

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCHWARZ PARTNERS PACKAGING, LLC, *d/b/a*
Maxpak,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Defendants.

Civil Action No. 13-343 (BAH)
Judge Beryl A. Howell

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
TRANSFER VENUE OR, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF
SUBJECT-MATTER JURISDICTION, AND IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Schwarz Partners Packaging, LLC (“Maxpak”), seeks to undo a National Labor Relations Board (“NLRB” or “the Board”) election in which Maxpak’s employees voted for union representation. For a variety of reasons, which are more fully set forth below, this is neither the time nor the place for such an argument. Accordingly, the NLRB and its Acting General Counsel, who are the Defendants in this case, respectfully move for a transfer of venue under 28 U.S.C. § 1404(a) to the United States District Court for the Middle District of Florida. In the alternative, because Maxpak’s claims are beyond the jurisdiction of any district court, the Defendants request dismissal for lack of subject-matter jurisdiction. Finally, regardless of how this Court rules on the Defendants’ motions, Maxpak is not entitled to summary judgment.

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. (“NLRA” or “the Act”). 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 applicable here, three members constitute a quorum. 29 U.S.C. § 153(b). In January 2012, the President conferred recess appointments upon Richard F. Griffin, Jr., Terence F. Flynn, and Sharon Block to serve as Board members. *See* News Release, New Board Members Take Office, Announce Chief Counsels, <http://www.nlr.gov/news-outreach/news-releases/new-board-members-take-office-announce-chief-counsels> (Jan. 10, 2010). 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.*¹

In addition, the Act establishes a General Counsel, who is likewise subject to the appointment and confirmation process. 29 U.S.C. § 153(d). 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.nlr.gov/link/document.aspx/09031d4580375b4c> (June 20, 2010).

One of the Board's principal duties is to determine whether employees desire to be represented for collective bargaining purposes. *See* 29 U.S.C. § 159. The NLRA permits the Board to delegate its representational functions to its regional directors, *id.* at § 153(b), and the Board has done so since 1961 without interruption. *See* Delegation of Authority, 26 Fed. Reg. 3911, 3911 (May 4, 1961); *see generally* 29 C.F.R. § 102.60-.88. Another important Board duty is to adjudicate unfair labor practice cases, which are brought by the General Counsel upon charges filed by third parties. *See* 29 U.S.C. §§ 153(d), 160.

¹ Mr. Flynn subsequently left the Board on July 24, 2012. *See* News Release, National Labor Relations Board Member Terence Flynn Resigns, <http://www.nlr.gov/news-outreach/news-releases/national-labor-relations-board-member-terence-flynn-resigns> (May 27, 2012).

Schwarz Partners Packaging, LLC is an Indiana company that operates a package manufacturing facility in Lakeland, Florida under the name Maxpak. (Cohen Decl. Ex. A.) In February 2012, a union filed a petition with Region 12 of the National Labor Relations Board located in Tampa, Florida. (Cohen Decl. Ex. B.) The petition, which was docketed as Case 12-RC-073852, asserted that the union had substantial support from a bargaining unit consisting of Maxpak's maintenance and production employees. (*Id.*) The petition therefore requested that the NLRB proceed under its authority to resolve questions concerning representation. (*Id.*) Soon after the petition was filed, Maxpak and the union executed a Stipulated Election Agreement, which was approved by the Acting Regional Director. (Cohen Decl. Ex. A at 1-2); *see generally* 29 C.F.R. §§ 101.19(b), 102.62(b) (describing stipulated election agreements). Pursuant to that agreement, a secret ballot election was scheduled for March 15, 2012, at Maxpak's facility in Lakeland. (Cohen Decl. Ex. A at 2.)² In the weeks leading up to the election, Maxpak attempted to persuade its Lakeland employees to vote against union representation. (Cohen Decl. Ex. C.)

On March 15, seventy-nine of those eighty-two employees (or 96%) cast ballots. (Cohen Decl. Ex. D.) The union challenged the eligibility of two employees who attempted to vote. (Cohen Decl. Ex. C at 2.) Pursuant to Board procedure, the two employees were allowed to vote, but their ballots were immediately impounded. *See* 29 C.F.R. § 102.69(a). The initial tally of unchallenged ballots showed thirty-nine votes in favor of the union and thirty-eight against. (Cohen Decl. Ex. D.) Because of the razor-thin margin, the two challenged ballots were sufficient to affect the outcome of the election, and their status had to be resolved. In addition, both the union and Maxpak filed formal objections to conduct allegedly affecting the results of the election with the Tampa regional office. (Cohen Decl. Ex. C at 2.)

² Unless otherwise stated, all dates are in 2012.

The Acting Regional Director for Region 12 ordered a hearing on the challenged ballots and the election objections. (*Id.* at 3.) That hearing was held at the NLRB's regional office in Tampa on April 23 and 24. (*Id.*) A total of 18 witnesses testified. (*Id.*) One month later, the hearing officer issued a 50-page report finding merit in three of the union's eleven election objections. (*See id.* at 50.) Those three objections concerned, among other things, statements made to Maxpak employees by company managers and supervisors that were alleged to interfere with the full and free expression of employee choice. (*See id.* at 34-41, 42-44, 47-48.) The hearing officer recommended that all other election objections and challenges to voter eligibility be overruled. (*Id.* at 48-49.)

