SCHEDULED FOR ORAL ARGUMENT SEPTEMBER 16, 2013
Nos. 13-1029, 13-1048, and 13-1130 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: JEANETTE GEARY,
Petitioner.

IN RE: SFTC, LLC, D/B/A SANTA FE TORTILLA CO.,
Petitioner.

IN RE: ENCINO HOSPITAL MEDICAL CENTER,
Petitioner.

On Petitions for Writs of Mandamus

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITIONS FOR WRITS OF MANDAMUS

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board certify the following:

(A) ***Parties and Amici.*** Except for the following, all parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Consolidated Brief of Petitioners:

In *United Nurses & Allied Professionals* (*Kent Hospital*), NLRB Case No. 01-CB-011135, amicus curiae briefs were filed by American Federation of Labor and Congress of Industrial Organizations; Service Employees International Union; International Union of Operating Engineers, Local 150; and National Association of Manufacturers.

In this proceeding, Service Employees International Union, United Healthcare Workers—West is an intervenor.

(B) ***Rulings Under Review.*** The Consolidated Brief of Petitioners is correct that there are no district court or administrative decisions directly under review.

(C) ***Related Cases.*** Similar petitions for writs of mandamus against the National Labor Relations Board have been filed in this Court in the following cases: (1) *In re Ozburn-Hessey Logistics, LLC*, No. 13-1170 (petition filed May 9, 2013); (2) *In re Magic Laundry Services, Inc.*, No. 13-1187 (petition filed May 24, 2013); and (3) *In re CSC Holdings, LLC*, No. 13-1191 (petition filed May 30, 2013). This

Court has ordered Ozburn-Hessey Logistics to show cause why its petition should not be dismissed as moot. In addition, this Court is holding the other two petitions in abeyance pending the outcome of this consolidated case.

Furthermore, the National Labor Relations Board is currently seeking temporary injunctive relief against Petitioner SFTC, LLC under section 10(j) of the National Labor Relations Act in *Overstreet v. SFTC, LLC*, No. 13-CV-0165 RB/LFG (D.N.M.) (petition for temporary injunction filed Feb. 21, 2013).

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GLOSSARY OF ABBREVIATIONS

Abbreviation or Acronym	Definition
Act	National Labor Relations Act
Agency	The National Labor Relations Board as an institutional whole, including the Board, the General Counsel, and their delegees
APA	Administrative Procedure Act
Board	The five-member body created by section 3(a) of the National Labor Relations Act
Encino	Encino Hospital Medical Center
FERC	Federal Energy Regulatory Commission
FLRA	Federal Labor Relations Authority
Geary	Jeanette Geary
J.A.	Joint Appendix
NLRA	National Labor Relations Act
NLRB	The National Labor Relations Board as an institutional whole, including the Board, the General Counsel, and their delegees
Petitioners	Jeanette Geary, SFTC, LLC, and Encino Hospital Medical Center

Petitioners' Br.	Consolidated Brief of Petitioners
Petr.'s Emergency Mot.	SFTC's Emergency Motion filed with this Court on May 20, 2013
SFTC	SFTC, LLC, doing business as Santa Fe Tortilla Company

JURISDICTIONAL STATEMENT

The National Labor Relations Board (NLRB, the Board, or the Agency), which is the Respondent in this case, does not contest this Court's jurisdiction to consider the petitions for writs of mandamus filed by Petitioner Jeanette Geary or Petitioner Encino Hospital Medical Center. But, as explained below, this Court lacks subject-matter jurisdiction to issue much of the mandamus relief requested by Petitioner SFTC, LLC. Specifically, this Court lacks jurisdiction to command the Agency to stop litigating a case seeking temporary injunctive relief against SFTC that is now pending in a New Mexico federal district court. *See infra* Part I.A. This Court also lacks jurisdiction to order the Acting General Counsel to cease prosecuting and to withdraw the unfair labor practice complaint against SFTC that is now before the Board. *See infra* Part I.B.

STATEMENT OF THE ISSUES

1 a. Does this Court have subject-matter jurisdiction to issue an extraordinary writ of mandamus commanding the NLRB to withdraw an ancillary and distinct proceeding for temporary injunctive relief that is currently pending before a district court within the Tenth Circuit, when that proceeding is not within this Court's current or prospective jurisdiction and will not affect this Court's jurisdiction over any other case?

b. Does this Court have subject-matter jurisdiction to issue an extraordinary writ of mandamus ordering the Acting General Counsel, who is an independent officer vested with final and unreviewable prosecutorial authority under the National Labor Relations Act (NLRA or the Act), to cease prosecuting and to withdraw an unfair labor practice complaint?

2. Have Petitioners satisfied their demanding burden to show that the extraordinary remedy of mandamus is justified to stop the NLRB from enforcing the Act by proving to this Court that the three following conditions are met: (1) there are no other adequate means for review, (2) they have a "clear and indisputable" right to relief, and (3) the writs are appropriate under the circumstances?

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Consolidated Brief of Petitioners:

28 U.S.C. § 41. Number and composition of circuits

The thirteen judicial circuits of the United States are constituted as follows:

Circuits	**Composition**
District of Columbia	District of Columbia.
First	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island.
Second	Connecticut, New York, Vermont.
Third	Delaware, New Jersey, Pennsylvania, Virgin Islands.

Fourth	Maryland, North Carolina, South Carolina, Virginia, West Virginia.
Fifth	District of the Canal Zone, Louisiana, Mississippi, Texas.
Sixth	Kentucky, Michigan, Ohio, Tennessee.
Seventh	Illinois, Indiana, Wisconsin.
Eighth	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
Ninth	Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii.
Tenth	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming.
Eleventh	Alabama, Florida, Georgia.
Federal	All Federal judicial districts.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

28 U.S.C. § 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

29 C.F.R. § 102.94. Expeditious processing of section 10(j) cases.

(a) Whenever temporary relief or a restraining order pursuant to section 10(j) of the Act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order shall be heard expeditiously and the case shall be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under section 10 (l) and (m) of the Act.

(b) In the event the administrative law judge hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer shall forthwith suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the administrative law judge.

STATEMENT OF FACTS

The National Labor Relations Board is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The NLRB has two principal duties: It adjudicates unfair labor practice complaints alleging violations of employee rights protected by the Act (typically after an administrative law judge has issued a recommended decision and order), and it holds representation elections in defined bargaining units. The Board consists of five members, who are appointed by the President by and with the advice and consent of the Senate to serve five-year terms. 29 U.S.C § 153(a). With one exception not implicated in this case,[1] three members constitute a quorum. 29 U.S.C. § 153(b).

In January 2012, during a recess of the Senate, the President conferred recess appointments upon Richard F. Griffin, Jr., Terence F. Flynn, and Sharon Block to serve as Board members. (*See* J.A. 85.)[2] They joined Chairman Mark Gaston Pearce and Member Brian Hayes, both of whom had previously been appointed by the President and confirmed by the Senate. (*See id.*) Member Flynn

[1] *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638, 2644 (2010) (discussing the circumstances in which the Board may delegate its powers to a three-member panel; so long as the delegee group maintains a membership of three, a Board panel may issue a decision with a quorum of two members).

[2] "J.A." refers to the Joint Appendix filed by Petitioners on June 14, 2013.

left the Board on July 24, 2012, and Member Hayes's term expired on December 16, 2012. (*Id.*) Therefore, the current Members of the Board are Chairman Pearce, whose term expires on August 27, 2013 (*id.* at 86), and Members Griffin and Block, whose terms expire at the end of the current session of Congress. *See* U.S. Const. art. II, § 2, cl. 3.

In addition to the five-member Board, the Act also establishes a General Counsel, who is likewise subject to the appointment and confirmation process. 29 U.S.C. § 153(d). The General Counsel is an independent officer who has final and unreviewable authority to prosecute or decline to prosecute unfair labor practice complaints. That authority has long been delegated to the Agency's cadre of Regional Directors. In accordance with the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-49d, Lafe E. Solomon has been serving as Acting General Counsel since June 21, 2010. *See* Press Release, Veteran NLRB Attorney Lafe Solomon Named Acting General Counsel, http://mynlrb.nlrb.gov/link/document.aspx/09031d4580375b4c (June 20, 2010).

On January 25, 2013, this Court issued its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (June 24, 2013). That case reached this Court on Noel Canning's petition for review of "a final order of the Board." 29 U.S.C. § 160(f). A three-member panel consisting of Members Hayes, Flynn, and Block had issued the final order in that case. The

Court granted the company's petition for review and vacated the order of the Board on the ground that the President's January 2012 appointments to the Board were not authorized by the Recess Appointments Clause in Article II, Section 2 of United States Constitution. The *Noel Canning* decision acknowledges that its constitutional holdings squarely conflict with the decisions previously reached by three other courts of appeals. The Board petitioned the Supreme Court for a writ of certiorari to review *Noel Canning*, and the petition was recently granted. *NLRB v. Noel Canning*, 81 U.S.L.W. 3629 (June 24, 2013). The case will be heard during the Court's next Term. In the meantime, the Agency is continuing to carry out its important statutory functions. (J.A. at 32.)

Petitioners all have unfair labor practice cases pending at various stages before the Board. Jeanette Geary, who worked as a nurse in Rhode Island (Petitioners' Br. at 9), filed an unfair labor practice charge against her union asserting various violations of her right to pay less than full dues under *Communications Workers v. Beck*, 487 U.S. 735 (1988). Following an investigation of Geary's charge, the Regional Director for NLRB Region 1 in Boston issued an administrative complaint alleging that Geary's union committed two distinct violations—first, it failed to provide Geary and others with evidence supporting the union's assertion that its financial activities were independently audited; and second, it charged Geary (that is, used her dues money) to fund

lobbying efforts in two state legislatures. (J.A. 22.)[3] After an evidentiary hearing, an administrative law judge issued a recommended decision dismissing the first allegation but finding some merit to the second. (*Id.* at 16-18.) Geary and the Acting General Counsel filed exceptions with the Board. On December 14, 2012, the Board issued a decision adopting the administrative law judge's dismissal of the first allegation, but soliciting further briefing from interested parties on how to determine whether particular lobbying expenses are properly chargeable to persons like Geary who object to paying dues for any nonrepresentational activities. (*Id.* at 4, 8-9.) Supplemental briefing to the Board is now complete.

