UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE JEANETTE GEARY, Petitioner.	)	Case No. 13-1029

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION

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INTRODUCTION

Pursuant to this Court's Order dated February 22, 2013, the National Labor Relations Board respectfully submits this opposition to the Petition for Writ of Mandamus or Writ of Prohibition filed by Jeanette Geary. Geary requests that the Court order the Board to cease adjudicating or deciding an administrative case that is fully briefed and awaiting final decision until "a constitutionally seated Board with a valid quorum is in place" (Pet. at 1), citing this Court's recent opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

As discussed below, this extraordinary relief should be denied because Geary cannot show (1) that absent immediate review, she lacks adequate means to appeal through the normal, mandatory course prescribed by Congress (29 U.S.C. § 160(f)) and that she will suffer irreparable harm by doing so; (2) that she has a "clear and indisputable" right to have the Board not adjudicate and decide her administrative unfair labor practice case; and (3) that it is appropriate to issue a writ in these circumstances.

BACKGROUND AND RELEVANT FACTS

The underlying administrative proceeding, *United Nurses and Allied Professionals (Kent Hospital) and Jeanette Geary*, 359 NLRB No. 42 (Dec. 14, 2012) (Pet. Ex. A), arises out of an unfair labor practice charge filed by Geary in

2009. The charge concerned union obligations pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988), in which the Supreme Court considered the limits of dues-paying obligations that a union and an employer can lawfully impose upon an employee who is not a voluntary member of the union. Generally, an employee represented by a union may only be required to pay that portion of union dues related to collective bargaining, contract administration, or grievance adjustment. *Id.* at 745. The Board and the courts continue to define the precise limitations. *E.g., Pirlott v. NLRB*, 522 F.3d 423, 433-37 (D.C. Cir. 2008) (affirming the Board's conclusion that the union had not presented sufficient evidence to support a finding that the union's organizing expenses were germane to its representational duties); *Am. Fed'n of Television & Recording Artists, Portland Local (KGW Radio)*, 327 NLRB 474, 475-78 (1999) (sustaining a complaint allegation that the union had failed to provide an objecting employee with expenditure information that had been independently verified to ensure that the expenses claimed were in fact made), *petition to review dismissed*, 1999 WL 325508 (D.C. Cir. Apr. 29, 1999).

In September 2009, Geary and other nursing employees working at Kent Hospital in Warwick, Rhode Island resigned their membership in the United Nurses and Allied Professionals ("the Union") and objected to the assessment of dues and fees for activities unrelated to collective bargaining, contract

administration, or grievance adjustment pursuant to *Beck*. 359 NLRB No. 42 at 1. By letter dated September 30, 2009, the Union notified nonmember objectors of their reduced fee amounts, and provided several charts setting forth the major categories of expenses incurred by the Union. *Id.* The Union's letter asserted that the amounts had been verified by a certified public accountant, but did not include a copy of the verification letter. *Id.*

On November 23, 2009, Geary filed an unfair labor practice charge against the Union with Region 1 of the NLRB in Boston (NLRB Case No. 01-CB-011135), which she subsequently amended. *Id.* at 14. Following an investigation, on June 30, 2010, the Regional Director, on behalf of the NLRB's Acting General Counsel, issued an administrative complaint against the Union, which was later amended on December 29, 2010. *Id.* The complaint alleged that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(1)(A), by "fail[ing] to provide Geary and other similarly situated employees with evidence beyond a mere assertion that the financial data [enclosed with the letter] was based on an independently verified audit." *Id.* at 1. The complaint further alleged that the Union violated Section 8(b)(1)(A) by charging objectors dues that it used to fund lobbying related to seven bills before the Rhode Island and Vermont state legislatures, which the complaint categorized as nonrepresentational activity. *Id.* at 4.

