No. 14-2051(L)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HUNTINGTON INGALLS INCORPORATED,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,
Intervenor.

On Petition For Review And Cross-Application For Enforcement Of An Order Of The National Labor Relations Board

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER/ CROSS-RESPONDENT AND URGING REVERSAL

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20001
(202) 463-5337

Noel J. Francisco
Counsel of Record
James M. Burnham
Sarah A. Hunger
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
njfrancisco@jonesday.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The undersigned certifies that the Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. It is not a publicly held corporation. The Chamber has no parent corporation, and no corporation or other publicly held entity has 10% or greater ownership in the Chamber. No publicly held corporation has a direct financial interest in the outcome of this litigation.

Dated: January 12, 2015

/s/ Noel J. Francisco
Noel J. Francisco

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are subject to the National Labor Relations Act ("NLRA"), the statute at the heart of this case. They devote extensive resources to developing practices and programs designed to comply with the NLRA, and they are subject to proceedings before the National Labor Relations Board (the "Board"). It is vitally important to those members—many of whom have large, nationwide workforces—that the basic principle of finality of judgments is preserved. These companies routinely make major business decisions in reliance on the decisions of the Board and the courts being final. The Chamber and its members thus have a strong interest in the proper resolution this case.

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[1] All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund to the preparation or submission of this brief.

The Chamber, moreover, has a particular interest in this case given the role that it played in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In that case, the Chamber initially moved to intervene in the proceedings before the United States Court of Appeals for the D.C. Circuit[2] and ultimately attorneys of the U.S. Chamber Litigation Center (previously the National Chamber Litigation Center) served as co-counsel to Noel Canning in the United States Supreme Court. The Chamber's central role in eliminating the uncertainty that clouded the Board in light of the recess-appointments gives it an especially acute interest in combating the uncertainty the Board's desired finality exception would create here.

[2] At the same time it issued its decision finding for Noel Canning, the D.C. Circuit dismissed the Chamber's petition for leave to intervene as moot. *Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

SUMMARY OF THE ARGUMENT

The finality of judgments is a cornerstone of our legal system. It is the reason the Federal Rules of Civil Procedure forbid reopening final judgments after one year, Fed. R. Civ. P. 60(c)(1), it is the "predicate" of bedrock doctrines like res judicata, *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 328 n.31 (5th Cir. 2006), and it is the reason why just last month the Supreme Court held that Federal Rule of Evidence 606(b) generally precludes reopening a judgment based on jurors' testimony about their deliberations, even if the testimony reveals that a juror lied during voir dire, *see Warger v. Shauers*, 135 S. Ct. 521, 524 (2014). Against all this, the Board comes to this Court asking it to create a new exception to the finality of its decisions that enables the Board to unilaterally recapture jurisdiction over matters that this Court has definitively resolved whenever the Board concludes that the Court's resolution was not on the "merits." The Board cites no legal basis for this requested exception and the Court should reject it.

The NLRA makes clear that this Court obtains exclusive jurisdiction over Board proceedings the moment that a petition for review or a petition for enforcement is filed. Just as a district court cannot revise its decisions once the losing litigant has appealed, the Board cannot rethink or reconsider its orders once review proceedings in an appellate court have commenced. That is what the NLRA means when it specifies that this Court's jurisdiction "shall be exclusive." 29 U.S.C. § 160(e).

Consistent with that straightforward directive, this Court has already held, in a decision that is controlling here, that the Board does not regain jurisdiction over a proceeding unless and until the Court remands back to the Board. As this Court explained, when it denies "the Board's request to enforce its bargaining order," it "terminat[es] all administrative proceedings relating to the case." *NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26 (4th Cir. 1996). That makes sense, because otherwise litigants would face "endless rounds of piecemeal litigation" and the Supreme Court would have difficulty "review[ing] final decisions of this court." *Id.*

The Board seeks to evade these settled principles by claiming that this Court secretly included a remand in its decision vacating the Board's order without remanding it. This argument has no basis in law or common sense. As for law, this Court has always *said* it is remanding to the Board when it *wants* to remand a case to the Board. Its failure to include an explicit remand here means that no such remand exists. Nor would implying a remand into this Court's disposition make sense, particularly given that the Court denied the Board's request for rehearing its decision specifically to include a remand in the judgment. Order, *Huntington Ingalls Inc. v. NLRB*, No. 12-2000 (4th Cir. Sept. 5, 2013). This Court was obviously not adopting the Board's argument by denying its request.

The Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), also does not help the Board. The Court's opinion in that case did not somehow effect a nationwide remand of all Board decisions rendered invalid by its holding that

President Obama's purported "recess" appointments to the Board exceeded his constitutional authority. To the contrary, even in the context of that specific case, the Court merely affirmed the judgment of the D.C. Circuit, which had denied the Board's petition for enforcement and vacated the Board's order without remanding. *See Noel Canning*, 134 S. Ct. at 2578; *Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

Finally, adopting the Board's rule would create enormous uncertainty regarding the finality of judicial decisions—certainty that is a vital component of business planning and economic growth. The Board's proposed rule would allow it to interfere with ongoing disputes and retroactively amend final judgments with which it disagrees. Without finality, companies cannot make long-term business decisions—such as expansion plans, hiring, and firing—and employees cannot rely on awards that they receive or employment that they have procured.

For all these reasons and those set forth in Huntington Ingalls Incorporated's brief, the Court should reject the Board's attempted arrogation of the power to reopen this Court's final judgments whenever the Board determines that a denial of enforcement was not *really* on the merits. Finality is in everyone's interest. All litigants with business before the Board will ultimately benefit from this Court's strict enforcement of this basic legal rule.

ARGUMENT

I. Under Section 10(e) Of The National Labor Relations Act, The Board Lacked Jurisdiction To Enter The Order At Issue In This Case.

The NLRA provides that when the Board applies for enforcement of its orders "the jurisdiction of the court shall be exclusive," and the court's "judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court." 29 U.S.C. § 160(e). The Board's decision ignores these simple directives, creating a residual-jurisdiction exception that, if accepted, would mean that final judgments of this Court are not really final. *Huntington Ingalls Inc.*, 361 NLRB 64 (2014). This Court possessed exclusive jurisdiction over this case when it entered final judgment. The Board cannot—as it has attempted to do—reopen that final judgment, issue a new decision in a terminated case, and then demand a second shot at obtaining enforcement. To the contrary, the NLRA makes clear that the Board's only option is to begin again anew.

A. This Court Obtained Exclusive Jurisdiction Over The Action Once The Board Filed Its Petition For Enforcement.

Section 10(e) of the NLRA does not mince words. It specifies that once the Board files its findings with a Court of Appeals for enforcement, "the jurisdiction of the court shall be exclusive." 29 U.S.C. § 160(e). Once that happens, "the Board no longer has jurisdiction over [the] case and *may not revive* the" underlying petition. *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, *20 n.3 (4th Cir. 1997) (per curiam) (emphasis added); *see also Int'l Union of Mine, Mill & Smelter Workers, Locals No.*

15 v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 342 (1945) ("There is no question that the [NLRA] intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement."). Indeed, "'[a]bsent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court.'" *Lundy*, 81 F.3d at 26 (quoting *George Banta Co., Inc. v. NLRB*, 686 F.2d 10, 16 (D.C. Cir. 1982), *cert. denied,* 460 U.S. 1082 (1983)); *see also Beverly Health & Rehab Services, Inc.*, 120 F.3d 262; *Service Employees Int'l Union Local 250 AFL-CIO v. NLRB*, 640 F.2d 1042, 1043-46 (9th Cir. 1981) (Kennedy, J.). That makes sense, because otherwise the Board could continuously revise its order throughout the appellate process, making it impossible for the parties to effectively litigate the order's validity, or for the court to effectively review it.

B. The National Labor Relations Act Does Not Give The Board Jurisdiction Absent A Remand.

In addition to vesting "exclusive" jurisdiction in the courts, Section 10(e) of the NLRA provides that when the Board applies for enforcement of its findings to a court, the court's "judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court." 29 U.S.C. § 160(e). Because these decrees are "to have all the qualities of any other decree entered in a litigated cause upon full hearing," *Lundy*, 81 F.3d at 26 (citing *Eagle-Picher*, 325 U.S. at 339), the Board does not have authority to displace this Court's final judgment with a reconsidered

order. But that is precisely what the Board has done here. Its claim that it can "consider[] the case again and issue[] a new decision," *Huntington Ingalls Inc.*, 361 NLRB at *2, conflicts directly with decisions of the Supreme Court and this Court.