SFTC, LLC (SFTC) is a New Mexico employer that is alleged to have violated the Act. (Petitioners' Br. at 15.) After completing an investigation of two charges filed by an individual and a labor union, the Regional Director for NLRB Region 28 in Phoenix issued an unfair labor practice complaint against SFTC on January 31, 2013. (J.A. 54-65.) The complaint alleges that SFTC unlawfully discharged two employees for engaging in union and protected activity and that the company also committed numerous discrete violations of the Act. A hearing occurred before an administrative law judge from late February through early

[3] The Joint Appendix only contains the original complaint, which was later amended to include the allegation regarding the chargeability of lobbying expenses.

March. On June 25, 2013, the administrative law judge issued a recommended decision and order finding that SFTC unlawfully discharged the two employees and discriminated against other employees for their union and protected activity, but recommending dismissal of other portions of the complaint. *SFTC, LLC*, No. 28-CA-087842, 2013 WL 3225952 (NLRB Div. of Judges June 25, 2013). Pursuant to regulation, the case is now before the Board. 29 C.F.R. § 102.45(a). Any exceptions to the administrative law judge's ruling are due July 23, 2013. If exceptions are filed, briefing likely will not be completed any earlier than August 20, 2013. *See* 29 C.F.R. § 102.45(d)(1), (h) (providing 14-day periods to file answering and reply briefs).

Based on the nature and extent of SFTC's alleged unfair labor practices, the Regional Director for Region 28 also sought and obtained authorization from the Board and from the Acting General Counsel to institute a lawsuit for temporary injunctive relief against SFTC under section 10(j) of the Act. The purpose of the 10(j) lawsuit is to restore, as much as possible, the status quo that existed before SFTC's alleged unlawful conduct until the Board can issue a final order. The Regional Director filed that lawsuit in the United States District Court for the District of New Mexico, as section 10(j) requires, on February 21, 2013. (J.A. 36-53.) SFTC filed a motion to dismiss, in which SFTC challenged the authority of the Board or the Acting General Counsel to seek 10(j) relief in light of the *Noel*

Canning decision. The Board opposed the motion, and on May 9, 2013, the district court issued an order rejecting SFTC's arguments and denying SFTC's motion to dismiss. (*Id.* at 66-78.) SFTC then filed a motion to stay further proceedings in the 10(j) case, which the district court also denied. (*See* Ex. A attached to Petr.'s Emergency Mot., *In re SFTC, LLC*, No. 13-1048 (D.C. Cir.), Doc. #1437093.) So far, the district court has not issued a final ruling on whether to grant 10(j) relief. Any appeal from the New Mexico district court's rulings will lie to the Tenth Circuit.

Encino Hospital Medical Center (Encino) is a California employer that, like SFTC, is alleged to have violated the Act. (Petitioners' Br. at 19.) After completing an investigation of a charge filed by a labor union, the Regional Director for NLRB Region 31 in Los Angeles issued an unfair labor practice complaint against Encino on February 28, 2012. (J.A. 171-77.) The complaint alleges that Encino unlawfully discharged an employee for engaging in protected activity. A two-day hearing occurred before an administrative law judge on April 30 and May 1, 2012. On July 26, 2012, the administrative law judge issued a decision recommending dismissal of the complaint. Based on exceptions filed by the union and the Acting General Counsel, the Board issued an order on March 19, 2013, remanding the case to the administrative law judge for further proceedings and a supplemental decision. *Encino Hosp. Med. Ctr.*, 359 NLRB No. 78, at 3 (Mar. 19, 2013). On May 21,

2013, the administrative law judge issued a supplemental decision, again recommending dismissal of the unfair labor practice complaint. (J.A. 186-209.) The union filed exceptions to the supplemental decision. The case is now before the Board and is expected to be fully briefed by July 16, 2013.

After *Noel Canning* issued, Geary, SFTC, and Encino all filed separate petitions for writs of mandamus seeking to halt enforcement of the NLRA by the Board, the Acting General Counsel, and their delegees in each of their respective cases. By Order dated May 7, 2013, this Court consolidated the cases and ordered the parties to file briefs.

On May 20, 2013, after failing to obtain dismissal or a stay of the 10(j) case from the New Mexico district court, SFTC filed an emergency motion seeking an order from this Court that would have essentially required the Board to request the New Mexico district court to stay the 10(j) case. The Board opposed the emergency motion, which this Court denied by Order dated June 28, 2013. Also, on that day, this Court granted a motion to intervene filed by the union that filed the charge in Encino's unfair labor practice case.

SUMMARY OF ARGUMENT

The extraordinary writs of mandamus that Petitioners seek should be denied. At the outset, this Court must dismiss SFTC's petition for a writ of mandamus insofar as the relief SFTC seeks is outside this Court's subject-matter jurisdiction.

Under the All Writs Act, this Court may issue writs of mandamus only to the extent such writs are "in aid of" this Court's current or prospective jurisdiction. But the two matters that are the focus of SFTC's petition are beyond this Court's current or prospective jurisdiction. First, this Court has no current or prospective jurisdiction over the Board's lawsuit in a New Mexico federal district court seeking temporary injunctive relief against SFTC under section 10(j) of the Act. Any appeal in that case will lie to the Tenth Circuit, not this Court, and no order in the 10(j) case could possibly diminish this Court's jurisdiction over any other matter. Second, longstanding precedents establish that the Acting General Counsel's discretionary decision to prosecute an unfair labor practice complaint against SFTC before the Board is not subject to judicial review. Thus, SFTC has failed to satisfy its burden to show that these matters are properly within this Court's mandamus jurisdiction.

On the merits, all three of the consolidated petitions fail to satisfy the highly demanding, three-factor standard set forth by the Supreme Court to justify the drastic remedy of mandamus. Specifically, Petitioners must show that (1) they have no other adequate means to obtain the relief they seek, (2) they have a "clear and indisputable" right to the requested writs, and (3) the issuance of mandamus is appropriate in these circumstances. All three conditions must be satisfied, and Petitioners satisfy none of them.

First, the statutory review process enshrined by section 10(f) of the Act is fully adequate to protect Petitioners' cognizable interests. Board orders are not self-enforcing, and when review of a Board order is sought under section 10(f), all properly preserved questions of the Board's authority and of constitutional right are reviewable. The Supreme Court recognized the adequacy of this procedure over seventy-five years ago in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938). Petitioners claim an entitlement to circumvent this process because they will not be able to recoup the time, money, and resources they must devote to a Board proceeding that might later be invalidated. But this Court rejected a strikingly similar argument in *Heller Brothers Co. v. Lind*, 86 F.2d 862 (D.C. Cir. 1936) (per curiam), when the constitutionality of the NLRA was still in doubt. In addition, SFTC has a fully adequate remedy to review any adverse order or judgment in the 10(j) case. It can simply appeal to the Tenth Circuit and, if necessary, seek a stay pending appeal.

Second, Petitioners have not shown a "clear and indisputable" right to mandamus relief. All of Petitioners' attacks on the Agency's authority are premised on the theory that this Court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (June 24, 2013), is clearly and indisputably correct. But this Court has recognized that the existence of a circuit split on the question that is the foundation of a mandamus petition

"make[s] it clear" that the petitioner will necessarily "fall[] a good deal short" of meeting its burden to demonstrate that "its right to issuance of such a writ is 'clear and indisputable.'" *Airline Pilots Ass'n, Int'l v. Dep't of Transp.*, 880 F.2d 491, 503 (D.C. Cir. 1989). And *Noel Canning* itself acknowledges that the constitutional holdings reached by the Court in that case are in conflict with those reached by three other courts of appeals. Moreover, Petitioners' contention that they are entitled to "immediate enforcement" of *Noel Canning* as well as other decisions to which they were not parties reflects a fundamental misunderstanding of what *Noel Canning* says and relies implicitly upon a theory of nonmutual collateral estoppel which simply does not apply in cases where the Federal Government is a party. Finally, Petitioners' reliance on *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), to support their argument that delegees of the Board are barred from exercising any of the Board's authority must fail not only because it necessarily depends on the unassailability of *Noel Canning*, but also because *Laurel Baye* has itself been called into question by a substantial number of courts.

Third, Petitioners have not shown that the writs they seek are appropriate in these circumstances. The public has a substantial interest in the timely and continued enforcement of a longstanding federal law like the National Labor Relations Act. Neither the obligations created by the Act nor the necessity of

prompt action to resolve labor disputes are suspended when the Board lacks a quorum. The Agency's judgment that it serves the public interest to continue to administer and enforce the Act, including section 10(j), while the challenges to the Board's authority are being resolved is supported by its recent experience during the two-year period when only two of the Board's five seats were filled. Petitioners' only argument to the contrary is that judicial economy favors issuing the writs, but this interest is already being addressed by this Court's practice of placing cases challenging the Board's authority in abeyance pending the Supreme Court's resolution of *Noel Canning*.

Petitioners have not shouldered their heavy burden in this case to demonstrate that the drastic remedy of mandamus is necessary and appropriate. Thus, the Board respectfully requests that this Court dismiss SFTC's petition to the extent that it seeks relief that is beyond this Court's subject-matter jurisdiction and deny on the merits Petitioners' remaining requests.

ARGUMENT

I. SFTC's Petition Should Be Dismissed to the Extent That It Requests a Writ of Mandamus Addressing Matters That Are Beyond This Court's Current or Prospective Jurisdiction.