A hearing was held before an NLRB administrative law judge, who, on March 30, 2011, found that the Union did not violate the NLRA by failing to provide a separate verification letter. *Id.* at 16. As to the chargeability of expenses, the ALJ found that the Union violated the NLRA by charging objectors for lobbying expenses related to four of the bills, but dismissed allegations relating to the three other bills. *Id.* at 15-17. On April 27, 2011, Geary and the Acting General Counsel filed exceptions with the Board.[1]

The Board considered the exceptions and issued a decision on December 14, 2012, agreeing with the ALJ that the Union did not violate the NLRA by failing to provide Geary and other nonmember objectors with an audit verification letter. *Id.* at 3-4.[2] Regarding the lobbying expenses, the Board concluded that (*id.* at 8-9):

> (1) lobbying expenses may be charged to objectors, but only if they are germane to the union's role in collective bargaining, contract administration or grievance adjustment, and (2) extra-unit lobbying expenses may be charged only if they were incurred for services that are otherwise chargeable and that may ultimately inure to the benefit of employees in the objector's

[1] On January 30, 2012, Geary filed a Motion to Disqualify Members Block, Griffin and Flynn from ruling on the case on the ground that their recess appointments to the Board by the President were invalid, which the Board denied. 359 NLRB No. 42 at 1 n.2.

[2] Contrary to Geary's implication (Pet. at 9), the question whether a union is required to provide objectors with a letter from an accountant verifying that an audit has been conducted, is, as the Board explained, a distinct question from whether the union has an obligation "to have its expenditure information verified by an independent audit." *Id.* at 2. The Board has previously held that unions have such an obligation. *Id.* (citing *Am. Fed'n of Television & Recording Artists, Portland Local (KGW Radio)*, 327 NLRB 474, 475-78 (1999)).

> bargaining unit because of the union's participation in an expense-pooling arrangement.

The Board decided, however, to leave for later consideration the question "whether particular lobbying expenses satisfy the germaneness test." *Id*. at 9. The Board proposed the use of "rebuttable presumptions of germaneness," but solicited the views of interested parties on this issue. *Id*. at 1, 9-10.

In sum, in its December 14, 2012, Decision and Order, the Board dismissed the allegation that the Union unlawfully failed to provide an audit verification letter. But the Board further ordered that "the complaint allegations pertaining to the chargeability of lobbying expenses to *Beck* objectors are severed from this case, and . . . the Board shall retain jurisdiction over those matters for further consideration." *Id*. at 10. On February 19 and March 5, 2013, the parties, including Geary and several *amici*, filed briefs with the Board on the germaneness standard for lobbying expenses. Briefing is now complete.

Meanwhile, on February 11, 2013, Geary filed the instant Petition in this Court. Relying on this Court's recent decision in *Noel Canning*, Geary seeks the extraordinary remedy of mandamus to prevent the Board from further adjudicating or deciding the fully-briefed, severed portion of her case. In addition, on March 12, 2013, the Board announced that, in consultation with the Department of Justice, it intends to file a petition for certiorari with the United States Supreme Court seeking review of *Noel Canning*. NLRB News Release, March 12, 2013,

http://www.nlrb.gov/news-outreach/news-releases/nlrb-seek-supreme-court-review-noel-canning-v-nlrb (last visited March 25, 2013). The current due date for the Government's petition is April 25, 2013.

ARGUMENT

GEARY HAS NOT SATISFIED THE THREE CONJUNCTIVE PREREQUISITES FOR ISSUANCE OF A WRIT OF MANDAMUS OR WRIT OF PROHIBITION

The All Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Issuance of a writ of mandamus is a remedy "reserved for really extraordinary cases," *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted), and "may not be appropriately used merely as a substitute for the appeal procedure prescribed by the statute." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). 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 with caution. *Cheney*, 542 U.S. at 380 (citation omitted). Accordingly, the Supreme Court has determined that three conditions must be satisfied before a writ 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 (quotations and citations omitted). These "hurdles" are "demanding," as all "three conditions must be satisfied before [the writ] may issue." *Id.*

Here, Geary cannot meet her burden of satisfying all of the three conjunctive requirements for the extraordinary relief she seeks.

A. Geary Has Other Adequate Means To Attain Her Desired Relief.

Geary's Petition asks this Court to "halt the Board's continuing attempts to adjudicate and decide" her fully briefed case, on the basis that the Board "has no lawful power or quorum to act under *New Process Steel* and *Noel Canning*" (Pet. at 2). Geary's petition fails at the outset because she cannot establish that she lacks an adequate opportunity to obtain the relief she seeks through the normal review procedures that Congress prescribed for challenging Board decisions and orders in unfair labor practice cases. Specifically, Geary's request for extraordinary relief fails because precisely the same adequate means are available to her as were used by the aggrieved parties in *New Process Steel* and *Noel Canning* who, like Geary, also contended that the Board was without the necessary quorum to issue a valid decision. Here, as there, Section 10(f) of the NLRA, 29 U.S.C. § 160(f), enables Geary to obtain the review she seeks if and when the Board issues a final order that causes her a concrete and particularized injury. *New Process Steel*, 130 S. Ct. at 2639; *Noel Canning*, 705 F.3d at 492-93. Moreover, mandamus is also

unnecessary here because pursuant to 29 U.S.C. § 160(f), review of a final Board order may be sought in a Circuit Court other than this one, thus eliminating the need for this Court to aid its jurisdiction.