Maxpak filed timely exceptions to the hearing officer's report with the Board. (*See* Cohen Decl. Ex. E); *see also* 29 C.F.R. § 102.69(c)(2). Maxpak also filed a brief. (*See* Cohen Decl. Ex. F); *see also* 29 C.F.R. § 102.69(c)(2). In those submissions, Maxpak contested the hearing officer's conclusions and recommendations. The company also asserted that the President's January 2012 recess appointments of Messrs. Griffin and Flynn and Ms. Block to be Board members were constitutionally invalid. (*See* Cohen Decl. Ex. F at 23-24.) Because the Board lacks a quorum when it has three or more vacancies, the company argued that the Board "lack[ed] a quorum to act on the Hearing Officer's Report on Challenges and Objections." (Cohen Decl. Ex. E ¶ 15.) The union filed a brief responding to Maxpak's arguments. *See Schwarz Partners Packaging, LLC*, 12-RC-073852, <http://www.nlr.gov/case/12-RC-073852>.

On August 29, a three-member panel of the Board consisting of Chairman Pearce, Member Griffin, and Member Block issued a Decision and Direction that "adopted the hearing officer's findings and recommendations" in substantial part. (Compl. Ex. 1, at 2 (footnote omitted), ECF No. 1-1.) Initially, the Board rejected Maxpak's argument that it lacked a quorum

to act. (Compl. Ex. 1, at 1 n.3.) Turning to the merits, the Board accepted the hearing officer's recommendation that the Regional Director for Region 12 be directed to open and count the two challenged ballots. (*Id.* Ex. 1, at 1 n.2.) If the revised tally showed that the union received a majority of valid votes cast, the Regional Director was instructed to certify the union. (*Id.* Ex. 1, at 4.) But if the revised tally showed the opposite, then in light of the union's meritorious election objections, the Regional Director was to set aside the election and order a new one. (*Id.* Ex. 1, at 4.)

On September 12, an agent for the Regional Director opened the two challenged ballots in the presence of observers for Maxpak and the union. (Cohen Decl. Ex. G.) The revised tally showed thirty-nine votes for the union and forty against it. (*Id.*) Accordingly, a rerun election was scheduled for October 19. (Cohen Decl. Ex. H.) Once again, the election was held at Maxpak's facility in Lakeland. (*See id.*) And once again, voter turnout was strong. Seventy-six of the seventy-seven eligible employees (or 99%) cast ballots. (Cohen Decl. Ex. I.) The tally of ballots in the second election showed fifty-five votes in favor of the union and twenty-one against. (Cohen Decl. Ex. I.) Maxpak filed objections to the second election with the Tampa regional office (Cohen Decl. Ex. J) and the Regional Director tentatively scheduled a hearing (Cohen Decl. Ex. K). But Maxpak soon withdrew the objection (Cohen Decl. Ex. L) and the Regional Director approved the withdrawal (Cohen Decl. Ex. M). That same day, November 6, the Regional Director certified that the union had received a majority of valid ballots cast and that it therefore is the exclusive bargaining representative of Maxpak's maintenance and production employees in Lakeland. (Decl. of Joseph A. Kennedy Ex. 2, ECF No. 12-1.) With that, NLRB Case 12-RC-073852 came to a close.

On January 25, 2013, over two months after Case 12-RC-073852 closed, the United States Court of Appeals for the D.C. Circuit issued its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *petition for certiorari filed*, 2013 WL 1771081 (U.S. Apr. 25, 2013) (No. 12-1281). That case, which does not involve Maxpak, was not brought in district court. Rather, Noel Canning followed the prescribed statutory procedure by filing with the Court of Appeals a petition for review of “a *final order* of the Board.” 29 U.S.C. § 160(f) (emphasis added). A three-member panel consisting of Members Hayes, Flynn, and Block had issued the final order in that case. The Court of Appeals 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. The *Noel Canning* decision acknowledges that its constitutional holdings squarely conflict with the Eleventh Circuit’s en banc decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). And just last month, the Solicitor General, on behalf of the Board, filed a petition seeking Supreme Court review of *Noel Canning*. See *Petition for a Writ of Certiorari, NLRB v. Noel Canning* (No. 12-1281), 2013 WL 1771081 (Apr. 25, 2013).

On March 15, 2013, after *Noel Canning* issued, Maxpak filed a complaint against the NLRB and Acting General Counsel Solomon, in his official capacity.³ The Complaint could have been filed in the United States District Court for the Middle District of Florida, which is within the Eleventh Circuit and includes within its territory both Lakeland and Tampa. See 28 U.S.C. § 89(b). Instead, Maxpak filed its lawsuit in this Court. Count I claims that the Board’s Decision and Direction and the Regional Director’s certification in Case 12-RC-073852 are invalid “because the Board lacked a quorum.” (Compl. ¶ 23.) Count II claims that Maxpak will

³ Maxpak does not challenge the validity of the President’s designation of Mr. Solomon to serve as Acting General Counsel.

be irreparably harmed unless the Acting General Counsel is “enjoined from pursuing any unfair labor practice charges against Maxpak based on the November 6, 2012 certification,” even though no such charges have been filed. (*Id.* ¶ 25.) The Complaint principally seeks declaratory and injunctive relief. (Compl. at 8.)

But in its Motion for Summary Judgment, Maxpak makes no reference to the claims made in Count II of the Complaint. Instead, it seeks only an order declaring that the NLRB lacked a quorum “at all times relevant to this lawsuit” and that the Board’s Decision and Direction and the Regional Director’s certification are invalid. (Proposed Order ¶¶ 2-3, ECF No. 12-2.)