Federal courts are courts of limited jurisdiction. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without

exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (alteration in original) (quoting *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Mandamus cases are not exempt from jurisdictional requirements. *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (dismissing mandamus petition for lack of jurisdiction). As the parties seeking to invoke federal subject-matter jurisdiction, Petitioners bear the burden of demonstrating that such jurisdiction exists. *Shuler v. United States*, 531 F.3d 930, 932 (D.C. Cir. 2008).

The All Writs Act, relied upon by Petitioners, permits federal courts to issue writs of mandamus so long as such writs are "in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). But the All Writs Act "is not itself a grant of jurisdiction." *In re Tennant*, 359 F.3d at 527; *accord Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (*TRAC*). Instead, it supports the exercise of the writ power only "in conjunction with" some other, independent source of current or future review authority. *TRAC*, 750 F.2d at 75 (emphasis added).[4]

[4] Precedent forecloses Petitioners' reliance on the Administrative Procedure Act (APA) or the mandamus statute (28 U.S.C. § 1361) as that source. *See Califano v. Sanders*, 430 U.S. 99, 106 (1977) (APA); *In re Tennant*, 359 F.3d at 529 n.4 (mandamus statute); *TRAC*, 750 F.2d at 76 (APA).

As set forth below, Petitioners have failed to establish this Court's subject-matter jurisdiction over at least two of SFTC's requests for mandamus relief. First, this Court lacks jurisdiction to order the Board to withdraw the 10(j) case against SFTC because this Court has no prospective appellate jurisdiction over the 10(j) case, and further prosecution of the 10(j) case will not defeat this Court's power to review any final Board order that may issue in the administrative case involving SFTC. Second, this Court lacks jurisdiction to order the Acting General Counsel to take any action with respect to the administrative complaint or the underlying charges filed against SFTC because initial decisions to prosecute complaints are not judicially reviewable.[5]

A. This Court lacks subject-matter jurisdiction to order the Board to withdraw the 10(j) case because that case does not implicate this Court's current or prospective jurisdiction.

Petitioners have not shown any jurisdictional basis for this Court to oversee the 10(j) case via mandamus. Petitioners do not contend that this Court has current or future authority to review the 10(j) case against SFTC, and rightly so. Congress vested the district courts with original jurisdiction over 10(j) cases. *See* 29 U.S.C.

[5] SFTC's petition takes aim almost entirely at the 10(j) case and the Acting General Counsel's exercise of his prosecutorial authority. Part I.A-B of this brief explains why those matters are beyond this Court's jurisdiction. To the extent that SFTC also challenges the Board's exercise of its adjudicatory authority, that argument is addressed in Part II of this brief.

§ 160(j) (supplying district courts with "jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper"). Furthermore, appellate jurisdiction over a 10(j) case is governed by 28 U.S.C. §§ 1291 and 1292(a)(1), *see NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996), and resides in the United States Court of Appeals for the circuit in which the district court sits. *See* 28 U.S.C. § 1294(1). Therefore, the Tenth Circuit is the only appellate court that has prospective jurisdiction to review any order or judgment issued by the United States District Court for the District of New Mexico in the 10(j) case against SFTC. *See* 28 U.S.C. § 41. This Court simply "has no appellate jurisdiction over the . . . case, past, present, or future, which mandamus could 'aid.'" *In re Stone*, 569 F.2d 156, 157 (D.C. Cir. 1978) (per curiam) (dismissing mandamus petition for lack of jurisdiction because any "appeal . . . will lie to the Eighth Circuit and not this court").

Nor, contrary to Petitioners, does *TRAC* support the exercise of the writ power over the 10(j) case. In *TRAC*, this Court recognized that it may issue a writ of mandamus if agency action or inaction might "defeat" this Court's future jurisdiction. 750 F.2d at 76. By virtue of section 10(f) of the NLRA, 29 U.S.C. § 160(f), this Court shares prospective jurisdiction with the Tenth Circuit (and perhaps others) to review any final order the Board issues in SFTC's unfair labor

practice case.[6] But the 10(j) case, which seeks temporary injunctive relief, cannot possibly "defeat" this Court's prospective jurisdiction under section 10(f) to review a final Board order in the unfair labor practice case. No decision issued in the 10(j) case, no matter how adverse to SFTC, could do so.

At least three features of 10(j) cases safeguard this Court's prospective 10(f) jurisdiction over the administrative case from intrusion. First, a district court 10(j) injunction automatically expires when the Board issues a final order in the underlying administrative case. *See, e.g.*, *Kinney v. Fed. Sec., Inc.*, 272 F.3d 924, 925 (7th Cir. 2001). Second, a district court's findings and conclusions in a 10(j) proceeding have no binding effect on any subsequent administrative proceeding before the NLRB. *See, e.g.*, *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993). Third, the mere authorization of 10(j) proceedings is not considered prejudicial to the final adjudication of an unfair labor practice case. *See, e.g.*, *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981) (per curiam). Therefore, a writ of mandamus commanding the Board to "cease the prosecution" of the 10(j) case (Petitioners' Br. at 5) could not possibly be "in aid

[6] Section 10(f) permits "any person aggrieved by a final order of the Board" to file a petition for review "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." 29 U.S.C. § 160(f). The unfair labor practices alleged in SFTC's administrative case occurred in New Mexico.

of" this Court's prospective jurisdiction over SFTC's administrative case. 28 U.S.C. § 1651(a).

In sum, this Court has no prospective jurisdiction over the 10(j) case. Moreover, the 10(j) case will not "defeat" this or any other Court's prospective jurisdiction under section 10(f) to review a final Board order in the administrative case. Without any jurisdiction to protect, this Court cannot issue a writ of mandamus. *In re Stone*, 569 F.2d at 157. Thus, this Court lacks subject-matter jurisdiction to order the Board to cease prosecuting the 10(j) case.

B. This Court lacks subject-matter jurisdiction over the issuance of the administrative complaint against SFTC because decisions to issue complaints under the NLRA are not judicially reviewable.

Petitioners have likewise failed to show that this Court has mandamus jurisdiction to command the Acting General Counsel to "dismiss or withdraw" the unfair labor practice complaint against SFTC and "cease the prosecution" of that complaint. (Petitioners' Br. at 5.) It has long been settled that the Act precludes judicial review of the General Counsel's decision to issue and prosecute unfair labor practice complaints. Moreover, there is no basis for Petitioners' claim that the General Counsel's authority to perform his statutory duties depends on the existence of a Board quorum. This contention is contrary to the text of the Act, congressional intent, and binding precedent, all of which consistently affirm the General Counsel's independence.

Section 3(d) of the Act creates the office of General Counsel and vests its occupant with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Courts understand section 3(d) to be a firm limitation on the jurisdiction of federal courts to examine the General Counsel's exercise of those functions. "Both this court and the Supreme Court have declared . . . that decisions of the General Counsel of the National Labor Relations Board whether to issue complaints are not subject to review by this court." *Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 753 (D.C. Cir. 1997) (citing *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117-33 (1987) (*UFCW*), and *Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 155 (D.C. Cir. 1996)).[7]

[7] *See also Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 396 (6th Cir. 2002) (reversing district court for "enjoining the Board from prosecuting [a] complaint"); *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir. 1968) (per curiam) (declaring it "well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon"); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (rejecting the proposition that courts should "police the procedural purity of the NLRB's proceedings long before the administrative process is over").

The principle of nonreviewability established by section 3(d) applies regardless of whether the General Counsel issues or declines to issue a complaint. *See, e.g.*, *UFCW*, 484 U.S. at 124-26, 129, 131 (holding that the lower court exceeded its authority in purporting to review a post-complaint, pre-hearing informal settlement decision of the General Counsel); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (noting the General Counsel's "unreviewable discretion [to] refuse to issue . . . a complaint"); *Beverly Health & Rehab. Servs.*, 103 F.3d at 155 ("[W]e find that the NLRA does not permit a court to review the issuance of a complaint . . . ."); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006) (describing *Beverly* as "holding that the NLRB General Counsel's decision to issue an unfair labor practice complaint is unreviewable"). Thus, there is no current or prospective jurisdiction for this Court or any other court to review the issuance of the complaint against SFTC. Accordingly, this Court may not issue a writ of mandamus commanding the Acting General Counsel to take any action with respect to that complaint.

Further, there is no merit to Petitioners' attempt to link the General Counsel's ability to exercise the statutory authority conferred by section 3(d) to the existence of a Board quorum. The General Counsel of the NLRB is an independent officer appointed by the President and confirmed by the Senate to whom staffs engaged in prosecution and enforcement are directly accountable. *See UFCW*, 484

U.S. at 127-28; *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010).[8] As stated, section 3(d) vests the General Counsel with "final authority" over the investigation and prosecution of unfair labor practice cases. 29 U.S.C. § 153(d). Thus, the General Counsel's final and unreviewable authority to investigate unfair labor practice charges and prosecute complaints does not derive from any power "delegated" by the Board. (Petitioners' Br. at 50.) Instead, it flows directly from the words of section 3(d).[9]

It does not detract from the General Counsel's independence that Congress included language in section 3(d) to make it clear that the General Counsel acts "on behalf of the Board." (Petitioners' Br. at 50.) When Congress established that statutory office in 1947, it chose to place the General Counsel within the NLRB rather than in a completely separate agency. *See generally* Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 Indus. & Lab. Rel. Rev. 371, 371-76 (1958). Congress included the phrase "on behalf of the Board" in section 3(d) to effectuate this choice and to avoid "'the cumbersome device' of

[8] The Acting General Counsel, whom the President appointed in accordance with the Federal Vacancies Reform Act, *see supra* p. 6, is likewise an independent prosecutorial official.

