COALITION FOR A
DEMOCRATIC WORKPLACE

Support H.R. 1120

President Obama's unprecedented and unlawful "recess appointments" to the National Labor Relations Board[1] (NLRB or Board) has caused unnecessary upheaval, uncertainty and litigation in labor relations. H.R. 1120 is a temporary measure that will reduce this uncertainty and litigation going forward. The measure expires when the Board has a confirmed quorum, the recess appointees' terms end, or when the U.S. Supreme Court rules on the constitutionality of the appointments, whichever occurs first.

Context

In January 2012, President Obama made recess appointments to fill three empty seats on the NLRB, even though the Senate was not in recess at that time.[2] When the Board issued an order against Noel Canning—a Yakima, Washington, beverage bottler—the company challenged the order on the grounds that the recess appointments were invalid and thus deprived the Board of the lawful quorum it needs to issue orders. On January 25, 2013, in *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's purported "recess" appointments to the Board were made while the Senate was in session and, therefore, unconstitutional.[3] Because the Supreme Court has ruled that a quorum of no less than three is required for the NLRB to issue orders, decisions, or promulgate rules, the *Noel Canning* decision has raised doubts as to the validity of many of the current and future Board actions, and may impact prior Board initiatives, as well. On May 16, 2013, the U.S. Court of Appeals for the Third Circuit echoed *Noel Canning* in its decision in *New Vista Nursing and Rehabilitation v. NLRB,* which ruled that Board member Craig Becker's appointment was invalid.

The Problem

With the Board in disarray, those subject to its jurisdiction face ever-growing uncertainty regarding their rights and obligations under the National Labor Relations Act (NLRA). Will *Noel Canning* and *New*

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[1] The NLRB is the federal government agency charged with enforcing and interpreting the National Labor Relations Act (NLRA). The NLRA, which was enacted in 1935, established the right of most private sector employees to join or refrain from joining a union and governs relations between most private businesses and unions.

[2] Details on the appointments are available at http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. The president has limited authority under Article II, Section 2 of the Constitution to make appointments without Senate confirmation when the chamber is in recess.

[3] President Obama's recess appointments of Block and Griffin were unprecedented, as no prior administration attempted appointments at a time when the Senate declared itself to be in session. Noel Canning challenged the validity of the recess appointments on that basis, and on the grounds that the Constitution only permits recess appointments during the period between sessions of Congress (intersession recesses)—and only when the vacancy arose during that recess. The D.C. Circuit ruled on the latter grounds. While other presidents have made appointments during break periods that occur during a session of Congress (intrasession recesses), few courts have ruled on the constitutionality of such appointments. The administration knew the recess appointments would create uncertainty and litigation, as the White House Office of Legal Counsel (OLC) noted in a memo on the appointments (available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf), "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." OLC also noted, "there is little judicial precedent addressing the [p]resident's authority to make intrasession recess appointments." In short, the administration knew it was attempting something novel that would invite legal challenges, as there was no judicial precedent on the issue of recess appointments when the Senate was in session and limited precedent on the intrasession issue.

Vista Nursing be applied in other jurisdictions? Will Board decisions and rulemakings issued by the unconstitutional Board be invalidated? Must companies and unions comply with current Board orders? Do Board decisions establish precedent for possible future litigation?

The Board Has Made the Situation Worse

Unfortunately, rather than taking measures to address the chaos created by the President's unconstitutional recess appointments, the Board has made matters worse by continuing to issue decisions, despite the ruling in *Noel Canning*:

- Richard Griffin and Sharon Block—the two Board members whose appointments were invalidated by *Noel Canning*—continue to sit on the Board and participate in its activities. (Craig Becker's invalid appointment expired on January 2012.)
- On the day the *Noel Canning* opinion was issued, NLRB Chairman Mark Pearce publicly stated that he, along with Block and Griffin, "will continue to perform [the Board's] statutory duties and issue decisions."

Although the Board has sought the Supreme Court's review of the *Noel Canning* decision, there is no guarantee that the Supreme Court will accept the case. The Coalition for a Democratic Workplace has filed an *Amicus* brief, urging the Supreme Court to accept the appeal and affirm the D.C. Circuit's decision. Even if the Supreme Court *does* choose to review *Noel Canning*, it may be over a year before it issues an opinion. In the meantime, employers, employees and unions are left to wonder about the validity of NLRB-issued orders, decisions and rulemakings. This disorder and confusion is untenable, particularly in this still-fragile economy, where legal certainty is a prerequisite to economic growth.

The Solution

Fortunately, there is a legislative solution available that will help stabilize labor-management relations. The *Preventing Greater Uncertainty in Labor-Management Relations Act* (H.R. 1120) would alleviate the current confusion by temporarily preventing the Board from taking any action that would require a three-member quorum until:

- The Senate confirms a sufficient number of appointees to constitute a Board quorum;
- The Supreme Court rules on the constitutionality of the appointees in question; or
- The first session of the 113th Congress is adjourned properly, terminating the terms of the appointees in question and allowing for legitimate recess appointments to fill their positions.

Significantly, H.R. 1120 would *not* prevent NLRB regional offices from accepting and processing election petitions or unfair labor practice charges. Thus, the normal, day-to-day activities of the Board would continue as usual.

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The Coalition for a Democratic Workplace supports the Preventing Greater Uncertainty in Labor-Management Relations Act as a common-sense and temporary solution to the confusion and chaos which has resulted from an unconstitutionally appointed NLRB.