ARGUMENT

I. This Case Should Be Transferred to the United States District Court for the Middle District of Florida.

Maxpak, which is located in Florida and employs workers in Florida, filed its lawsuit in this Court over events surrounding a representation proceeding that was filed in Florida and conducted almost entirely by the NLRB’s regional office in Florida. It did so, at least in part, to avoid the adverse precedent of *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005), which binds the district courts of Florida, and to reap whatever benefits it thinks might flow from the D.C. Circuit’s decision in *Noel Canning*. Forum shopping of this sort is wholly inappropriate. It is just this kind of litigation tactic that merits a transfer of venue under 28 U.S.C. § 1404(a), which permits a district court, “in the interest of justice,” to “transfer any civil action to any other district or division where it might have been brought.”

That was the conclusion reached by this Court just one month ago in *Laboratory Corp. of America Holdings v. NLRB*, --- F. Supp. 2d ---, No. 13-276 (RBW), 2013 WL 1810636 (D.D.C. Apr. 4, 2013) [hereinafter “*LabCorp*”]. In that case, which is strikingly similar to this one, a

company from another state sought to invalidate a representation proceeding by bringing its suit in this Court and citing the reasoning of *Noel Canning*. In response, the NLRB moved to dismiss, or alternatively, to transfer venue. Relying on this Court's recent transfer order in *Pacific Maritime Ass'n v. NLRB*, --- F. Supp. 2d. ---, No. 12-1477 (BAH), 2012 WL 5866231 (D.D.C. Nov. 20, 2012) (Howell, J.), this Court first concluded that it may address a motion to transfer before reaching its own subject-matter jurisdiction. *LabCorp*, 2013 WL 1810636, at *1. Next, the Court applied section 1404(a). In *LabCorp*, it was "undisputed that th[e] case could have been brought in the District of New Jersey, where the plaintiff's facilities and employees impacted by th[e] litigation are located, where the union election petition was filed, and where the defendant ha[d] ordered that a union election take place." *Id.* at *2. Therefore, the statute's threshold requirement was met. The district court then considered "the relevant private and public interest factors" and found that they "weigh[ed] in favor of transfer." *Id.* The court found it particularly significant that the locus of the dispute was in New Jersey and that "there is a strong local interest" in having union election controversies decided "where the affected employees are located." *Id.*

This Court was not persuaded by the company's plea in *LabCorp* that "its choice of forum should be accorded deference because its claims are connected to and arose in the District of Columbia." *Id.* The Court relied on precedent holding that "[m]ere involvement . . . on the part of federal agencies, or some federal officials who are located in Washington, D.C. is not determinative of whether the plaintiff's choice of forum [in the District of Columbia] receives deference." *Id.* (quoting *Fed. Hous. Fin. Agency v. First Tenn. Bank Nat'l Ass'n*, 856 F. Supp. 2d 186, 192 (D.D.C. 2012)) (alterations in original) (internal quotation omitted). Indeed, the *LabCorp* plaintiff's choice of forum was entitled to little deference because the plaintiff relied

chiefly on *Noel Canning*, which at the time was the only case to hold that the President's January 2012 recess appointments to the Board were not authorized by the Recess Appointments Clause, while other cases raising the very same issue were pending in other circuits—including the Third Circuit, which encompasses New Jersey. *Id.* at 3. This Court refused to tolerate or reward such transparent forum shopping. *See id.* It therefore transferred the case to the United States District Court for the District of New Jersey. *Id.*

Maxpak's lawsuit should meet a similar fate. As in *LabCorp*, this action could have been brought elsewhere. Maxpak does business in Florida. It employs a Florida-based workforce. The union filed its petition with the NLRB's regional office in Florida. The election was held in Florida, as was the two-day hearing that culminated in the hearing officer's post-election report. In addition, the Regional Director for Region 12 in Florida issued the certification that terminated the representation case. It is indisputable that this case could have been brought in Florida. Therefore, as in *LabCorp*, the threshold requirement of section 1404(a) is satisfied.

In addition, it is in the "interest of justice" to transfer this case. Florida is where nearly every significant event involving Case 12-RC-073852 has taken place. Moreover, Florida has no less substantial an interest in having a union election controversy decided in its state than New Jersey did in *LabCorp*. In fact, the over 95% turnout in both representation elections only intensifies the deeply local interest in this case. Finally, it is beyond peradventure that Maxpak has filed suit in this Court not for the sake of convenience to itself or even its counsel, who appear *pro hac vice*, but rather to obtain a litigation advantage. Like the plaintiff in *LabCorp*, Maxpak selected this Court because it is bound by *Noel Canning*. In the face of such blatant forum shopping, the Board's involvement in the disposition of Case 12-RC-073852 is not sufficient to justify deference to Maxpak's choice of forum.

For these reasons, Maxpak should litigate this case in the United States District Court for the Middle District of Florida, in which Lakeland and Tampa are located. The Board recognizes that *Evans* is binding in that court. Surely, Maxpak's lawyers know that, too. But even if adverse precedent means that Maxpak will have a more difficult path to victory, it does not outweigh the reasons for transferring the case. As this Court has stated, "It is not 'in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or primarily to *obtain* or *avoid* specific precedents, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case.'" *LabCorp*, 2013 WL 1810636, at *3 (quoting *Schmid Labs., Inc. v. Hartford Accident & Indem. Co.*, 654 F. Supp. 734, 737 (D.D.C. 1986)) (emphasis added).