[9] Regional Directors, who are members of the General Counsel's staffs engaged in prosecution of unfair labor practices, derive their authority to issue complaints from the General Counsel. *See Dunn v. Retail Clerks Int'l Ass'n*, 307 F.2d 285, 288 (6th Cir. 1962); *United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 760 (S.D.N.Y. 1965), *aff'd*, 366 F.2d 776 (2d Cir. 1966).

establishing a new independent agency within the executive branch." *Id.* at 376. As the Supreme Court concluded, Congress did not mean to imply that the acts of the General Counsel were to be considered acts of the Board. *UFCW*, 484 U.S. at 128-29. Petitioners' contrary reading ignores the historical context of section 3(d) and Congress's intent "to create an officer independent of the Board." *Id.* at 127.

Under these authorities, this Court lacks subject-matter jurisdiction to order the Acting General Counsel to "dismiss or withdraw the [unfair labor practice] complaint" and to "hold the [unfair labor practice] charges against SFTC in abeyance." (Petitioners' Br. at 5.) It therefore follows that this Court may not issue any writ to that effect. But in any event, section 3(d) conclusively establishes that the General Counsel is an independent officer who may exercise his or her statutory duties without regard to the composition of the Board.

II. All Three Petitions Should Be Denied Because the Petitioners Have Not Satisfied the Three Conjunctive Requirements for Issuance of Writs of Mandamus.

A writ of mandamus is an exceptionally rare remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). "As the writ is one of 'the most potent weapons in the judicial arsenal,'" the Supreme Court has admonished the courts of appeals to exercise the writ power sparingly and with caution. *Id.* (quoting *Will v. United States*, 389 U.S. 90, 107 (1967)). Accordingly, the Supreme Court has

determined that each of the following "three conditions must be satisfied," *id.*, before a writ of mandamus can issue:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 380-81 (citations and internal quotation marks omitted) (alterations in original); *accord Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 739-30 (D.C. Cir.), *cert. denied*, 133 S. Ct. 274 (2012).

Petitioners' already substantial burden is magnified because they seek a writ of mandamus against an administrative agency rather than a district court. "The nature of the relationship between courts and agencies . . . warrants a standard still higher than the demanding standards that control writ practice with respect to district courts." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3942 (2d ed. 1996). As then-Circuit Judge Kennedy wrote on behalf of the Ninth Circuit, "The circumstances that will justify our interference with nonfinal agency action must be truly extraordinary, for this court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts." *Pub Utils. Comm'n v. FERC*, 814 F.3d 560, 562 (9th Cir. 1987) (internal quotation marks omitted).

Here, the Petitioners cannot satisfy any—let alone each—of the "demanding" preconditions for mandamus relief. *Cheney*, 542 U.S. at 381. They make the barest of efforts to do so, but to no avail.[10] Therefore, the petitions for writs of mandamus must be denied.

A. Petitioners have adequate means to attain the relief they desire by following the available statutory review procedures.

A party seeking to obtain a writ of mandamus must first show that it has "no other adequate means to attain the relief he desires." *Id.* at 380. Petitioners fail at this first step because the NLRA's statutory review procedures are fully capable of providing adequate redress. Petitioners will not endure any cognizable injury by following the statutory review procedures in each of their respective administrative cases. In addition, the New Mexico district court has already considered SFTC's 10(j)-related arguments, and SFTC can obtain review of those arguments at the appropriate time before the Tenth Circuit. The adequacy of these established statutory routes to review show that Petitioners impermissibly seek writs of mandamus to "substitute for the regular appeals process." *Id.*

[10] Petitioners claim that they satisfy the requirements for mandamus relief (*see* Petitioners' Br. at 22-23, 33-36), but remarkably, they never clearly state what those requirements are.

1. The NLRA's statutory review procedure is adequate.

As described above, section 10(f) of the NLRA provides the exclusive procedure that aggrieved persons must follow in order to obtain judicial review in unfair labor practice cases. *See supra* pp. 18-19 and note 6. That section permits "[a]ny person aggrieved by a final order of the Board" to seek review "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." 29 U.S.C. § 160(f). Congress designed section 10(f) to give aggrieved persons "a full, expeditious, and exclusive method of review . . . after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain." H.R. Rep. No. 74-1147, at 24 (1935) (emphasis added), *quoted in Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 n.5 (1938).

The Supreme Court long ago concluded that "the judicial review . . . provided [by the NLRA] is adequate." *Myers*, 303 U.S. at 50. The Court gave two principal reasons for its conclusion. First, the Board does not have the power to enforce its own orders. *Id.* at 48. Instead, that power resides exclusively with the courts of appeals. *Id.*[11] And second, when reviewing a Board order, "all questions

[11] *Porter v. Gardner*, 277 F. 556 (D.C. Cir. 1922), is therefore distinguishable. (Petitioners' Br. at 30.) The applicable statute in that case empowered this Court to

of the jurisdiction of the Board and the regularity of its proceedings and all questions of constitutional right or statutory authority are open to examination by the court." *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)). Thus, if a court of appeals finds reversible error in the Board's order, "the Board's petition to enforce it will be dismissed, or the [opposing party's] petition to have it set aside will be granted." *Id.* at 50. Together, these features provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* at 48.[12]

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review decisions made by the D.C. Rent Commission. But before this Court could complete its review in a particular case, a municipal court proceeding commenced to enforce the Rent Commission's decision. In those circumstances, this Court issued a writ of mandamus to prevent its review jurisdiction from being "rendered futile and abortive." *Id*. at 558. Here, by contrast, the Board's actions present no such danger. Indeed, the statute makes it impossible for the Board to obtain pre-review enforcement of its orders.

[12] This is why arguments eventually found to be correct on the merits have nevertheless been rejected as premature when raised before completion of NLRB proceedings. *Compare Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir.) (refusing to enjoin ongoing Agency proceedings with respect to a church-operated parochial school "because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights"), *cert. denied*, 431 U.S. 908 (1977), *with Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977) (granting petition for review and vacating Board's final order directing church-owned parochial school to bargain with faculty), *aff'd*, 440 U.S. 490, 494-95, 506 (1979). Petitioners seek to distinguish *Grutka* on the basis that it dealt with an as-applied challenge to the Board's authority, but there is no principled reason to limit *Grutka* and like cases to such situations. (Petitioners' Br. at 36 n.11.)

The adequacy of this process is not diminished by the nature of Petitioners' challenge to the Agency's authority. Indeed, Petitioners' own cases show the presumptive adequacy of ordinary appellate review even in the face of dubious assertions of jurisdiction by lower tribunals. For example, in *In re Chicago, Rock Island & Pacific Railway Co.*, 255 U.S. 273 (1921) (Petitioners' Br. at 30), the Supreme Court refused to issue mandamus when a district court's assertion of personal jurisdiction was "in doubt." *Id.* at 279. The Supreme Court explained that the district court's assertion of jurisdiction was at least colorable and the petitioner could "have its remedy by appeal" if the district court's jurisdictional assessment was erroneous. *Id.* at 280. Cases like *Ryder v. United States*, 515 U.S. 177 (1995), and *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), upon which Petitioners rely (Petitioners' Br. at 30-31), are not to the contrary. In both cases, litigants successfully challenged a governmental body's authority through established statutory review procedures. They did not need to seek the drastic remedy of mandamus because, like here, the statutory review processes were entirely adequate and could provide appropriate relief.

Petitioners contend that the NLRA's statutory review process is nevertheless inadequate because "they have no current appeal rights." (Petitioners' Br. at 2 n.2.; *see id.* at 22-23.) But this argument proves too much. The lack of a current right to appeal cannot, on its own, render any eventual appeal inadequate. *See In re Chi.*,

Rock Island & Pac. Ry. Co., 255 U.S. at 280. Were it otherwise, the limited scope of extraordinary mandamus relief could be extended to virtually any interlocutory order.

Petitioners unsuccessfully attempt to bolster their attack on the adequacy of section 10(f) review by asserting that the statutory process "will not adequately protect them from having to comply with the current orders and demands of an illegally seated Board." (Petitioners' Br. at 35.) In essence, Petitioners argue that they will suffer irreparable harm by submitting to any agency proceedings while the Board's authority is being challenged. But this argument is foreclosed by Congress's determination that no cognizable injury arises unless and until the Board issues a final order. *See* H.R. Rep. No. 74-1147, at 24, *quoted in Myers*, 303 U.S. at 48 n.5.[13]

Petitioners SFTC and Encino further complain of the required expenditure of "time, monies, and scarce resources" in Board proceedings (Petitioners' Br. at 38) and claim that the costs of Board proceedings extend to "employees and managers" who are called to participate as witnesses. (*Id.* at 39.) However, this Court rejected

[13] Petitioners have not pointed to any exceptional circumstances of the sort that this Court has found establish the inadequacy of review in the normal course. *See In re Papandreou*, 139 F.3d 247, 251-52 (D.C. Cir. 1998) (representative of foreign sovereign potentially entitled to immunity from the normal burdens of litigation); *In re Sealed Case No. 98-3007*, 151 F.3d 1059, 1065-66 (D.C. Cir. 1998) (normal statutory review process might threaten the integrity of a grand jury investigation).

the sufficiency of nearly identical arguments almost eighty years ago in a similar action to enjoin the Board.