1. Section 10(f) Of The NLRA Affords Geary Adequate Means To Attain The Relief She Desires

Section 10(f) of the NLRA, 29 U.S.C. § 160(f), provides that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order 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 Circuit . . . . " As the Supreme Court early determined in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), Congress designed Section 10(f) to give aggrieved parties "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*, 303 U.S. at 48 n.5). The review available at the conclusion of Agency unfair labor practice cases is adequate because, as the Supreme Court explained in *Myers*, "'[A]ll questions 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)). The Supreme Court concluded that because "the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." *Id.* at 50.[3]

Employees such as Geary who file unfair labor practice charges against a union to enforce their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), have the right to petition for review if and when the Board issues a final order that causes them a concrete and particularized injury. *See Pirlott v. NLRB*, 522 F.3d 423, 433-34 (D.C. Cir. 2000). No irreparable injury results from requiring aggrieved employees to follow this course even though, as Geary alleges (Pet. at 17-18), she has a strong interest in avoiding compulsory payment of dues for the Union's political or ideological activities. Union dues charged erroneously are fully recoupable to aggrieved employees, with interest. *See, e.g., Pirlott*, 522 F.3d at 437; *Int'l Bhd. of Teamsters, Local Union 492*, 346 NLRB 360, 366-67 (2006).

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[3] Consistent with *Myers*, the cases are legion where, *after* exhaustion of the administrative process and issuance of a final Board order, the reviewing circuit courts have considered and resolved constitutional claims. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 494-95, 506 (1979); *Ampersand Pub. LLC v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012). *Compare Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir. 1977) (refusing to enjoin ongoing Board proceedings with respect to a church-operated parochial school on the ground that "statutory review procedures are fully adequate to protect the plaintiff's constitutional rights."), *cert. denied*, 431 U.S. 908 (1977).

Because the Board's make whole remedy prevents irreparable injury to employees with valid *Beck* claims, this Court in *Peterson v. NLRB*, 1998 WL 315595, at *1 (D.C. Cir. May 8, 1998), cited by Geary (Pet. at 2 n.3), properly declined to review a non-final Board order remanding to an administrative law judge to consider a union's charging non-members for organizing and litigation expenses. In so ruling, the Court found "there has been no showing that the Board's decision, if unreviewed, would result in 'irreparable injury, with no practical means of procuring effective relief after the close of the proceeding.'" *Id.* (quoting *WMATA v. Director of Workers' Comp. Program*, 824 F.2d 94, 95 (D.C. Cir. 1987) (*per curiam*)). *Accord Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989) (explaining that the "mere deduction and collection of fair share fees from nonmembers' paychecks" does not constitute "constitutional harm of a magnitude requiring a preliminary injunction," where "plaintiffs' remedy, should they succeed on the merits, will consist of restitution and/or monetary damages."). That is equally true here.[4]

[4] As previously noted, the administrative hearing and briefing in this case have already been completed. Nevertheless, the burden of submitting to agency proceedings and incurring litigation expenses would not, in any event, provide grounds for obtaining extraordinary relief. *E.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (citing *Myers*, 303 U.S. at 51-52).

Geary seeks to avoid the normal requirements for seeking review in the ordinary course on the ground that her challenge to the Board's issuing a decision in the fully briefed case pending before it is based upon *Noel Canning's* holding that the Board, as currently constituted with one Senate-confirmed member and two intra-session recess appointees, is without power to issue a decision. But, as previously discussed, *Noel Canning* is not an exception to the normal requirement that court of appeals review is available only after the Board has issued a final order, but an illustration of that principle. *See Noel Canning*, 705 F.3d at 493 (predicating jurisdiction on 29 U.S.C. § 160(e) and (f), and noting that petitioner had sought review after the Board had issued its order).