The Supreme Court has already foreclosed the Board from reopening cases, in whole or in part, where final judgment was entered. In *Eagle-Picher*—a case addressing whether the Board is entitled to have all final judgments remanded—the Court emphatically rejected the suggestion that "although the court has entered its decree, the Board may resume jurisdiction in the same case when it pleases, disregarding the court's decree." 325 U.S. at 343. Forbidding this "peculiar" practice was necessary to "prevent interference with the court while it is deliberating to determine what its decree shall be, but allow[] the decree to be ignored after it is entered." *Id.* *Eagle-Picher* likewise repudiated the notion that the NLRA enables the Board to reconsider a case in part, concluding that "nothing in the [NLRA]" indicates that these decrees are "dual in character; part of it final and part of it subject to vacation and reexamination by the Board . . . regardless of the view the court holds as to the propriety of such vacation." *Id.* at 343-44; *see also, e.g.*, *Ford Motor Co. v. NLRB*, 305 U.S. 364, 368 (1939) ("The authority conferred upon the Board . . . ended with the filing in court of the transcript of record.").

This Court, too, has precluded the Board from the unauthorized reopening of a final judgment. In *Lundy*, this Court had to determine whether an earlier order it had entered included a remand to the Board for further consideration. 81 F.3d at 26. As

here, the Board interpreted the order denying enforcement as including an implicit remand and sua sponte revived its proceedings. *Id.* This Court rejected that approach, explaining that when it denied "the Board's request to enforce its bargaining order," it "terminat[ed] all administrative proceedings relating to the case." *Id.*; *see also, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (recognizing that "the scheme of the [NLRA] contemplates that when the record has been made and is finally submitted for action by the Board the judgment shall be final"). Were things otherwise, this Court explained, litigants would face "endless rounds of piecemeal litigation" and the Supreme Court would have difficulty "review[ing] final decisions of this court." *Lundy*, 81 F.3d at 26. That decision is dispositive here. *See, e.g.*, *id.*; *see also Beverly Health & Rehab. Servs., Inc.*, 120 F.3d at *20 n.3 ("In accordance with our decision in [*Lundy*], the Board no longer has jurisdiction over this case and may not revive the representation petition that is the subject of this decision.").

The Board's claim to perpetual jurisdiction to revise orders dissolved on so-called "non-merits" bases could only be correct, moreover, if the judicial decrees in NLRA petitions were different from the judicial decrees issued in every other context. But the Supreme Court has already rejected that distinction—declining to exempt

NLRA cases from standard finality principles and holding that judicial decrees in this context have the same characteristics of "a decree of a court entered in a judicial proceeding." *Eagle-Picher*, 325 U.S. at 343; *see also, e.g.*, *Lundy*, 81 F.3d at 26 (decrees entered in NLRA cases "have all the qualities of any other decree entered in a litigated cause upon a full hearing"); *W.L. Miller Co.*, 988 F.2d at 837 ("*Eagle-Picher* makes clear that with the issuance of our opinion and judgment, and expiration of the time for certiorari, the dispute was finally adjudicated."). Finality of litigation is "an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation." *Eagle-Picher*, 325 U.S. at 340. Parties in NLRA proceedings are "entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them." *Id.* "[T]here must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction." *Id.* at 341. Those fundamental legal rules apply as fully in this case as they did in *Eagle-Picher*.

C. Section 10(e) Does Not Contain Any Implied Jurisdictional Exceptions.

Nor is there, as the Board claims, an implicit exception to these jurisdictional limits for situations where "no validly constituted Board has ruled on . . . [a] motion." *Huntington Ingalls Inc.*, 361 NLRB at *2. It is a cardinal rule of statutory construction that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-24

(1992). Where Congress has not seen fit to include an exception, there is none. This principle applies fully to supposed implied exceptions for reconsideration. *See, e.g.*, *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 325-28 (1961) (rejecting an implied exception to the Federal Aviation Act); *Case v. Bowles*, 327 U.S. 92, 98-100 (1946) (rejecting an implied exception to agricultural price controls for states).

In *Civil Aeronautics Board*, for example, the Court decided whether the Civil Aeronautics Board could "alter, without formal notice or hearing, a certificate of public convenience and necessity once that certificate has gone into effect." 367 U.S. at 321. Recognizing that "the Board is entirely a creature of Congress," the Court explained that "the determinative question is not what the Board thinks it should do but what Congress has said it can do." *Id.* at 322. Once viewed in that light, the Court reasoned, the "proposition becomes clear beyond question," as "Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies." *Id.* Because the Court's "review of these statutes reveals a wide variety of detailed provisions concerning reconsideration," it concluded that Congress knew how to craft varying reconsideration provisions and that it thus knowingly chose the scheme outlined in the plain text of the statute. *Id.* The Court therefore rejected the Civil Aeronautics Board's request to read an implied exception into the statute.

The Court made a similar point in *Eagle-Picher,* where it distinguished the NLRA from the statute governing the Federal Trade Commission. 325 U.S. at 342.