In *Heller Brothers Co. v. Lind*, 86 F.2d 862 (D.C. Cir. 1936) (per curiam), various employers sought injunctions to prevent the Board from conducting hearings and adjudications on the basis that the NLRA was unconstitutional in whole or in part.[14] The employers argued that any activity undertaken by the purportedly unconstitutional Board would produce irreparable injury and that they had "no plain, adequate, or complete remedy at law." *Id.* at 863. This Court affirmed the district court's refusal to issue the requested injunctions. Without addressing the constitutionality of the Act, the Court concluded that "the attendance of officers and employees at hearings, the employment of counsel, and like matters" were simply "annoying incidents" and were "not enough of themselves to establish a case for equitable relief." *Id.* The Court found it acceptable that any losses incurred by employers from participating in the Board's proceedings would "have to be borne without redress" if the NLRA were subsequently held to be unconstitutional. *Id.* at 864. In words that still ring true

[14] At the time, three courts of appeals had already concluded that the NLRA was unconstitutional as applied to certain employers. *See NLRB v. Friedman-Harry Marks Clothing Co.*, 85 F.2d 1 (2d Cir. 1936) (per curiam), *rev'd*, 301 U.S. 58 (1937); *Fruehauf Trailer Co. v. NLRB*, 85 F.2d 391 (6th Cir. 1936) (per curiam), *rev'd*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998 (5th Cir. 1936) (per curiam), *rev'd*, 301 U.S. 1 (1937).

today, the Court observed that "these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage as to which equity will interfere to prevent." *Id.; accord U.S. ex rel. Denholm & McKay Co. v. U.S. Bd. of Tax Appeals*, 125 F.2d 557, 558 (D.C. Cir. 1942) ("It is possible that the use of the statutory appeal after entry of the [Tax] Board's order may be costlier in effort and money than if the issue of jurisdiction were settled now. But the statutory appeal is certainly adequate as the law knows the term.").[15]

Petitioners' final argument against section 10(f) review relies on a distorted reading of *Association of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007). In that case, this Court provided examples of situations in which a court might excuse the failure to exhaust administrative remedies. *Id.* Petitioners argue that *Chao* supports bypassing the NLRA's established review procedures in this case. (Petitioners' Br. at 36 n.12.) But Petitioners conveniently omit the distinction *Chao* noted between "non-jurisdictional exhaustion," which a court may excuse in its discretion, and "jurisdictional exhaustion," which a court is powerless to

[15] A writ of mandamus, like an injunction, is an equitable remedy. *Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000). Just as the harms alleged in *Heller Brothers* did not suffice to justify issuing an injunction, the same harms alleged here by Petitioners do not justify short-circuiting the NLRA's statutory review process via mandamus.

excuse. *See Chao*, 493 F.3d at 159 (citing *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004)). Just last year, this Court held that the NLRA "make[s] exhaustion a jurisdictional prerequisite." *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1329 (D.C. Cir. 2012). Thus, *Chao* is of no assistance to Petitioners.

2. The review procedure in 10(j) cases is likewise adequate.

There is also a fully adequate means for Petitioner SFTC to obtain review of its 10(j)-related arguments. The 10(j) case against SFTC is currently being heard in the District Court for the District of New Mexico, where SFTC has already raised and lost the argument that the NLRB lacked authority to file the 10(j) case. As noted above, in accordance with settled statutory procedures, review of the district court's decision will be available exclusively in the Court of Appeals for the Tenth Circuit. *See supra* p. 18. While the appeal is pending, SFTC may seek a stay of any adverse order entered by the district court. *See* Fed. R. Civ. P. 62; Fed. R. App. P. 8. It is black-letter law in this Circuit that a mandamus petition will not lie where a stay pending appeal "will suffice to prevent the alleged harm." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985); *see also Denholm & McKay*,

125 F.2d at 558 (holding that "there can be no reason whatsoever for entertaining the petition for a writ of prohibition" if the required mode of appeal is adequate).[16]

In sum, mandamus proceedings are not a permissible substitute for the appeals processes Congress prescribed in section 10(f) of the Act for review of final Board orders and in 28 U.S.C. §§ 1291 and 1292(a)(1) for review of district court matters like the 10(j) case. Petitioners cannot dispute the adequacy of these review procedures without resorting to arguments that this Court has consistently rejected. Because following these procedures will not result in any cognizable form of harm, the Court need look no further to deny the petitions.

B. Petitioners' right to mandamus is not "clear and indisputable."

Petitioners cannot succeed for the further reason that they have no "clear and indisputable" entitlement to relief. *Cheney*, 542 U.S. at 381 (internal quotation marks omitted). "In seeking a writ of prohibition, the lack of authority of the body against which the writ is to be directed must be clearly shown." *Denholm & McKay*, 125 F.2d at 558. Although *Noel Canning* and *Laurel Baye* are currently the law of this Circuit, Petitioners cannot show a "clear and indisputable" right to

[16] Petitioners assert, without elaboration, that the Board has "caused enormous harm to SFTC that will continue absent the issuance of a writ of mandamus." (Petitioners' Br. at 51.) Whatever Petitioners mean by this, any such cognizable harm can be remedied through the processes described above.

an extraordinary and unprecedented writ commanding the Board, the Acting General Counsel, and their delegees to stop processing their cases.

1. *Noel Canning* does not establish that Petitioners have a "clear and indisputable" right to mandamus relief that would shut down the NLRB.

The principal reason why Petitioners lack a clear and indisputable right to the drastic relief they seek is because the courts of appeals are divided on the constitutional issues resolved in *Noel Canning*. As this Court has acknowledged, *Noel Canning*'s conclusions concerning the President's recess appointment authority conflict with those reached by three other circuit courts that have addressed the issues. *Noel Canning*, 705 F.3d at 505-06, 509-10 (discussing *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc), *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (limited en banc), and *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962)). A divided panel of the Third Circuit recently added to this split by issuing a decision that joined this Circuit in holding that the Recess Appointments Clause authorizes appointments only during intersession recesses of the Senate and not intrasession recesses. *See NLRB v. New Vista Nursing & Rehab.*, --- F.3d ----, Nos. 11-3440, 12-1027, 12-

1936, 2013 WL 2099742 (3d Cir. May 16, 2013) (2-1 decision).[17] Additional courts of appeals may also weigh in soon. *See, e.g.*, *NLRB v. Enter. Leasing Co. Southeast, LLC*, No. 12-1514 (4th Cir.) and *Huntington Ingalls Inc. v. NLRB*, Nos. 12-2000, 12-2065 (4th Cir.) (joint oral argument held Mar. 22, 2013); *FTS Int'l Proppants, LLC v. NLRB*, Nos. 12-3322, 12-3654 (7th Cir.) and *Big Ridge, Inc. v. NLRB*, Nos. 12-3120, 12-3258 (7th Cir.) (joint oral argument held May 31, 2013).

Moreover, the Supreme Court has granted the Board's petition for a writ of certiorari to review the *Noel Canning* decision. *NLRB v. Noel Canning*, 81 U.S.L.W. 3629 (June 24, 2013). A decision is expected during the Court's next Term. But until then, while this circuit split lingers, Petitioners cannot establish that their entitlement to exceptional mandamus relief is "clear and indisputable."

This Court has previously recognized that the existence of a circuit split on the question that is the foundation of a petition for writ of mandamus precludes issuance of the writ. A circuit split "make[s] it clear" that the petitioner will necessarily "fall[] a good deal short" of meeting its burden to demonstrate that "its right to issuance of such a writ is 'clear and indisputable.'" *Airline Pilots Ass'n, Int'l v. Dep't of Transp.*, 880 F.2d 491, 503 (D.C. Cir. 1989); *see also Hobby*

[17] On July 15, 2013, in response to the Board's petition for rehearing and rehearing en banc in *New Vista*, the Third Circuit stayed the case pending the Supreme Court's decision in *Noel Canning*. *See* Addendum, *infra*, at A1-A2.

Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) (denying All Writs Act relief because the Supreme Court had not yet addressed the question at issue and because "lower courts have diverged on whether to grant" relief in similar cases); *Lux v. Rodrigues*, 131 S. Ct. 5, 7 (2010) (Roberts, C.J., in chambers) (denying injunction pending appeal because the legal rights at issue are not "indisputably clear" whenever "the courts of appeals appear to be reaching divergent results").

This Circuit's *Airline Pilots* decision has special pertinence because there, as here, the Court faced a situation where the petitioner's legal argument challenging the jurisdiction of the lower tribunal found support in the law of this Circuit. *See* 880 F.2d at 499-501. But, that did not suffice to show that the petitioner had a "clear and indisputable" right to mandamus relief. The Court observed that the statute governing judicial review of the agency proceeding in that case, also like here, did not guarantee that this Court's future jurisdiction would "inevitably be implicated." *Id.* at 501.[18] Under those circumstances, it could not "be thought that

[18] Because section 10(f) of the NLRA supplies venue choice, *see supra* note 6, judicial review of Petitioners' administrative cases could take place in this Circuit or in the First Circuit (Geary), the Tenth Circuit (SFTC), or the Ninth Circuit (Encino), among others. Indeed, it is not uncommon for multiple aggrieved parties to file petitions for review of the same Board order in different circuits. In such situations, the Judicial Panel on Multidistrict Litigation randomly selects the court that will review the case pursuant to 28 U.S.C. § 2112(a)(3). *See, e.g.*, *Target Corp. v. NLRB*, No. 13-1153, Doc. #1439331 (D.C. Cir. June 4, 2013) (ordering

an injunction would be necessary to protect the appellate jurisdiction of *any one* of the courts of appeals because there is a split of authority in the circuits." *Id.* That reasoning applies with equal force here.[19]

Principles guiding the exercise of "exceptional circumstances" jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958), provide further support for the Board's position that Petitioners' right to mandamus relief is not "clear and indisputable." This Court has previously noted the similarity between the standards for courts of appeals to evaluate mandamus requests under the All Writs Act and the standards for district courts to assert jurisdiction under *Kyne*. *See Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 n.4 (D.C. Cir. 1980) (en banc). A party challenging Board action under *Kyne* must demonstrate, inter alia, that the Board has "clearly violated an express provision of the statute." *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 (D.C. Cir. 1984). And, as this Court has explained, there can be no clear violation if there is "*any colorable support for the Board's ruling*." *Id.* at 1313 (quoting Robert A. Gorman, Basic

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case transferred to the Second Circuit, which was "randomly selected by the Judicial Panel on Multidistrict Litigation as the court to review this case"), *reproduced in* Addendum, *infra*, at A3.

