the vacancy "happened" during the same recess.[13] While *Noel Canning* certainly brings into question the validity of Board actions since August 27, 2011, other periods of Board activity may also be affected.

- *The Impact of the Noel Canning Decision on Other Federal Agencies*

It is important to note that impact of *Noel Canning* is not limited to the National Labor Relations Board. Rather, it calls into question every recess appointment made during an intrasession recess or that was used to fill a vacancy that did not arise during an intersession recess.

The Board undoubtedly would like to proceed with its important work of enforcing the Act. However, its actions since the *Noel Canning* decision, including, as of February 10, 2013, issuing 26 published and unpublished decisions, authorizing two Section 10(j) lawsuits, and appointing one Regional Director, only exacerbates the uncertainty surrounding the Board.

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[12] This most recent codification of the regulation may be invalid because it was issued by a quorumless Board on August 1, 2012. Prior Boards have, however, issued the same regulation many times, including on October 9, 2002 (67 Fed. Reg. 62,992). The requirement of Board approval was originally promulgated in 1955 (20 Fed. Reg. 2,175 (Apr. 6, 1955)), then revoked in 1959 (24 Fed. Reg. 6,666 (Aug. 15, 1959)), and finally restored again in May 1961 (26 Fed Reg. 3,911 (May 4, 1961)). It has remained in place ever since.

[13] The Board's membership data is maintained on the Board's website at http://www.nlrb.gov/members-nlrb-1935. Each row denotes a change in Board composition, including adding Members, losing Members, and the confirmation of previously recess-appointed Members. The "from" and "to" columns indicate the dates those Members served on the Board beginning from taking their oath of office. Thus, the date does not necessarily reflect the date that they were recess appointed. For example, while the chart shows that Members Block, Griffin, and Flynn began serving on January 9, 2012, they were recess appointed on January 4, 2012. Each recess appointment has been classified as intersession or intrasession relying on the February 4, 2013 Congressional Research Service Report entitled The *Noel Canning* Decision and Recess Appointments Made from 1981-2013, *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf (last visited Feb. 11, 2013)..

- **The Administration Should Seek Certiorari To Resolve These Important Issues**

At present, it remains unclear whether the Administration will either appeal the *Noel Canning* decision to the en banc D.C. Circuit or seek certiorari to the U.S. Supreme Court. In a White House Press Briefing on January 25, 2013, White House Press Secretary Jay Carney made clear that the White House "disagree[s] strongly" with the decision. *See Press Briefing by Press Secretary Jay Carney* (Jan. 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013. However, the Administration, like the Board, maintains the untenable and mistaken position that the decision only affects "one case, one company, one court." *Id.*

Given the Board's position that it will continue to operate on a "business as usual" basis, the validity of recess appointees Block and Griffin must be resolved. In the interim, the Board's interested stakeholders are left to wonder about the validity of virtually all Board actions. Chamber President and CEO Thomas J. Donohue has outlined a number of important questions that parties before the Board face while the administration continues to ignore *Noel Canning*. A copy of President Donohue's opinion piece published on February 5, 2013 in *Politico* is attached as Appendix F.

As President Donohue noted, the Administration should seek certiorari now, rather than waiting for a more favorable decision from another appeals court. The issues in the case are clear and the Court should address them now, at the earliest available opportunity. A failure to do so only increases the uncertainty faced by all parties to Board proceedings—employers, employees, and unions alike. Such stakeholders during this great period of uncertainty must continue to comply with the Board's actions, thereby resulting in an unnecessary waste of time and litigation costs. Finally, there will continue to be a substantial "legal taint" on all of the Board's actions and its legitimacy until this issue is resolved.

- **The Uncertain Future Of The National Labor Relations Board**

Despite efforts by the NLRB and the current Administration to suggest that *Noel Canning* is only one case about one company, the decision has placed a dark cloud not only over the NLRB, but over every agency that relies on recess appointees to carry out the important work of the federal government. As noted above, countless Board actions are now of dubious validity, including Board decisions, rules, delegations of authority, official appointments, and many other Board actions.

While the Board must be mindful of the impact of *Noel Canning* on its past, the Board and Congress must also focus on the agency's highly uncertain future. Chief Judge Sentelle's opinion in *Noel Canning* noted the fragile nature of the Board's composition, with the Board often facing a virtual shutdown by the loss of quorum when Congress and the Executive are unable to reach agreement over the qualification of nominees. Indeed, *Noel Canning* leaves Chairman Pearce as the only valid current Member of the Board. His term expires in just over six months on August 27, 2013.

In short, the Board finds itself in the same position it has repeatedly found itself during the last decade: its ability to perform its statutory duty of enforcing the nation's labor laws and promoting industrial stability is in doubt. Many interested stakeholders, including the Executive and the Board, could have taken actions to minimize, or perhaps prevent, this stain on the Board's reputation. Going forward, I encourage this Committee, Congress, the Administration, and the Board to ensure that the Board's future is not called into further doubt and that this unnecessary uncertainty is brought to an end.

- **CONCLUSION**

In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.