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**ORAL ARGUMENT SET FOR APRIL 4, 2013**

January 30, 2013

**BY HAND DELIVERY**

Mr. Mark J. Langer  
Clerk, U.S. Court of Appeals for the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001-2866

Re: *Chamber of Commerce of the United States of America and Coalition for a  
Democratic Workplace v. National Labor Relations Board*  
Case No. 12-5250

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Dear Mr. Langer:

I write pursuant to Rule 28(j) regarding the Court's recent decision in *Noel Canning v. National Labor Relations Board*, No. 12-1115 (filed Jan. 25, 2013), which provides an additional, independent ground for affirming the district court's decision that the Board lacked a quorum when issuing the election rules challenged in this case.

In *Noel Canning*, this Court ruled that *all* intra-session Presidential recess appointments are unconstitutional. Slip op. 30. The majority additionally ruled that inter-session recess appointments can only take place for vacancies that "happen" (*i.e.*, originate) during that same recess. *Id.* at 30-32, 43-44. Because the unconstitutional appointments deprived the Board of the statutorily mandated quorum, the Court concluded that "its decision must be vacated." *Id.* at 30, 43.

*Noel Canning* compels affirmance in the instant case. According to the Board, it purportedly adopted the election rules at issue on December 16, 2011, with the "participation" of Members Pearce, Hayes, and Becker. NLRB Br. 13-20. Under *Noel Canning*, however, Member Becker's recess appointment on March 27, 2010, was unconstitutional both because (1) it occurred intra-

Mr. Mark J. Langer  
January 30, 2013  
Page 2

session (during the second session of the 111th Congress, *see Congressional Directory for the 112th Congress* 536-38 (Dec. 1, 2011), <http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf>, and (2) it purported to fill a seat on the Board that became vacant during a previous inter-session recess, but with the appointment coming years after that prior recess ended.<sup>1</sup>

Thus, even if Member Hayes sufficiently “participated” in the adoption of the Board’s election rules for quorum purposes (which he did not, *see* Chamber Br. 12-17), the district court still correctly held the rule invalid for lack of quorum because at most, under *Noel Canning*, there were only two properly sitting Board members when the rule was purportedly adopted on December 16, 2011.<sup>2</sup>

Sincerely,

/s/ Allyson N. Ho

Allyson N. Ho

cc: Abby Propis Simms  
Joel Frank Dillard  
*Counsel for Appellant National Labor Relations Board*  
(via ECF)

ANH/ed

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<sup>1</sup> The seat became “vacant” on either December 17, 2004, or January 1, 2008, depending on whether the recess appointment of Member Walsh is considered. *See Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited Jan. 28, 2013).

<sup>2</sup> This argument goes to the Board’s jurisdiction and is not waivable even though not raised in prior briefing. *See Noel Canning*, slip op. 10-13.