[19] The existence of this split also led the Court to conclude that it was improper for the petitioner to request that the D.C. Circuit stop collateral litigation pending in a federal district court in Texas. The Court viewed such a request "as a thinly-veiled attempt to impose D.C. Circuit substantive law" outside the boundaries of this Circuit. *Id.* at 502. Petitioner SFTC repeats this misguided litigation maneuver.

Text on Labor Law: Unionization and Collective Bargaining 64-65 (1976)). Although the Board's position in *Noel Canning* did not convince this Court, it cannot be said that the Board lacked "colorable support." Therefore, reasoning by analogy to *Kyne*, Petitioners do not have a "clear and indisputable" right to writs of mandamus here because colorable and substantial arguments stand in their way.

Consistent with this Court's decision in *Airline Pilots*, 880 F.2d at 499-501, courts applying *Kyne* have likewise concluded that, where there is a conflict in the circuits, injunctive relief is not warranted simply because the ongoing litigation is without merit under the law of the circuit. In *Armco Steel Corp. v. Ordman*, 414 F.2d 259 (6th Cir. 1969) (per curiam), the Sixth Circuit affirmed the denial of injunctive relief that Armco sought after the General Counsel commenced an unfair labor practice proceeding against the company based on language in a collective bargaining agreement that allegedly violated the NLRA. Just a few years earlier, the Sixth Circuit had denied enforcement to a Board order that found Armco liable for including the very same language in a predecessor agreement. *Id.* at 260. But, after this earlier decision, the Board obtained a contrary decision from the Fifth Circuit in a different case. *Id.* So even though the Sixth Circuit's earlier decision had rejected the Board's legal theory, the intervening Fifth Circuit case "clearly establishe[d] a split of opinion in the circuits" and "rendered the current

NLRB complaint 'arguable.'" *Id.*[20] Accordingly, the Sixth Circuit concluded that "the NLRB ha[d] jurisdiction to hear and decide the . . . unfair labor practice complaint subject to statutorily provided review procedures." *Id.* at 260-61.[21]

Contrary to Petitioners' contention, the lead opinion in *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983), does not preclude the Agency from disagreeing with *Noel Canning*. (Petitioners' Br. at 27.)[22]

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[20] The Supreme Court ultimately resolved the longstanding disagreement between the Board and the circuit court in the Board's favor. *See NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322 (1974), *rev'g* 474 F.2d 1269 (6th Cir. 1973).

[21] In addition, it is noteworthy that this Court and the Supreme Court have recently denied a spate of motions seeking to stay Agency action in light of *Noel Canning*. For example, this Court denied emergency motions to stay Agency action in *Ozburn-Hessey Logistics, Inc. v. NLRB*, No. 13-1170 (D.C. Cir. May 14, 2013), *In re SFTC, LLC*, No. 13-1048 (D.C. Cir. June 28, 2013), and *In re CSC Holdings, LLC*, No. 13-1191 (D.C. Cir. June 28, 2013). *See* Addendum, *infra*, at A4-A6. Furthermore, the Supreme Court or individual Justices denied similar motions in *HealthBridge Management, LLC v. Kreisberg*, No. 12A769 (denial by Justice Ginsburg Feb. 4, 2013; denial by the Court Feb. 6, 2013), and *CSC Holdings, LLC v. NLRB*, No. 13A20 (July 2, 2013) (Roberts, C.J., in chambers). *See* Addendum, *infra*, at A7-A9. To be sure, those motions and applications were briefed under a somewhat different legal standard. But this record of failure suggests that Petitioners' right to mandamus relief is not as "clear and indisputable" as they claim.

[22] The portion of the opinion in *Yellow Taxi* cited by Petitioners was not followed by the other two members of the appellate panel. *See Yellow Taxi*, 721 F.2d at 384 (Wright, J., concurring) ("I cannot concur with the [lead opinion's] condemnation of Board behavior . . . ."); *id.* at 385 (Bork, J., concurring) (declining "either to agree or disagree with [the lead opinion's] strong criticism of the Board"). Thus, it did not represent the opinion of the Court. In any event, the lead opinion repeatedly distinguished between situations where a law's meaning is "firmly established" and where, as here, it is still subject to legitimate dispute. *Id.* at 383 & n.39.

Because the question of the validity of the President's recess appointments remains in litigation, it is appropriate for the NLRB to continue to exercise its duties and responsibilities in accordance with its legal position that the recess appointments are valid. Petitioners seek, in effect, to invoke the doctrine of offensive nonmutual collateral estoppel against the Agency. But it is settled law that this doctrine is not available against the government. *See United States v. Mendoza*, 464 U.S. 154, 159-63 (1984) (explaining that the federal government is not bound to follow adverse judgments in future cases involving entities who were not parties to that adverse judgment). Moreover, even under common law principles, the doctrine of nonmutual collateral estoppel does not apply where courts are divided on a legal or factual issue. *See* Restatement (Second) of Judgments § 29, cmt. f.

As this Court has observed on multiple occasions, the government is permitted to relitigate issues decided in a proceeding involving a different party. *See Cotton v. Heyman*, 63 F.3d 1115, 1119 n.2 (D.C. Cir. 1995); *see also Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting) (discussing *Mendoza*). Indeed, in *American Federation of Government Employees, Council 214 v. FLRA*, 835 F.2d 1458, 1459, 1462-63 (D.C. Cir. 1987), this Court concluded that the FLRA was permitted to relitigate its position even though the Fifth Circuit, which also would have been a proper venue

for review under the governing judicial review provision (5 U.S.C. § 7123), had ruled in a prior case that the agency's position was meritless.[23]

Petitioners are further mistaken when they claim that they qualify for a writ of mandamus to obtain "immediate enforcement" of the decisions in *Noel Canning* and *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009). (Petitioners' Br. at 21, 25.) One of the cases upon which they chiefly rely, *Yablonksi v. United Mine Workers*, 454 F.2d 1036 (D.C. Cir. 1971) (Petitioners' Br. at 23, 35), stands for the uncontested proposition that a court has the authority to issue writs of mandamus to enforce or clarify its mandate in a particular case. But this Court issued the writ in *Yablonski* and like cases to give effect to "the mandate rule," which "is a specific application of the doctrine commonly known as the law of the case." *City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 348 (D.C. Cir. 1977); *id.* at 348 n.37 (citing *Yablonski*). The mandate rule reflects the common-sense notion that "[a] party always has recourse to seek enforcement of its mandate." *Office of Consumers' Counsel v.*

[23] *Accord Atchison, Topeka & Santa Fe Ry. Co v. Pena*, 44 F.3d 437, 446-47 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring) ("We know from *United States* v. *Mendoza* that the executive branch need not follow a circuit's interpretation, even within that circuit's borders." (citation omitted)); *Frock v. U.S. R.R. Ret. Bd.*, 685 F.2d 1041, 1046 (7th Cir. 1982) ("[T]he scope of this court's . . . decision was necessarily limited to the rights of the litigant in that case, and the agency was bound to comply with this court's decision only with regard to that litigant.").

FERC, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (per curiam) (emphasis added). But that rule has no application here because Petitioners were not parties to *Noel Canning* or *Laurel Baye*, and this mandamus proceeding has no direct relationship to those cases.[24]

In addition, this Court stated in *Atlantic City Electric Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003) (per curiam) (*Atlantic City II*), that a grant of certiorari significantly affects whether an agency may refuse "to comply with the prior mandate of this Court." In *Atlantic City II*, FERC had taken action on remand from this Court that was precluded by this Court's prior decision in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City I*). FERC did so because it disagreed with *Atlantic City I* and "still believed it was correct the first time." *Atlantic City II*, 329 F.3d at 859. This was improper, so the Court granted the petition to enforce the mandate from *Atlantic City I*. But the Court also explained what FERC should have done instead if it wanted to avoid the effects of the prior decision:

> If FERC thinks we are wrong, then like any other litigant, it may petition for *certiorari* to the Supreme Court of the United States.

[24] For this reason, and with respect, Judge Henderson's reliance on *Office of Consumers' Counsel* in her dissent from the order denying an emergency motion for stay in *Ozburn-Hessey Logistics, LLC v. NLRB*, No. 13-1170 (D.C Cir. May 14, 2013), *reproduced in* Addendum, *infra*, at A4, was misplaced.

> Absent such a petition and the issuance of *certiorari*, in an order by the Supreme Court, FERC is bound by our decision.

Id. As stated, the NLRB has sought and the Supreme Court has issued a writ of certiorari to review the *Noel Canning* decision. Accordingly, *Atlantic City II* further undercuts Petitioners' argument that they are entitled to "immediate enforcement" of the *Noel Canning* decision.

Petitioners' further argument that the Board was required to seek a stay of this Court's mandate in *Noel Canning* in order to continue to enforce the NLRA is contrary to *Atlantic City II* and finds no support in the mandate itself. (Petitioners' Br. at 32.) The Court's mandate in *Noel Canning* does not order the Board to take any action, nor does it prohibit any particular function of the Board (much less the specific functions at issue here). The mandate in *Noel Canning* granted Noel Canning's petition for review and denied the Board's cross-petition for enforcement, and no more. *See Noel Canning v. NLRB*, Nos. 12-1115, 12-1153 (D.C. Cir Jan. 25, 2013) (judgment), *reproduced in* Addendum, *infra*, at A10. The Board has complied with the mandate and has not asked Noel Canning to comply with the Board's order.[25]

[25] Moreover, even if the Board had requested—and the Court had granted—a stay of the mandate, the stay would not have lessened *Noel Canning*'s precedential effect, which is the only effect Petitioners can rely upon here. As previously discussed, the Board does not dispute that *Noel Canning* is circuit precedent. Rather, the Board objects to the argument that *Noel Canning* is sufficient to

2. Petitioners' derivative challenge to the authority of administrative law judges is both moot and unavailing.

Separately, Petitioners assert that the Board's longstanding delegation of authority to administrative law judges to hear cases and issue recommended decisions, *see* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (promulgating a predecessor to 29 C.F.R. §§ 102.34-.35), lapsed when the Board allegedly lost a quorum. (Petitioners' Br. at 51.) At the outset, it is unnecessary for the Court to reach this argument because none of Petitioners' proceedings are currently before administrative law judges. All that remains in each administrative case is for the Board to issue a final decision. In addition, Petitioners' argument wrongly assumes as a premise the question that is in dispute—that is, whether the Board clearly and indisputably lacks a quorum.[26]

On the merits, Petitioners' argument apparently relies on this Court's statement in *Laurel Baye*, 564 F.3d at 475, that "delegated power to act . . . ceases

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establish a "clear and indisputable" right to mandamus relief that would bring administration of the NLRA to a standstill.