II. Alternatively, This Case Should Be Dismissed for Lack of Subject-Matter Jurisdiction.

If the Court concludes that venue is appropriate here (which it should not), the Court should dismiss this suit for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See* Fed. R. Civ. P. 12(h)(3). As the party asserting jurisdiction, Maxpak bears the burden of demonstrating its existence. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Shuler v. U.S.*, 531 F.3d 930, 932 (D.C. Cir. 2008); *Masoud v. Suliman*, 816 F. Supp. 2d 77, 80 (D.D.C. 2011) (Howell, J.). Maxpak cannot satisfy its burden as to either of the Complaint's two counts, the first of which challenges rulings made in Case 12-RC-073852 and the second of which seeks to enjoin the Acting General Counsel from pursuing any unfair labor practice charge connected to the representation case.

As to Count I, district courts generally lack jurisdiction to review rulings in NLRB representation cases. A very limited exception permits district courts to exercise jurisdiction over such matters, but only when a ruling by the Board violates a clear statutory command and

would otherwise escape judicial review. But, the D.C. Circuit has recognized that this exception “was not devised for the benefit of an employer.” *Miami Newspaper Printing Pressmen’s Union Local 46 v. McCulloch*, 322 F.2d 993, 997 n.7 (D.C. Cir. 1963) [hereinafter “*Printing Pressmen’s Union*”]. And, in any event, this case does not satisfy either of the exception’s highly demanding requirements. Therefore, dismissal of Count I is warranted.

Count II fares no better. As an initial matter, Maxpak has forfeited or abandoned Count II by failing to brief it in its Motion for Summary Judgment. But even if Maxpak has somehow preserved that claim, it has long been recognized that federal courts lack jurisdiction to grant the relief Maxpak seeks in Count II—that is, to enjoin or otherwise control the General Counsel’s statutory duty to investigate and, if necessary, prosecute unfair labor practice charges. Thus, Count II must also be dismissed.

A. This Court lacks jurisdiction to review the representation case rulings at issue in Count I.

There is no jurisdictional basis for district courts to review the exercise of authority by the Board and its agents in representation cases. Congress made the deliberate decision to allow judicial review of representation case rulings *only* by an appropriate court of appeals and *only* if a subsequent unfair labor practice proceeding results in a final Board order. And although the Supreme Court has recognized a very narrow exception to this rule, the D.C. Circuit has recognized that employers, like Maxpak, cannot rely on it.

1. District courts generally lack jurisdiction to review representation cases.

On its face, the NLRA indicates a purpose to limit judicial review of representation decisions. Section 10(e) and (f) provides for review, in the appropriate Court of Appeals, of “a final order of the Board” entered in an unfair labor practice proceeding under section 10. 29

U.S.C. § 160(e), (f). In *American Federation of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940), the Supreme Court held that a certification, which typically terminates a representation case after an election has been held, does not constitute a “final order of the Board” within the meaning of section 10(e) and (f). Therefore, “as a general rule, Board orders emanating from representation proceedings are not directly reviewable in court.” *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1310 (D.C. Cir. 1984).

Instead, the Act provides an indirect method for judicial review of section 9 representation proceedings. Specifically, section 9(d) provides that when a certification has become the basis for a subsequent unfair labor practice order, and that order is before an appropriate Court of Appeals under section 10(e) or (f), the certification itself is also open to review. 29 U.S.C. § 159(d); see *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 471 n.1 (D.C. Cir. 1996) (“Although a Board’s decision in a certification proceeding is not directly reviewable in the courts, an employer may challenge a certification decision indirectly by refusing to bargain with the union and then raising its election objection in the ensuing unfair labor practice proceedings.”). “Congress adopted this policy because it wished to avoid delays involved in direct judicial review—delays which 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). The indirect review process chosen by Congress protects this important interest and still “makes full provision for judicial review of the underlying certification order.” *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964).

2. *Leedom v. Kyne* supplies jurisdiction only in extraordinary circumstances.

The cases following the principle of *American Federation of Labor* over the last seventy years “are legion.” *Hartz Mountain*, 727 F.2d at 1310. Nevertheless, “the Supreme Court has

established one important and extremely narrow exception to the general rule that Board representation orders are not subject to direct judicial review.” *Id.* at 1311. In *Leedom v. Kyne*, 358 U.S. 184, 187 (1958), the Supreme Court held that district courts may exercise jurisdiction under 28 U.S.C. § 1337 “to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act,” 358 U.S. at 188, but only “[i]f the absence of jurisdiction of the federal courts [would] mean[] a sacrifice or obliteration of a right which Congress has created,” *id.* at 190 (quoting *Switchmen’s Union v. Nat’l Mediation Bd.*, 320 U.S. 297, 300 (1943)). “Thus, in order to justify the exercise of [*Kyne*] jurisdiction, a plaintiff must show, first, that the agency has acted ‘in excess of its delegated powers and contrary to a specific prohibition’ which ‘is clear and mandatory,’ and, second, that barring review by the district court ‘would wholly deprive [the party] of a meaningful and adequate means of vindicating its statutory rights.’” *Nat’l Air Traffic Controllers Ass’n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (second alteration in original) (citation omitted).⁴

“The federal courts have consistently recognized the limits imposed by the *Kyne* decision.” *Physicians Nat’l House Staff Ass’n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (en banc); *see also id.* at 503 (dissenting opinion) (“This circuit, like the other lower courts, has been frugal in recognizing the *Kyne* exception.”). The D.C. Circuit, in particular, has repeatedly emphasized how difficult it is for plaintiffs to establish jurisdiction under *Kyne*. “The limits of *Kyne* jurisdiction have been described as ‘nearly insurmountable’ by the District of Columbia Circuit.” *Int’l Union of Operating Eng’rs, Local 70 v. NLRB*, 940 F. Supp. 1439, 1442 n.3 (D.

