

ORAL ARGUMENT SCHEDULED FOR DECEMBER 5, 2012

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

NOEL CANNING, A DIVISION OF
THE NOEL CORPORATION,

*Petitioner/Cross-
Respondent,*

v.

NATIONAL LABOR RELATIONS
BOARD,

*Respondent/Cross-
Petitioner.*

Case Nos. 12-1115, 12-1153

**MOTION OF AMICI CURIAE
SENATE REPUBLICAN LEADER MITCH McCONNELL
AND 41 OTHER MEMBERS OF THE UNITED STATES SENATE
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

Pursuant to D.C. Circuit Rule 34(e), amici curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the United States Senate (the “Senate Amici”) respectfully move this Court for leave to participate in oral argument in this case, and request that they be allotted 10 minutes of argument time, to address the discrete issue of the validity under the Recess Appointments Clause of the President’s January 4, 2012 appointments to the National Labor Relations Board. Counsel for the Senate Amici has consulted with counsel for all other parties and is authorized to state as follows: (1) Petitioner Noel Canning and Movant-

Intervenors Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace (collectively, “Movant-Intervenors”) consent to the Senate Amici’s motion, provided that any time allotted to the Senate Amici is not deducted from argument time to which Petitioner and Movant-Intervenors, collectively, would otherwise be entitled; (2) Respondent National Labor Relations Board takes no position regarding the Senate Amici’s request to participate in oral argument, but does oppose any allocation of time that would give Petitioner, Movant-Intervenors, and the Senate Amici, collectively, more time in total than the Court allots to Respondent and Intervenor International Brotherhood of Teamsters Local 760, collectively; and (3) Intervenor Teamsters Local 760 does not oppose the Senate Amici’s motion, provided that an equal amount of total argument time is allotted to Petitioner, Movant Intervenors, and the Senate Amici, collectively, and to Respondent and Intervenor Teamsters Local 760, collectively.

1. The Senate Amici’s participation in oral argument is warranted in light of their unique institutional interest in the Court’s resolution of the constitutional question of the legality of the January 4 appointments and the arguments they bring to bear on that question. As members of the Senate, amici have an unparalleled stake in preserving the chamber’s constitutional authority to govern its own proceedings—including the authority to determine when and how to hold sessions. Indeed, unlike Petitioner, Movant-Intervenors, and their other amici, the Senate

Amici's primary submission—explained in detail in the brief they have submitted—is that the Court can and should hold the January 4 appointments invalid on that basis alone. *See* Br. for Amici Curiae Senate Republican Leader Mitch McConnell et al. 13-22 (Sept. 26, 2012). No other party has the same interest in the Court's determination of that issue—and in its resolution of the case *on that basis*—or can offer the same perspective on the adverse consequences for the separation of powers that the Executive's expansive theory invites that the Senate Amici, by virtue of their unique institutional responsibilities and extensive experience serving in the chamber, can provide.

The Senate Amici also have an unmatched interest in defending the chamber's constitutionally prescribed role in the appointments process against the Executive's latest encroachments. The President made the January 4 appointments in an overt attempt to deprive the Senate of its ability to review and reject his nominations. *See* 2012 DAILY COMP. PRES. DOCS. No. 00003, at 3 (Jan. 4, 2012) (“I refuse to take no for an answer”). Particularly in light of Senate rules and practices providing members of the minority party a meaningful role in the chamber's consideration of appointments, the Senate Amici have a powerful interest in ensuring that the Executive's assertion of a unilateral power to appoint federal officers—a power that the Framers deliberately withheld—is repudiated.

By participating in oral argument, the Senate Amici could significantly assist the Court's consideration of these constitutional issues. For example, as the briefing to date reflects, one important component of the question presented is the Senate's longstanding practice of convening pro forma sessions for a variety of constitutional, statutory, and legislative purposes—sessions that the Executive has heretofore acknowledged as valid, when it suited the Executive's interests. The Senate Amici can provide distinct perspective and insight regarding that practice and other aspects of Senate procedure that will aid the Court in considering these issues.

2. In keeping with its well-established practice of permitting amici to participate in oral argument where they have a distinct and significant interest in the case,¹ this Court, like the Supreme Court, has permitted members of Congress to participate in oral argument where a chamber's institutional interests were at stake. *See, e.g., The Pocket Veto Case*, 279 U.S. 655, 673 (1929) (“[A]t the

¹ *See, e.g., Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1321 (D.C. Cir. 2012); *Point Park Univ. v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1337 (D.C. Cir. 2002); *United Food & Commercial Workers, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 293 (D.C. Cir. 1996); *cf. Renne v. Geary*, 501 U.S. 312, 314 (1991) (counsel for California Democratic Party permitted to argue as amicus in suit by others challenging state constitutional provision banning parties from endorsing candidates for nonpartisan offices).

request of the Committee on the Judiciary of the House of Representatives, we granted Mr. Sumners, a member of that Committee, leave to appear as amicus curiae. He has aided us by a comprehensive and forcible presentation of arguments against the conclusion of the court below.”); *United States v. Rose*, 28 F.3d 181, 182 (D.C. Cir. 1994) (permitting counsel for Speaker of the House and Bipartisan Leadership Group of the House of Representatives to present oral argument as amici in case implicating Speech or Debate Clause); *see also Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 951 (D.C. Cir. 1998) (permitting counsel for National Republican Senatorial Committee to argue in case involving challenges to campaign donations). It should do the same here.

* * *

Accordingly, the Senate Amici respectfully request that the Court grant them leave to participate through counsel in the oral argument in this case and allot them 10 minutes of argument time to address the recess-appointments issues. Amici request that this time be granted in addition to, and not deducted from, the time to which Petitioner and Movant-Intervenors collectively would otherwise be entitled.

CONCLUSION

For the foregoing reasons, the Senate Amici respectfully request that their motion to participate in oral argument be granted.

Dated: October 18, 2012

Respectfully submitted,

/s/ Miguel A. Estrada

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2012, I electronically filed the foregoing Motion for Leave to Participate in Oral Argument with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system, which accomplished service on the following counsel this same day:

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