Nor do the other authorities cited by Geary support the proposition that she is entitled to short-circuit the normal requirements for court of appeals review because her claim is that the Board is improperly constituted. *Ryder v. United States*, 515 U.S. 177 (1995), and *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), cases cited by Geary for the general proposition that parties adversely affected by *ultra vires* agency action are entitled to judicial review (Pet. at 14-15), are both examples of challengers to agency authority seeking judicial review in the normal course. In *Ryder*, 515 U.S. at 179-80, a convicted member of the Coast Guard challenged the composition of the Coast Guard Court of Military Review in that court, then in the Court of Military Appeals, then in the Supreme

Court. In *NRA Political Victory Fund*, 6 F.3d at 822-23, the aggrieved party challenged the composition of the FEC in an enforcement action brought by the FEC against it in Federal District Court, then in the Court of Appeals.

2. Because A Petition To Review A Final Board Order May Be Filed Elsewhere, Mandamus Is Not Necessary To Aid This Court's Jurisdiction

Mandamus is unnecessary not only because Geary can seek review of a final Board order in the normal course, but also because review of a final Board order may be sought elsewhere where *Noel Canning* is not controlling, thus obviating the need for this Court to aid its jurisdiction.

As discussed above, p. 8, Section 10(f) of the NLRA, 29 U.S.C. § 160(f), permits review not only in this Court but in multiple forums. Accordingly, it is far from certain that this case, which arises in Rhode Island, will ultimately be reviewed in this Court as Geary's petition assumes. The Acting General Counsel's complaint against the Union was sustained in part by the administrative law judge and has not finally been resolved by the Board. The Board sought further briefing from interested parties in order to ensure that its proposed germaneness standard is proper. 359 NLRB No. 42 at 1, 9-10. Potentially, the Board's resolution of the issues briefed by the parties and the *amici* could result in a split decision that aggrieves both the charged party Union and the charging party Geary, prompting both to file petitions for review. Under multidistrict litigation procedures, if Geary and the Union each file a petition for review within 10 days after the Board issues

a final order, then pursuant to 28 U.S.C. § 2112(a)(3), the First Circuit, not this Court, may be the circuit selected "random[ly]" by the Judicial Panel on Multidistrict Litigation to review the case. *See, e.g, In re NLRB (California Saw and Knife Works)*, 936 F. Supp. 1091, 1092 (J.P.M.L. 1996) (selecting randomly the Seventh Circuit to review petitions filed in both this Court and the Seventh Circuit).

The relief Geary seeks is therefore not required to aid this Court's jurisdiction where the First Circuit, not this Court, may ultimately be the court to review a final Board order in the underlying proceeding.

3. The Other Cases Relied Upon By Geary Do Not Support Her Claim To Mandamus Relief

None of the remaining cases cited by Geary support a writ to "confine the Board to a lawful exercise of its prescribed jurisdiction" (Pet. at 13-15). To the contrary, those cases all require the petitioner to show that appellate review in the normal course is unavailable, which Geary cannot do. Properly understood, therefore, those cases buttress the conclusion that Geary's petition should be denied.

For example, in *In re Chicago, R.I & P. Ry.*, 255 U.S. 273, 275 (1921), the Supreme Court held that a writ may issue to prevent a lower court "clearly without jurisdiction" from "wrongfully assuming jurisdiction," but only where the petitioner "has no other remedy." The Court denied the writ where the district

court's personal jurisdiction over the company was "in doubt" and petitioner had "remedy by appeal." *Id.* at 279-80. Similarly, in *Porter v. Gardner*, 277 F. 556, 559 (D.C. Ct. App. 1922), the Court of Appeals of the District of Columbia[5] issued a writ prohibiting a municipal court from enforcing a decision of the D.C. Rent Commission. Otherwise, the municipal court would render "futile and abortive" the authority of the Court of Appeals, which was required by statute to first decide the propriety of the Commission decision before the municipal court enforced it (*id.* at 558). Without the writ against the municipal court, the petitioner in *Porter* would have been denied the benefit of judicial review by the Court of Appeals. Geary makes no similar allegation here that she would be denied the benefit of Court of Appeals review of a final Board order, nor can she in view of her right to seek court review when and if she is actually aggrieved by a final order. 29 U.S.C. § 160(f).