⁴ Although this is the classic recitation of the *Kyne* test, it is well established that the first prong is implicated when clear violations of either affirmative commands or “words of prohibition” are involved. *Printing Pressmen’s Union*, 322 F.2d at 997.

Minn. 1996) (quoting *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir 1993)). “In *Physicians*, [the Court of Appeals] made it unmistakably clear that the *Kyne* exception is extraordinarily narrow.” *Hartz Mountain*, 727 F.2d at 1312. Accordingly, only “in the rarest of circumstances” will *Kyne* support district court jurisdiction. *Id.* at 1311.

3. *Leedom v. Kyne* does not support jurisdiction in this case.

Maxpak has not shown that its suit involves the “rarest of circumstances” necessary to establish jurisdiction under *Kyne*. Indeed, Maxpak cannot satisfy either of *Kyne*’s two conjunctive requirements. Therefore, this Court lacks subject-matter jurisdiction.

a. Jurisdiction is not available under *Leedom v. Kyne* because Maxpak has a meaningful and adequate opportunity for judicial review.

Maxpak may obtain judicial review of the statutory and constitutional arguments it makes here simply by following the procedure prescribed by the NLRA. As the Supreme Court explained in *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991), there can be no “sacrifice or obliteration” of a right under *Kyne* where “a meaningful and adequate opportunity for judicial review” is available. *See Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 398 (6th Cir. 2002) (noting that the Supreme Court “rested its decision in *MCorp* solely on the basis that MCorp had available to it review in the appellate courts, thus making district court jurisdiction improper under *Leedom*[*v. Kyne*]”); *see also Nat’l Air Traffic Controllers Ass’n*, 437 F.3d at 1263.

Sections 9(d) and 10(e) and (f) of the Act, which together establish the indirect review procedure in representation cases, provide Maxpak with “a meaningful and adequate opportunity for judicial review.” *MCorp*, 502 U.S. at 43. Although Case 12-RC-073852 is now closed and the union has been certified, Maxpak can simply refuse to bargain with the union. An

employer's post-certification refusal to bargain will either force the union to file an unfair labor practice charge, or, in the absence of a charge, permit the employer to ignore the results of the election. See *Hartz Mountain*, 727 F.2d at 1311 (“Congress declared that the person aggrieved by a Board representation decision is obliged to precipitate an unfair labor practice proceeding as a means of securing review in the appellate courts”) (quoting Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 60 (1976)).⁵ “In *Kyne*, by contrast, the plaintiff in the district court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action.” *Goethe House N.Y., German Cultural Ctr. v. NLRB*, 869 F.2d at 75, 80 (2d Cir. 1989). This is because, as a practical matter, few employers will file a refusal-to-bargain charge against a union. See *Printing Pressmen's Union*, 322 F.2d at 997 n.7. In addition, a union risks losing employee support if it refuses to bargain, especially in the initial period after certification.

In light of all this, the D.C. Circuit has cogently explained that “the *Leedom v. Kyne* remedy was not devised for the benefit of an employer.” *Id.* “Indeed, the District of Columbia Circuit has opined that had the aggrieved party in *Kyne* been an employer and thus able to seek indirect judicial review, the Supreme Court probably would have held that the district court lacked jurisdiction over the case.” *Goethe House*, 869 F.2d at 80 (citing *Hartz Mountain*, 727 F.2d at 1312 n.2). Accordingly, courts within and outside this circuit have repeatedly and consistently dismissed lawsuits like this one in which an employer seeks premature judicial review of an NLRB representation case. See, e.g., *id.*; *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240, 245 & n.4 (6th Cir. 1979); *Bd. of Trustees of Mem'l Hosp. of Fremont*

⁵ At this point, no refusal-to-bargain charge has been filed against Maxpak. Moreover, Maxpak does not allege that the union has made a post-certification request for bargaining. “[I]t is well established that a bargaining request must be made in an appropriate unit to serve as a basis for a finding of unlawful refusal to bargain.” *Joslin Dry Goods Co.*, 118 NLRB 555, 557 (1957).

County, Wyo. v. NLRB (10th Cir. 1975) [hereinafter “*Fremont County Mem’l Hosp.*”]; *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917-18 (D.C. Cir. 1968); *Lily-Tulip Cup Corp. v. Leedom*, 44 L.R.R.M. (BNA) 2768, 2769 (D.D.C. 1959); *Conn. Light & Power Co. v. Leedom*, 43 L.R.R.M. (BNA) 2802, 2804 (D.D.C. 1959).

The fact that Maxpak has raised an argument with a constitutional dimension does not diminish the availability of meaningful and adequate judicial review. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court examined the various provisions of the NLRA, including the ones supplying judicial review. The Court concluded: “Upon that review all questions of the *jurisdiction of the Board* and the regularity of its proceedings, all questions of *constitutional right* or statutory authority are open to examination by the court.” *Id.* at 47 (emphasis added). Indeed, the Court relied on this conclusion the very next year in rejecting an employer’s impermissible attempt to seek district court review of its constitutional argument before an NLRB administrative hearing had commenced. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50 (1938). Other courts have likewise refused to exempt constitutional arguments from the NLRA’s prescribed review procedure, which is fully capable of resolving such matters. This is so even when plaintiffs claim that the NLRB proceeding itself violates the Constitution. *See, e.g., AMERCO v. NLRB*, 458 F.3d 883, 887-88 (9th Cir. 2006); *Blue Cross & Blue Shield of Mich.*, 609 F.2d at 244-45; *J.P. Stevens Employees Educ. Comm. v. NLRB*, 582 F.2d 326, 329 (4th Cir. 1978); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 672-73 (5th Cir. 1966).