[26] Petitioners suggest, but never clearly state, that the Board's contingent delegation of 10(j) authority to the General Counsel has also lapsed. (See Petitioners' Br. at 49, 51-52.) That delegated authority is triggered whenever the Board lacks a quorum. *See* Order Delegating Authority to the General Counsel, 66 Fed. Reg. 65,998, 65,998 (Dec. 21, 2001). It is not necessary to evaluate the status of this delegation because it, too, necessarily relies on a prior conclusion that the Board clearly lacks a quorum. But in any event, the argument has been rejected by numerous circuit and district courts. *See infra* pp. 46-47 and note 27.

when the Board's membership dips below the Board quorum." But the quoted language is of uncertain precedential value and is insufficient to establish the "clear and indisputable right" that the Petitioners' request for relief requires. In addressing the same delegation question considered in *Laurel Baye*, the Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), pointedly declined to follow the agency theory invoked by *Laurel Baye*. The Supreme Court explained that, in invaliding a decision issued by a Board panel with only two members, it reached the same result as *Laurel Baye* but did so on different grounds and that "we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." *Id.* at 2643 n.4. Specifically, with respect to the questions at issue here, the Court stated, "Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." *Id.*

After *New Process Steel*, three other courts of appeals rejected *Laurel Baye*'s reasoning and held that Board delegations of authority to the General Counsel to commence 10(j) cases did not cease when the Board dipped below a quorum. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011) (ruling

that *Laurel Baye's* underlying premise was rejected by *New Process Steel*, which "instructs that the Act's quorum requirement must be satisfied when the Board is acting directly through its members, but does not need to be satisfied for the Board's earlier exercises and assignments of its authority, made with a proper quorum, to remain valid and in effect"), *cert. denied*, 132 S. Ct. 1821 (2012); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 853 (5th Cir. 2010) ("[A]t the time of its delegation [of section 10(j) authority] to the General Counsel, the Board comprised the requisite number of members to constitute a quorum. The fact that Board membership subsequently dipped below a quorum does not retroactively invalidate the Board's prior delegation."); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011) (following *Overstreet*).[27] Given the number of court decisions disputing the validity of *Laurel Baye*'s agency theory, the Petitioners have failed to shoulder their burden to establish that they have a "clear and indisputable right" to preclude administrative law judges from performing their delegated duties.

[27] Recent district court decisions are also in accord in disputing that *Laurel Baye*'s agency theory invalidates the prior delegations of the Board. *See Overstreet v. SFTC, LLC*, No. 13-CV-0165 RB/LFG, 2013 WL 1909154, at *5-*6 (D.N.M. May 9, 2013); *Calatrello v. JAG Healthcare, Inc.*, No. 1:12-CV-726, 2012 WL 4919808, at *3-*4 (N.D. Ohio Oct. 16, 2012), *appeal dismissed*, No. 12-4258 (6th Cir. July 2, 2013); *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964-65 (E.D. Wis. 2012); *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 345-50 (E.D.N.Y. 2012).

Accordingly, for all these reasons, it cannot be said that Petitioners have "clear and indisputable" grounds for the extraordinary relief sought here.

C. Writs of mandamus are not appropriate in these circumstances.

Even assuming that Petitioners could meet the first two requirements for mandamus under the Supreme Court's *Cheney* standard, 542 U.S. at 380-81, which they cannot, this Court should exercise its discretion to deny issuing the writs in this case. *See id*. at 381 ("[E]ven if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.").

1. The public interest strongly favors the continued availability of relief under the National Labor Relations Act, including section 10(j).

The public interest favors the continued enforcement and administration of longstanding federal law such as the National Labor Relations Act. The NLRA creates and protects a set of "public rights" that apply to the workplace. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940). The peaceful resolution of industrial disputes depends on an effective means to vindicate those rights. *See* 29 U.S.C. § 151 (stating the policies and purposes of the NLRA). Congress created the NLRB and the office of General Counsel to perform that critical function.

Petitioners seek nothing less than to "halt all further efforts" of the Board for as long as it may lack a "constitutionally valid" quorum. (Petitioners' Br. at 28.)

Although the relief Petitioners seek is technically limited to their own cases before the Board, issuing the writs would have severe and far-reaching consequences. Other parties with business before the Board are waiting for their chances to obtain writs of mandamus from this Court, *see, e.g.*, *In re CSC Holdings, LLC*, No. 13-1191 (D.C. Cir. June 28, 2013) (order holding case in abeyance pending disposition of this case); *In re Magic Laundry Servs., Inc.*, No. 13-1187 (D.C. Cir. July 9, 2013) (same), and more will surely follow if this Court grants mandamus in this case. Therefore, granting the full measure of relief requested by Petitioners would quickly metastasize and might ultimately prevent the Agency from investigating charges, holding elections, issuing adjudications, or seeking temporary injunctive relief under section 10(j), until and unless the Board indisputably satisfies the Act's quorum requirement. That result cannot be justified as appropriate in the circumstances.

Contrary to Petitioners' assumption, the rights and obligations of the NLRA are not suspended if the Board lacks a quorum. Unfair labor practice charges must still be filed within the six-month statute of limitations in section 10(b), 29 U.S.C. § 160(b). And unless those charges are promptly investigated and the evidence heard when memories are fresh and witnesses are available, the policy of the statute is frustrated. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419 (1960). Furthermore, as Petitioners rightly acknowledge (Petitioners' Br. at 42),

Congress's purpose in making interim relief available in section 10(j) was to bridge the gap in an unfair labor practice case between a Regional Director's finding of merit to a charge and the issuance of a final Board decision. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and could thereby render a final Board order ineffectual. *See Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) (citing S. Rep. No. 80-105, at 8, 27 (1947), *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 414, 433 (1985)). Finally, Congress has explicitly determined that delays in the representation process should be avoided because they "ultimately could frustrate employees' bargaining rights before the employees had an opportunity to exercise them." *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 267 (D.C. Cir. 1993). To better avoid such delays, Congress amended the NLRA in 1959 to authorize the Board to grant its regional directors final authority to resolve representational disputes, subject to wholly discretionary Board review. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971). The Agency's continued performance of these important duties—i.e., investigating disputes, receiving testimony, conducting elections, and considering interim relief—thus contributes to the prompt and fair resolution of industrial disputes.

The Board's judgment that the public interest is served by its continuing to adjudicate cases while challenges to its authority are being resolved is supported by experience. For example, of some 550 decisions issued by the two-member Board prior to issuance of the Supreme Court's decision in *New Process Steel*, about 450 were closed under the Board's processes with no review required. (J.A. 35.) And in none of the remaining 100 cases did a reviewing court find that the administrative hearing was flawed because it was conducted at a time when there was only a two-member Board. Similarly, in the period since *Noel Canning* was decided, approximately 90% of meritorious unfair labor practice charges have been settled. *See* Lawrence E. Dubé, *Solomon Reports Labor Board Nearing Crisis, Senate Confirmations of 'Critical Importance,'* Daily Lab. Rep. (BNA), at A3 (June 7, 2013).

In addition, with respect to 10(j) cases, the Board's experience during the period prior to the issuance of *New Process Steel* is once again illuminating. During that time, the Board delegated the power to authorize 10(j) suits to the General Counsel. *See, e.g.*, *supra* note 26 (citing one of the Board's historical delegations of 10(j) authority to the General Counsel). The General Counsel used this authority to help resolve high-profile industrial disputes that might otherwise have significantly disrupted interstate commerce. According to a report by then-General Counsel Ronald Meisburg, during the period when he had authority to

initiate 10(j) cases, which lasted from December 28, 2007 through April 5, 2010, he authorized the filing of sixty-two 10(j) suits, fifty-nine of which had been resolved by the time he submitted his report. Twenty-eight cases were settled and three were voluntarily withdrawn; two suits were never filed because of changed circumstances. The Agency prevailed on the merits in eighteen cases, and lost on the merits in eight cases. (*See* J.A. 121-56.) Thus, in 86% of cases, the labor dispute was either resolved amicably or remedied by an injunctive order. These statistics show that continuity of 10(j) relief during periods of quorum uncertainty has a significant positive effect on the resolution of labor disputes.

For all these reasons, the public interest is served by the continued processing of the unfair labor practice complaints until such time as the Supreme Court resolves the conflict in the circuits over the recess appointment issues decided in *Noel Canning*.

2. Petitioners' arguments regarding the appropriateness of mandamus relief are insubstantial and unavailing.

Petitioners argue that unless this Court issues a writ of mandamus, "this Court will be forced to hear and decide an ever-growing backlog of appeals challenging the Board's authority." (Petitioners' Br. at 33.) Petitioners' reasoning is baffling. This Court is holding in abeyance any case where the Board's authority is in question. Those cases can be disposed of in an orderly fashion once the Supreme Court issues its decision in *Noel Canning*. If the Supreme Court agrees

with this Court's *Noel Canning* decision, those cases can be remanded "for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum." *Laurel Baye*, 564 F.3d at 476. And if the Supreme Court reverses, this Court can then hear those cases on the merits.