Other cases Geary relies on for her theory that a writ is necessary also required the petitioner to demonstrate that, absent a writ, petitioner would get no appellate review at all. *See Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 730 (D.C. Cir. 2012) (granting writ where there was no statutory method of appeal applicable to a district court stay of indefinite length); *In re MacFarland*,

[5] The Court of Appeals of the District of Columbia existed before Congress established the United States Court of Appeals for the District of Columbia Circuit. *See FTC v. Klesner*, 274 U.S. 145, 156 (1927).

1908 WL 27947, at *17 (D.C. Ct. App. Feb. 11, 1908) (granting writ where *ex parte* statutory scheme provided aggrieved party no right of appeal from an order granting relief to gas manufacturer). Again, Geary has not shown that the Board's adjudication of her case will not lead to Circuit Court review of a final Board order.

Equally misplaced is Geary's reliance (Pet. at 16) upon *Association of Flight Attendants-CWA v. Chao*, 493 F.3d 155 (D.C. Cir. 2007), for the proposition that the Court has discretion to grant review before the Board issues a final order. Geary overlooks the principle that "[w]here Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (footnotes omitted). The *Association of Flight Attendants-CWA* case involved the kind of "non-jurisdictional exhaustion" statute that leaves room for judicial discretion to excuse exhaustion (493 F.3d at 159). The NLRA, by contrast, is a "jurisdictional exhaustion" statute (*id.*) substantively limiting appellate review only to final Board orders. *Compare Myers*, 303 U.S. at 48 (Congress vested Board and courts of appeals with "exclusive" jurisdiction over unfair labor practice proceedings) *with Madigan*, 503 U.S. at 149, 152 (Congress "neither enacted nor mandated" administrative exhaustion over federal prisoners' money damage claims). Thus, because the NLRA mandates exhaustion, the Court "cannot excuse

it." *See Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (explaining that jurisdictional exhaustion is "rooted not in prudential principles, but in Congress's power to control the jurisdiction of the federal courts").

In sum, mandamus proceedings are not a permissible substitute for the regular appeals process Congress prescribed in Section 10(f). Geary can obtain review of any final Board order that causes her actual injury. The Court need look no further to deny mandamus. *See In re Fowlers Mill Historical Preservation Ass'n*, 2001 WL 883300, at *1 (D.C. Cir. July 31, 2001) (denying petition for writ of mandamus "[b]ecause the agency is still considering the issues addressed in the mandamus petition and because petitioner will have an opportunity to seek judicial review of those issues once the agency has completed its administrative review."); *In re GTE Serv. Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985) ("The court will not consider the extraordinary relief a writ of mandamus provides unless the petitioners can show that this ordinary mode of relief is inadequate."); *United States ex rel. Denholm & McKay v. United States Board of Tax Appeals*, 125 F.2d 557, 558 (D.C. Cir. 1942) (where the required mode of appeal is adequate, "there can be no reason whatsoever for entertaining the petition for a writ of prohibition."). In addition, mandamus is not necessary in aid of this Court's jurisdiction, because, under the broad venue provisions of Section 10(f) of the

NLRA, 29 U.S.C. § 160(f) review may be sought (for instance, by the Union, if aggrieved) in another circuit, such as the First Circuit where this case arose.

B. Geary's Right To Issuance Of A Writ Prohibiting The Board From Adjudicating And Deciding Her Case Is Not "Clear and Indisputable."

Because Geary cannot satisfy the threshold requirement of establishing that she has no other adequate means to attain the relief she desires, she is not entitled to a writ of mandamus under the Supreme Court's *Cheney* standard, 542 U.S. at 380-81, even if she could satisfy its other requirements. But Geary cannot succeed for the further reason that she has no "clear and indisputable" entitlement to relief. *Cheney*, 542 U.S. at 381.

Although binding in this Circuit, *Noel Canning* is not "indisputable" proof that the Board would act unjustifiably by adjudicating the underlying case. Initially, we note that Geary's right to relief cannot be considered "clear and indisputable" because, as discussed on pp. 12-13, the Union may seek review of a final Board order pursuant to Section 10(f) in the First Circuit, not this Court. Given venue uncertainty, Geary is mistaken in claiming that "all future appeals" will necessarily arise in this Court and be decided on the basis of *Noel Canning* (Pet. at 19).