The very cases that Maxpak relies upon exemplify these points. For instance, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the employer did not file an ancillary lawsuit in district court to obtain review of its constitutional arguments. Rather, the case reached the

D.C. Circuit exactly as the NLRA contemplates—that is, on a petition for review of “a final order of the Board” in an unfair labor practice case. *Id.* at 492. Similarly, in *NLRB v. J.S. Carambola, LLP*, 457 Fed. Appx. 145, 149 (3d Cir. 2012) (unpublished), the employer did not challenge the Board’s election rulings by filing a district court lawsuit, like Maxpak has done here. Instead, the employer followed the statutory procedure and refused to bargain with the union, thus permitting the employer to obtain judicial review of its election objections at the conclusion of the ensuing unfair labor practice case. *Id.* at 147-48.

In short, Maxpak has a meaningful and fully adequate opportunity for judicial review. The Act, as authoritatively interpreted by over seventy years of precedent, provides a way forward. Maxpak cannot blaze its own nonstatutory trail to that destination. On this basis alone, *Kyne* jurisdiction does not lie.

b. Jurisdiction is not available under *Leedom v. Kyne* because Maxpak has not shown that the Board has violated a clear statutory command.

Not only has Maxpak failed to show that it has no meaningful and adequate opportunity to vindicate its rights, but it cannot succeed for the further reason that it has not shown that the Board has unquestionably violated a clear and mandatory provision of the NLRA.

In *Hartz Mountain*, where an employer unsuccessfully relied on *Kyne* to establish district court jurisdiction, the D.C. Circuit emphasized—literally, using italics—that “*any colorable support for the Board’s ruling should be treated as a jurisdictional defect dictating dismissal.*” 727 F.2d at 1313 (quoting *Gorman, supra*, at 64-65). This is a very difficult standard for plaintiffs like Maxpak to meet. It prevents district courts from exercising jurisdiction over any Board ruling if the Board can muster a nonfrivolous defense of its actions.

Here, Maxpak relies on the D.C. Circuit's decision in *Noel Canning* to show that the Board "clearly" violated 3(b)'s quorum requirement when the Board issued the rulings in Case 12-RC-073852 that Maxpak challenges.⁶ But, in the Board's view, *Noel Canning* was wrongly decided. To that point, the Solicitor General, on behalf of the Board, filed a petition seeking Supreme Court review of that decision. See Petition for a Writ of Certiorari, *NLRB v. Noel Canning* (No. 12-1281), 2013 WL 1771081 (Apr. 25, 2013). Indeed, as the D.C. Circuit candidly acknowledged in its decision, see 705 F.3d at 505-06, 509-10, *Noel Canning* directly conflicts with decisions from three different courts of appeals that support the President's authority to make the January 2012 recess appointments.⁷ See *Evans v. Stephens*, 387 F.3d 1220, 1224-27 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005), *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986), and *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).⁸ Accordingly, it is far from "clear" that the Board lacked a valid quorum at the time it

⁶ Maxpak's lawsuit in this Court does not allege a constitutional violation by the Board. Rather, Maxpak claims that two discrete rulings were made in Case 12-RC-073852 at a time when the Board lacked a quorum. Although the premise of Maxpak's argument is that the Recess Appointments Clause did not authorize the President's January 2012 recess appointments of Members Griffin, Flynn, and Block, the crux of Maxpak's lawsuit here is that the Board did not satisfy the statutory quorum requirement under section 3(b) of the Act.

⁷ Over the dissent of Judge Greenaway, the Third Circuit recently concluded that the Recess Appointments Clause did not authorize the President's intrasession recess appointment of former Member Craig Becker in 2010. *NLRB v. New Vista Nursing & Rehab., LLC*, --- F.3d ---, No. 11-3440, 2013 WL 2099742 (3d Cir. May 16, 2013) (2-1 decision). That decision only deepens the circuit split acknowledged by the D.C. Circuit in *Noel Canning*.

⁸ In addition, the validity of the President's recess appointments is currently being litigated in a number of other circuits. See, e.g., *NLRB v. Enterprise Leasing Co.*, 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.) (argument scheduled May 31, 2013); *DiracTV v. NLRB*, Nos. 12-71297, -72526, and -72639 (9th Cir.).

issued its Decision and Direction in this matter in violation of section 3(b). *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) (holding that the law is not “clearly established” for purposes of qualified immunity if there is a circuit split on whether the officer’s conduct was unconstitutional); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (same); *Bame v. Dillard*, 637 F.3d 380, 387-88 (D.C. Cir. 2011) (same).

Moreover, at the time the Board issued its Decision and Direction in August 2012, the D.C. Circuit had not yet decided *Noel Canning*. Maxpak cannot fairly argue that the holding of *Noel Canning* was “clear” prior to the issuance of the opinion in that case. *See, e.g., Wilson*, 526 U.S. at 617 (if a decision clearly establishes the applicable constitutional law *after* the challenged conduct, then the officers did not violate clearly established law because they “cannot have been expected to predict the future course of constitutional law”).⁹ Thus, in light of the circuit precedent that contradicts the holdings in *Noel Canning*, and the fact that *Noel Canning* had not been decided when the Board issued its Decision and Direction, there is “colorable support” for the Board’s rejection of Maxpak’s challenge to the Board’s composition. Consequently, insofar as *Kyne* is concerned, Maxpak has not shown that the exercise of district court jurisdiction is appropriate here.