Petitioners' arguments against the continuing availability of 10(j) relief are likewise meritless. Petitioners contend that mandamus relief is appropriate here because 10(j) relief was intended to allow the Board to "protect its remedial power," but when it lacks a quorum, the Board has "no legally exercisable remedial power to protect." (Petitioners' Br. at 43 (emphasis removed).) No court has ever refused to grant an injunction under section 10(j) on the theory that the Board temporarily lacks the power to issue a corresponding final order. And for good reason: As just discussed above, the obligations imposed by the statute are not suspended when the Board lacks a quorum. The purpose of section 10(j) is to provide interim relief where needed to ensure that, when the Board does eventually decide the case, its ability to provide meaningful relief for unfair labor practices will be assured.

Petitioners unpersuasively claim that, in the absence of a Board quorum, a 10(j) order will become "*de facto* permanent relief." (*Id.* at 45.) But this is not plausible because, as noted above and as Petitioners elsewhere complain (*id*. at 26-27), the current Board is continuing to decide cases during the period while the

issues raised by *Noel Canning* are in litigation. Section 10(j) cases must be processed to final decision on a priority basis. 29 C.F.R. § 102.94. Thus, at all times during processing of SFTC's case and others like it, the Board is duty-bound to prioritize the issuance of a final order. Once that order issues, the 10(j) injunction will be vacated,[28] and if the order aggrieves SFTC, the company will be able to seek judicial review under section 10(f). Therefore, Petitioners' suggestion that the Board is abusing its 10(j) authority is baseless. (Petitioners' Br. at 46.)

Finally, citing *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980), Petitioners claim that extraordinary relief is justified because a decision of the Board "will not be enforced by this Court" and, thus, 10(j) relief would be futile (Petitioners' Br. at 45.) This statement is pure speculation on two levels (beyond the fact that it assumes that the Supreme Court will affirm this Court's decision in *Noel Canning*).

First, at the time a final Board order issues, the Board may have a different composition; the Senate could confirm new Board members at any time. *See Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 351-52 (E.D.N.Y. 2012) (noting that "the Board's membership could change between now and the Board's final adjudication of this case" and thus rejecting the argument that

[28] See *supra* p. 19.

the Board case "necessarily will end without any valid adjudication"). Indeed, a full slate of five nominees to the Board is currently awaiting Senate confirmation. *See* United States Senate, Pending Nominations on the Executive Calendar, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cal.htm (last visited July 12, 2013) (showing five pending nominations to the NLRB—PN158, PN159, PN264, PN265, PN266).[29]

Second, regardless of the Board's composition, review of the Board's final decision in SFTC's case can be had in the Tenth Circuit or D.C. Circuit (or perhaps others). For a request for 10(j) relief to be granted, there need only be reasonable cause to believe that a final Board decision "will be enforced by a Court of Appeals," *Kaynard*, 633 F.2d at 1033 (internal quotation mark omitted) (emphasis added), not this Court of Appeals. In any case, Petitioners take the above quote from *Kaynard* completely out of context. As one district court has persuasively observed, *Kaynard* is an instruction to district courts to follow the law of their own circuit when determining whether the Board has established "reasonable cause" to believe that unfair labor practices have been committed. *Paulsen*, 849 F. Supp. 2d

[29] On August 27, 2013, Chairman Pearce's term will expire, leaving only Members Griffin and Block. (J.A. at 86.) Those two members will not be able to carry out business in the name of the Board. *See* 29 U.S.C. § 153(b). Moreover, the recess appointments of Members Griffin and Block will expire at the end of the Senate's current session. U.S. Const. art. II, § 2, cl. 3.

at 351-52. It is not an invitation for courts to decide cases by speculating as to the Board's future make-up or the venue where review proceedings might be brought.

For these further reasons, Petitioners have failed to establish that exercise of the writ power is appropriate in these circumstances. *See Cheney*, 542 U.S. at 381. Accordingly, Petitioners are not entitled to the extraordinary relief they have requested.

CONCLUSION

Petitioner SFTC's petition for a writ of mandamus should be dismissed to the extent that it seeks relief that is beyond this Court's subject-matter jurisdiction. The remainder of that petition and the totality of Geary's and Encino's petitions should be denied for failure to satisfy the *Cheney* criteria for mandamus relief.

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JULY 15, 2013

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,528 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman.

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Dated at Washington, DC
this 15th day of July 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Addendum of Unpublished Dispositions

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-3440/12-1027/12-1936

NATIONAL LABOR RELATIONS BOARD,
Petitioner

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,
Intervenor

v.

NEW VISTA NURSING AND REHABILITATION,
Respondent

SUR PETITION FOR REHEARING
EN BANC

Before: MCKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, and VAN ANTWERPEN, *Circuit Judges*

AND NOW, upon consideration of the petition for rehearing and rehearing en banc, it is hereby ORDERED that further consideration of this matter is stayed pending a decision of the Supreme Court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert granted* ____ S. Ct. ___ (June 24, 2013).

By the Court,

/s/ Theodore A. McKee
Chief Circuit Judge

Dated: July 15, 2013
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1153 **September Term, 2012**

NLRB-29CA30880
NLRB-29CA30820
NLRB-29RC12058
NLRB-29CA30804

Filed On: June 4, 2013 [1439331]

Target Corporation,

Petitioner

v.

National Labor Relations Board,

Respondent

O R D E R

It appearing that the United States Court of Appeals for the USCA 2nd Circuit has been randomly selected by the Judicial Panel on Multidistrict Litigation as the court to review this case, it is

ORDERED that this case be transferred to the United States Court of Appeals for the USCA 2nd Circuit. The Clerk is directed to send a copy of the order of the Judicial Panel on Multidistrict Litigation, a certified copy of this order, and this court's original file to the United States Court of Appeals for the USCA 2nd Circuit.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1170 **September Term, 2012**

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NLRB-26CA024065
NLRB-26CA024090
NLRB-26RC008635

Filed On: May 14, 2013

Ozburn-Hessey Logistics, LLC,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Henderson,* Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion to stay, the opposition thereto, and the supplement to the motion, it is

ORDERED that the motion be denied. Petitioner has not satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

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* Judge Henderson would grant the Emergency Motion for Stay in order to consider OHL's petition for mandamus which, it appears, should be granted to enforce the mandate of Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). See Office of Consumers' Counsel v. FERC, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (per curiam).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1048 **September Term, 2012**

NLRB-28CA087842

Filed On: June 28, 2013

In re: SFTC, LLC, doing business as Santa Fe Tortilla Company,

Petitioner

Consolidated with 13-1029

BEFORE: Rogers and Tatel, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the emergency motion for injunctive relief, the response thereto, and the reply, it is

ORDERED that the emergency motion for injunctive relief be denied. Petitioner has not satisfied the stringent requirements for an injunction pending consideration of the petition for a writ of mandamus. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1191 **September Term, 2012**

Filed On: June 28, 2013

In re: CSC Holdings, LLC and Cablevision Systems New York City Corp.,

Petitioners

BEFORE: Rogers and Tatel, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus or prohibition; and the emergency motion for stay, the response thereto, and the reply, it is

ORDERED that the emergency motion for stay be denied. Petitioners have not satisfied the stringent requirements for a stay pending consideration of the petition for a writ of mandamus. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011). It is

FURTHER ORDERED, on the court's own motion, that this case be held in abeyance pending the court's disposition of In re Geary, et al., No. 13-1029, et al. Petitioners are directed to file a motion to govern further proceedings within 30 days of the court's decision in In re Geary.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

SUPREME COURT
OF THE UNITED STATES

No. 12A769
Title: HealthBridge Management, LLC, et al., Applicants
v.
Jonathan B. Kreisberg, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board
Docketed: February 5, 2013
Lower Ct: United States District Court for the District of Connecticut
Case Nos.: (3:12-cv-1299)

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 4 2013	Application (12A769) for a stay pending appeal, submitted to Justice Ginsburg.
Feb 4 2013	Application (12A769) denied by Justice Ginsburg.
Feb 4 2013	Application (12A769) refiled and submitted to Justice Scalia.
Feb 6 2013	Application (12A769) referred to the Court.
Feb 6 2013	Application (12A769) denied by the Court. Justice Alito took no part in the consideration or decision of this application.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioners:		
Paul D. Clement	Bancroft PLLC 1919 M Street, N.W., Suite 470 Washington, DC 20036	(202) 234-0090
Party name: HealthBridge Management., LLC, et al.		
Attorneys for Respondent:		
Donald B. Verrilli Jr.	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: Jonathan B. Kreisberg, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board		

(ORDER LIST: 568 U.S.)

WEDNESDAY, FEBRUARY 6, 2013

ORDER IN PENDING CASE

12A769 HEALTHBRIDGE MGMT., LLC, ET AL. V. KREISBERG, JONATHAN B.

The application for stay presented to Justice Scalia and by him referred to the Court is denied.

Justice Alito took no part in the consideration or decision of this application.

SUPREME COURT
OF THE UNITED STATES

No. 13A20
Title: CSC Holdings, LLC, et al., Applicants
v.
National Labor Relations Board
Docketed: July 1, 2013
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (13-1191)

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 1 2013	Application (13A20) for a stay pending adjudication of petition for writ of mandamus or prohibition in the United States Court of Appeals for the District of Columbia Circuit, submitted to The Chief Justice.
Jul 2 2013	Application (13A20) denied by The Chief Justice.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioner:		
Theodore B. Olson	Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036	(202) 955-8500
Party name: CSC Holdings, LLC, et al.		
Attorneys for Respondent:		
Donald B. Verrilli Jr.	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: National Labor Relations Board		

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1115

September Term, 2012
FILED ON: JANUARY 25, 2013

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760,
INTERVENOR

Consolidated with 12-1153

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: SENTELLE, *Chief Judge*, HENDERSON and GRIFFITH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the petition for review and cross-application for enforcement for Enforcement of an Order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is granted, the Board's order is vacated, and the cross-application for enforcement is denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: January 25, 2013

Opinion for the court filed by Chief Judge Sentelle.
Concurring opinion filed by Judge Griffith.