Geary lacks a clear and indisputable right to relief for the further reason that, as this Court has acknowledged, *Noel Canning*'s conclusions concerning the President's recess appointment authority conflict with those of the other circuit

courts that have addressed the issues. *Compare Noel Canning*, 705 F.3d at 505-06, 509-10, *with 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) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Moreover, the questions resolved in *Noel Canning* are currently being litigated in a number of other circuits as well.[6]

In light of the circuit split, Geary cannot establish that her entitlement to relief is "clear and indisputable." *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (Dec. 26, 2012) (Sotomayor, J., in chambers) (denying relief under the All Writs Act in part because the applicants had not established that their entitlement to relief was "indisputably clear"; noting that "lower courts have diverged on whether to grant" relief in similar cases); *Lux v. Rodrigues*, 131 S.Ct. 5, 7 (Sept. 30, 2010) (Roberts, C.J., in chambers) (finding a party's right to injunctive relief not "indisputably clear" in part because "the courts of appeals appear to be reaching divergent results in this area."). *See also United States v. Horak*, 833 F.2d 1235, 1250 (7th Cir. 1987) (denying relief under the All Writs Act where conflicting interpretations of a statute showed that the right to relief was

[6] *See, e.g., NLRB v. New Vista Nursing*, No. 11-3440, 12-1027 and 12-1936 (3d Cir.) (argument held March 19, 2013); *NLRB v. Enterprise Leasing Co., SE*, No. 12-1514 (4th Cir.) (argument held March 22, 2013); *Kreisberg v. Healthbridge Mgmt. LLC*, No. 12-4890 (2d Cir.); *Big Ridge, Inc. v. NLRB*, No. 12-3120 (7th Cir.); *DirecTV v. NLRB*, Nos. 12-71297, -72526, -72639 (9th Cir.).

not "indisputable" even where one interpretation was found less plausible than the other).[7]

Citing *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983) (Pet. at 16), Geary contends that the Board has no right to disagree with this Court's ruling that two of its three current members are not validly appointed. Because the question of the validity of the President's recess appointments remains in litigation, however, it is appropriate for the Board to continue to exercise its responsibilities in accordance with its legal position that the recess appointments are valid. In cases issued subsequent to *Yellow Taxi Co. of Minneapolis*, this Court has recognized that agency nonacquiescence in circuit court decisions is appropriate where the agency "honestly believes a circuit court has misinterpreted the law" and seeks to have the Supreme Court resolve a circuit conflict after "letting important legal issues 'percolate' throughout the judicial system." *Johnson v. United States R.R. Retirement Board*, 969 F.2d 1082, 1092-93 (D.C. Cir. 1992); *Independent Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 n.3 (D.C. Cir. 1996) ("We do not . . . dispute . . . the proposition that agencies have the

[7] Justice Ginsburg and the Supreme Court recently denied requests for an emergency stay in *HealthBridge Mgmt. LLC v. Kreisberg*, No. 12A769, 133 S. Ct. 1002 (Feb. 4, 2013 denial by Justice Ginsburg; Feb. 6, 2013 denial by full Court). The applicant there had based its request for an emergency stay on the constitutional reasoning in *Noel Canning*.

power of nonacquiescence in decisions of a single circuit."). *Accord United States v. Mendoza*, 464 U.S. 154, 159-63 (1984) (explaining that the government is not bound to follow adverse judgments in future cases involving entities not party to that adverse judgment).[8]

The principle this Court recognized in *Johnson v. United States R.R. Retirement Board* is applicable here. The Board's position is plainly one of good faith, supported by rulings in three Courts of Appeals. In addition, as stated above, pp. 5-6, in an effort to bring about a prompt resolution of the existing inter-circuit conflict, the Board has recently announced that, in consultation with the Department of Justice, it intends to file a petition for certiorari with the United States Supreme Court seeking review of *Noel Canning*.

In sum, where, as here, a court other than this Court may review a final Board order in the underlying administrative case, and there is a conflict in the circuits on the recess appointment issue that the Supreme Court will soon be called upon to resolve, it cannot be said that *Noel Canning* provides Geary with "clear and indisputable" grounds for the extraordinary relief sought here.

[8] *See also Atchison, Topeka and Santa Fe Railway Co v. Pena*, 44 F.3d 437, 446-47 (7th Cir. 1994) (en banc) ("We know from [*Mendoza*] that the executive branch need not follow a circuit's interpretation, even within that circuit's borders.") (Easterbrook, J., concurring).