The FTC's organic statute, the Court reasoned, "specifically allows the Commission to modify its order after it has become final." *Id.* The NLRA, by contrast, does not afford the Board such power. *Id.* That difference means "[t]here is *no question* that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement." *Id.* (emphasis added).

It is thus unsurprising that the circuit courts that have addressed the issue have overwhelmingly declined to read an implied exception into the NLRA. This Court, for example, has followed the D.C. Circuit in *George Banta* in holding that "[a]bsent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court." *Lundy*, 81 F.3d at 26 (internal quotation marks omitted); *see also Beverly Health & Rehab Servs., Inc.*, 120 F.3d at 262. Likewise, the Ninth Circuit in *SEIU Local 250* rejected the claim that the Board retained jurisdiction once the court had ruled and issued a decision without remand. 640 F.2d at 1045 (Kennedy, J.). As with this Court's decision in *Lundy*, the Ninth Circuit analyzed the statutory text, reasoning: "*it is plain* that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board, the judgment 'shall be final.'" *SEIU Local 250*, 640 F.2d at 1045 (Kennedy, J.) (emphasis added). Finally, the Eighth Circuit in *W.L. Miller Co.* declined to adopt an implied exception to the general rule that "[t]he Board ha[s] no jurisdiction to modify the remedy after judicial enforcement." 988 F.2d at 837.

D. The National Labor Relations Act Thus Divests The Board Of Jurisdiction To Issue The Order In This Case.

Despite these clear statutory limitations on the Board's jurisdiction, it asserted jurisdiction here (and in other similar cases) to address a motion that it adjudicated several years ago, sought enforcement of shortly thereafter, and lost when this Court entered a final judgment denying enforcement. Even though the Court denied enforcement and did not remand for further proceedings, the Board determined that "[t]he motion is . . . still pending before the Board" because this Court's "denial of enforcement" was based upon its "conclusion that the January 2012 appointments were invalid," and "was not based on the merits of the unfair labor practice findings," *Huntington Ingalls Inc.*, 361 NLRB at *2—a "non-merits denial" exception that has no basis in the NLRA's statutory text or any decision of this Court. *See also, e.g.*, *Noel Canning*, 361 NLRB (2014); *Enterprise Leasing Co. Se., LLC*, 361 NLRB (2014).

The Board is wrong. There is no question that the Board petitioned this Court for an enforcement of its findings on August 30, 2012. Application for Enforcement of Agency Order, *NLRB v. Huntington Ingalls Inc.*, No. 12-2065 (4th Cir. Aug. 30, 2012). That triggered Section 10(e), which vests "exclusive" jurisdiction over the case in this Court. *Lundy*, 81 F.3d at 26. Because this Court obtained exclusive jurisdiction and since it never remanded to the Board for further proceedings, there is no basis for the Board claiming jurisdiction now. It is that simple.

Moreover, enforcing this basic dictate of the NLRA does not leave the Board without recourse to regain jurisdiction or modify its initial findings, if it so desires. To the contrary, once "the case has come under the jurisdiction of the court," the Board "may apply to the court for remand," as may any party before the court. *Eagle-Picher*, 325 U.S. at 341; *see also Ford Motor Co.*, 305 U.S. at 370 ("Considering the scope and purpose of the jurisdiction of the court in a proceeding under § 10(e), and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure."). The Board may also "apply to the court for leave to adduce additional evidence . . . before the Board" if it determines that such evidence is "material." 29 U.S.C. § 160(e). Should the court agree and allow the Board to take additional evidence, the Board "may modify its findings as to the facts, or make new findings," and file these findings with the court for its consideration. *Id.* Finally, the Board may seek review of an unfavorable determination by petitioning the Supreme Court for certiorari. *Id.* What the Board may not do, however, is ignore this Court's judgment, unilaterally assert jurisdiction, and proceed to re-decide a terminated case. As the Supreme Court has explained, the NLRA forbids the Board from "merely wait[ing] until the 'final' decree is entered and then proceed[ing] to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order." *Eagle-Picher*, 325 U.S. at 341. There is thus no reason to depart in this case from "the firm and unvarying practice" of the courts "to render no judgments not binding and conclusive on the parties and none that are

subject to later review or alteration by administrative action." *Chicago & S. Air Lines*, 333 U.S. at 113-14.