B. This Court also lacks jurisdiction over Count II, which has been abandoned.

Maxpak has forfeited or abandoned Count II of its Complaint. In Count II, Maxpak asks this Court to enjoin the Acting General Counsel “from pursuing any unfair labor practice charges against Maxpak based on the November 6, 2012 certification.” Compl. ¶ 25. But Maxpak has

⁹ Indeed, the Justice Department’s Office of Legal Counsel published a twenty-three-page memorandum concluding that the President’s January 2012 recess appointments were authorized by the Recess Appointments Clause. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel --- (Jan. 6, 2012), <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

failed to brief or even mention that claim in its Motion for Summary Judgment. Thus, it is abandoned. *See, e.g., Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (en banc) (“[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.”); *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (CWx), 2010 WL 3034060, at *7 (C.D. Cal. July 30, 2010) (collecting cases); (cf. Standing Order for Civil Cases ¶ 5(e) (stating that “a dispositive motion[] . . . should present *all* legal issues that the party claims are capable of disposing of the case at that stage of the proceedings”), ECF No. 6.)

The Proposed Order submitted with Maxpak’s Motion for Summary Judgment only confirms that the company has forfeited or abandoned Count II. (*See* Proposed Order, ECF No. 12-2.) That Proposed Order, if entered by this Court, would merely provide declaratory relief as to the two challenged rulings in Case 12-RC-073852. Notably, it says nothing about the Acting General Counsel’s authority to investigate and prosecute any unfair labor practice charges. Perhaps this is because, elsewhere in its Complaint, Maxpak suggests that an injunction against the Acting General Counsel would be needed only “[d]uring the pendency of these proceedings.” (Compl. ¶ 3.)¹⁰

In any event, even if that claim were still live, the Court lacks jurisdiction to supervise or control the actions of the General Counsel in response to unfair labor practice charges. Section 3(d) of the NLRA vests the General Counsel with “final authority . . . in respect of the investigation of charges and issuance of complaints under section [10].” 29 U.S.C. § 153(d).

¹⁰ Maxpak has also abandoned any challenge to the authority of the Regional Director for Region 12. In its Complaint, Maxpak suggests that it challenges the validity of her appointment and her ability to exercise delegated authority. (Compl. ¶ 2.) But, there are no separate counts addressing those matters, there is nothing in the Prayer for Relief relating to such contentions, and the claims are neither pressed in Maxpak’s Motion for Summary Judgment nor spoken to in its Proposed Order.

The Supreme Court, the D.C. Circuit, and other courts understand this unrestricted grant of authority to “insulate[] the General Counsel from judicial review of his prosecutorial functions.” *Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 152 (D.C. Cir. 1996); *see id.* at 153 (“The Supreme Court accordingly has held that the Act does not authorize judicial review of the General Counsel’s decision to file or withdraw a complaint.”). Maxpak cites no authority permitting courts to restrain the General Counsel from performing those functions. To the contrary, “[i]t is 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.” *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir. 1968) (per curiam); *see also Little River Band of Ottawa Indians v. NLRB*, 747 F. Supp. 2d 872, 874-75 (W.D. Mich. 2010) (dismissing, for lack of jurisdiction, the plaintiff’s complaint “to prevent the NLRB from proceeding on the [unfair labor practice] charge”). Therefore, Count II must also be dismissed.

C. Neither jurisdictional statute asserted by Maxpak applies to this case.

Sections 1331 and 1337 of Title 28, upon which Maxpak relies, cannot supply district court jurisdiction in this case when the NLRA precludes its exercise. Section 1331 gives district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Section 1337, in relevant part, provides district courts with jurisdiction over “any civil action or proceeding arising under any Act of Congress regulating commerce.” 28 U.S.C. § 1337.

General jurisdictional statutes like sections 1331 and 1337 are no exception to the long-settled limitations on judicial authority over NLRB proceedings.¹¹ “The courts uniformly hold that statutory review in the agency’s specially designated forum prevails over general federal question jurisdiction in the district courts.” *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989). As the Ninth Circuit observed in a case resolving a challenge to agency action where district court jurisdiction was premised on two general jurisdictional provisions:

Specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts. A contrary holding would encourage circumvention of Congress’s particular jurisdictional assignment. It would also result in fractured judicial review of agency decisions, with all of its attendant confusion, delay, and expense.

Owners-Operators Indep. Drivers Ass’n of Am., Inc. v. Skinner, 931 F.2d 582, 589 (9th Cir. 1991) (citation omitted). By the same token, Maxpak’s reliance on two general jurisdictional statutes to establish district court jurisdiction cannot surmount the NLRA’s specific review procedures, which exclusively vest the power of judicial review over NLRB proceedings in a “specially designated forum”—that is, the courts of appeals. *See* 29 U.S.C. § 160(e), (f).

That is precisely what courts have held in prior cases like this one. For example, in *Fremont County Memorial Hospital*, an employer argued that section 1337 provided jurisdiction to the district court to “enjoin[] a representation election ordered by the National Labor Relations Board.” 523 F.2d at 846. The Tenth Circuit rejected this argument. “A general statute does not confer jurisdiction when an applicable regulatory statute precludes it.” *Id.* Similarly, in *Little River Band of Ottawa Indians*, the district court properly rejected an Indian tribe’s reliance on two general jurisdictional statutes in an attempt to enjoin an NLRB unfair labor practice case.