C. A Writ of Mandamus Is Not Appropriate In These Circumstances.

Even assuming Geary could meet the first two requirements for mandamus under the Supreme Court's *Cheney* standard, 542 U.S. at 380-81, which she cannot, this Court should exercise its discretion to deny a writ in this case. *See id.*, at 381 ("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"). A writ in these circumstances is not appropriate.

Citing this Court's decision in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"), Geary argues (Pet. 11-12) that just as it is appropriate for this Court to issue writs of mandamus or prohibition to protect its prospective jurisdiction when an agency unreasonably delays issuing a decision, so it is appropriate for this Court to exercise that same extraordinary authority to prevent an agency from acting in haste to adjudicate a case following *Noel Canning*'s determination that the Board lacks a valid quorum. That conclusion does not follow at all. If the Board were to act in "haste," as Geary professes to fear (Pet. at 12, 14), appellate review is not in doubt (and would in fact be available more quickly). There is simply no threat to this Court's prospective jurisdiction within the meaning of *TRAC* if the Board acts promptly to decide the fully briefed case pending before it. Accordingly, contrary to Geary's contention, while Administrative Procedure Act provisions prohibiting undue agency *delay* support

judicial intervention in ongoing agency proceedings, *TRAC*, 750 F.2d at 76 (discussing 5 U.S.C. §§ 555(b) & 706(1)), APA provisions permitting courts to set aside statutory and constitutional violations committed by an agency (5 U.S.C. § 706(2)(B), (C)) do not similarly support premature review (Pet. at 12-13, n.6).

The reality is that Geary's misguided attempt to delay the Board's evaluation of the fairness of the fee structure at issue serves neither her interest, nor the Union's, nor the public's, in the prompt resolution of industrial disputes. The longer the administrative case languishes in abeyance – which is the relief Geary seeks (Pet. at 1) – the longer she must pay dues that she asserts are being charged unlawfully (Pet. at 18). By contrast, the sooner the Board issues a decision, the sooner Geary can obtain judicial review of any adverse Board rulings on the issues raised by the Acting General Counsel's unfair labor practice complaint, which sought reductions in the fees the Union is charging Geary.

The public interest in the Board's deciding this case is not diminished where, as here, there is a challenge to the authority of the Board to act. The Board's most recent experience in continuing to process cases during the analogous dispute leading to *New Process Steel*, 130 S. Ct. 2635 (holding that a two-member Board lacks the authority to decide cases), suggests that continuing to adjudicate pending cases while the challenges to its authority are being adjudicated contributes to the resolution of industrial disputes. Of some 550 decisions issued by the two-member

Board prior to *New Process*, only about 100 were impacted by that decision. Nearly all of the remaining matters decided by the two-member Board have been closed under the Board's processes with no review required. *See* Background Materials on Two-Member Board Decisions, http://www.nlrb.gov/news-outreach/backgrounders/background-materials-two-member-board-decisions (last visited March 25, 2013). As was the case then, the Board's present determination to continue to decide cases until the Supreme Court resolves the recess appointments issue is hardly "redundant and wasteful," as Geary claims (Pet at. 19), even assuming, as Geary does, that the Board does not ultimately prevail.

It is not at all clear, in any case, that a decision of the Board will "surely" and "of necessity" be vacated or reversed by this Court "on direct appeal due to the lack of a quorum" and will have to be re-litigated, as Geary asserts (Pet. at 17, 19). As discussed above, pp. 12-13 & 17-18, Section 10(f) of the NLRA, 29 U.S.C. § 160(f), permits review in multiple forums and the First Circuit may be the reviewing court in this case.

For these further reasons, Geary has failed to establish the appropriateness of prohibiting the Board's continued processing of this *Beck* case. Because under the Supreme Court's *Cheney* standard all three of its conditions must be satisfied before a writ may issue, 542 U.S. at 380-81, Geary, who has satisfied none of those conditions, is not entitled to the extraordinary relief she has requested.

CONCLUSION

The Petition should be denied. Geary has other adequate means to attain the relief she desires and has not shown that she has a clear and indisputable right to the extraordinary relief she seeks. Nor has Geary shown that prohibiting the Board from issuing a decision in this case is appropriate in all the circumstances.

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March 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013 a true and correct copy of the foregoing Response of the National Labor Relations Board in Opposition to Petition for Writ of Mandamus or Writ of Prohibition was filed using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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