¹¹ *Kyne* recognizes that district courts may exercise jurisdiction over NLRB proceedings under section 1337, but only if exceptional circumstances are present. As explained above, this case does not satisfy *Kyne*’s requirements. *See* discussion *supra* Part II.A.

747 F. Supp. 2d at 889-90 (addressing 28 U.S.C. §§ 1331 and 1362); *cf. Louisville & Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983) (rejecting arguments that sections 1331, 1337, and 1361 provided the district court with jurisdiction because “when Congress designates a forum for judicial review of administrative action, that forum is exclusive” and “Congress has conferred upon this court such sole and exclusive jurisdiction”). In both cases, it was held that the plaintiff could avail itself of judicial review in the manner the NLRA prescribes. *See Fremont County Mem’l Hosp.*, 523 F.2d at 847-88; *Little River Band of Ottawa Indians*, 747 F. Supp. 2d at 890.

Therefore, Maxpak has not satisfied its burden to show that this Court has jurisdiction over its Complaint. In the absence of such jurisdiction, this Court has no choice but to dismiss. *See Fed. R. Civ. P. 12(h)(3)* (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).¹²

III. This Court Should Decline to Exercise Its Discretion to Award Equitable Relief.

Even if jurisdiction to hear this case exists, which it does not, this Court should decline to provide the declaratory relief that Maxpak seeks. As then-Circuit Judge Scalia wrote on behalf of the D.C. Circuit, “all bases for nonmonetary relief—including injunction, mandamus and declaratory judgment—are discretionary.” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985) (footnote omitted). Under these circumstances, this Court should decline to exercise its discretion to grant equitable relief.

Maxpak has not explained what practical consequences the certification of the union has had on its business operations. Notably, Maxpak does not claim that the union has requested bargaining or that the certification itself has hindered Maxpak from implementing any new terms

¹² Because this Court lacks jurisdiction over this case, Maxpak’s motion for summary judgment should be denied as moot. *See, e.g., Chan v. Reno*, 916 F. Supp. 1289, 1308 (S.D.N.Y. 1996).

and conditions of employment at its facility. In fact, it appears that Maxpak does not fully comprehend the effect the relief it seeks would have on its existing legal obligations.

Under the NLRA, an employer generally may not change the terms and conditions of employment without bargaining with a certified or voluntarily recognized union. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1992) (“The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”). Similarly, an employer acts at its own peril if it makes unilateral changes to the terms and conditions of employment while election objections or challenges remain pending. *See Laney & Duke Storage Warehouse Co.*, 151 NLRB 248, 266-67 (1965), *enf’d in relevant part*, 369 F.2d 859, 866, 868-69 (5th Cir. 1966), *cited with approval in Fugazy Cont’l Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984) (per curiam). But the practical effect of Maxpak’s lawsuit would be to return to the status quo ante that existed before the Board issued its Decision and Direction resolving the election objections and challenges in Case 12-RC-073852. Essentially, Maxpak’s bargaining obligations would be no different than they were on August 28, 2012, which is the day before the Board issued its Decision and Direction. Thus, although the declaratory relief that Maxpak seeks would effectively set aside the certification, Maxpak would still act at its peril if it made unilateral changes without first bargaining with the union.

In short, it is not clear what the purpose of declaratory relief would be in these circumstances, except perhaps to force the union to prevail in a third election at some point in the future. Therefore, even if this Court were to reach the merits of Maxpak’s Complaint, this Court should decline to exercise its discretion to issue the declaratory remedy that Maxpak has requested.

CONCLUSION

For these reasons, this case should be transferred to the United States District Court for the Middle District of Florida, which is where Maxpak should have filed it in the first place. Alternatively, this Court should dismiss the action for lack of subject-matter jurisdiction. And if the Court decides that it will retain the case and that subject-matter jurisdiction exists, it should decline to award the discretionary relief that Maxpak has requested.

Respectfully submitted,

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Dated: May 23, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCHWARZ PARTNERS PACKAGING, LLC, *d/b/a*
Maxpak,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Defendants.

Civil Action No. 13-343 (BAH)
Judge Beryl A. Howell

**DEFENDANTS' STATEMENT OF DISPUTED MATERIAL FACTS
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Defendants agree with Plaintiff's Statement of Undisputed Material Facts, except as to the following:

Plaintiff's Fact in Paragraph No. 4: Defendants agree that on January 4, 2012, the President appointed Sharon Block, Terrence Flynn, and Richard Griffin to fill vacancies on the Board, but assert that the appointments were constitutionally valid.

Plaintiff's Fact in Paragraph No. 13: Defendants agree that the Board delegated its authority in this proceeding to a three-member panel, but assert that the panel included Chairman Mark Pearce as well as constitutionally-valid appointees Sharon Block and Richard Griffin.

Respectfully submitted,

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Dated: May 23, 2013

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law and Statement of Disputed Material Facts was electronically filed with the Clerk of Court for the United States District Court for the District of Columbia this 23rd day of May, 2013 using the CM/ECF system, which will serve Barbara A. Duncombe, Kerry P. Hastings, and Lisa A. Amend, Attorneys for Plaintiff Schwarz Partners Packaging, LLC d/b/a Maxpak by CM/ECF.

/s/ Nancy E. Kessler Platt