II. The Court Did Not Remand Any Part Of This Case To The Board.

The Board further attempts to evade the plain language of the NLRA by claiming that the "import" of this Court's order denying enforcement, "along with the Supreme Court's *Noel Canning* decision," was to somehow remand the merits issues to the Board for reconsideration. *Huntington Ingalls Inc.*, 361 NLRB at *2. Once again, the Board is wrong. First, this Court did not remand this proceeding—neither expressly nor impliedly nor through its unspoken "import." In fact, the Court specifically *declined* the Board's request to amend its opinion to include a remand to the Board for reconsideration. Order, *Huntington Ingalls Inc. v. NLRB*, No. 12-2000 (4th Cir. Sept. 5, 2013). Likewise, the Supreme Court's decision in *Noel Canning* neither instructed the Board to disregard the finality of its orders in other cases, nor created an exception allowing the Board to reopen its proceedings absent an express remand. The Board's arguments thus fail on this front too.

A. This Court's Final Judgment Denied Enforcement Without Remand.

This Court has already concluded that when it denies enforcement of a Board order without a remand, the case is closed in all respects. In *Lundy*, this Court was asked to clarify the meaning of an opinion that simply stated: "we deny enforcement of the Board's order." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995)

supplemented, 81 F.3d 25 (4th Cir. 1996). In doing so, the Court rejected any implication that its holding included an implied or inherent remand and "reiterate[d]" its "earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects." *Lundy*, 81 F.3d at 26-27. Because this Court employed the same language—"enforcement denied"—in this case, in the exact same context, *NLRB v. Enterprise Leasing Co. Se., LLC*, 722 F.3d 609, 660 (4th Cir. 2013), it can only be understood as having the same meaning.

Indeed, when this Court denies enforcement and remands to the Board for further proceedings, it says so plainly. In *Ultrasound Western Constructors v. NLRB*, 18 F.3d 251, 259 (4th Cir. 1994), for example, this Court entered the following disposition: "Petition for review granted; petition for enforcement denied *and case remanded for further proceedings*." And in *NLRB v. Maidsville Coal Co.*, 693 F.2d 1119, 1120 (4th Cir. 1982), this Court "decline[d] enforcement and *remand[ed] the cause to the Board for further proceedings* consistent with this opinion." *See also Cedar Coal Co. v. NLRB*, 678 F.2d 1197, 1199 (4th Cir. 1982) ("We deny enforcement and remand for further proceedings."). In other words, if this Court intended the Board to address "the merits of the unfair labor practice findings," *Huntington Ingalls Inc.*, 361 NLRB at *2, on remand from its 2013 decision in this case, it would have followed its usual course and said so.

The Board knows this, which is why it availed itself of the available remedy for a party that is "dissatisfied" with a court's judgment—to apply "to the issuing court

for correction or interpretation, or seek appellate review." *SEIU Local 250*, 640 F.2d at 1046 (Kennedy, J.) (citing *Eagle-Picher*, 325 U.S. at 339). It thus asked this Court in a petition for rehearing to modify its judgment from denying enforcement to denying enforcement and remanding to the Board. This Court declined to do so, *see* Order, *Huntington Ingalls Inc. v. NLRB*, No. 12-2000 (4th Cir. Sept. 5, 2013), and the Supreme Court denied the Board's petition for certiorari, *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, 134 S. Ct. 2902 (2014). Now that the Board has called "the alleged error . . . to [the Court's] attention in [a] rehearing petition, [ ] when the court declined to correct it, its judgment became final." *SEIU Local 250*, 640 F.2d at 1046 (Kennedy, J.).

Seeking to evade that outcome, the Board speculates that in *denying* the Board's request, this Court must have assumed that a properly constituted Board would come to the same conclusion and, therefore, implicitly must have endorsed the Board's proffered analysis. It claims that "no inference can be drawn that the denial was inconsistent with" what it calls the "clear import" of the "order denying enforcement," which the Board then takes to mean that this Court was "anticipating the possibility of issuance of new Board orders." *Huntington Ingalls Inc.*, 361 NLRB at *2.

That is absurd. This Court previously concluded only that the Board was wholly without authority to act, and it made no determination either way on the underlying labor-law issues. The simple reality is that when this Court declines to

modify its opinion, that means the modification is not part of the opinion. The Board cannot twist its defeat into a *sub silentio* adoption of its position; and its counter-intuitive interpretation of this Court's opinion is entitled to no deference. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of [the Court's] decisions."), *overturned on other grounds due to legislative action*, Pub. L. No. 111-2 (Jan. 29, 2009). That is especially so here, where the Board's proffered interpretation "find[s] no support in the statute and [is] inconsistent with [this Court's] precedents." *Ledbetter*, 550 U.S. at 642.

B. The Supreme Court's Decision In *Noel Canning* Did Not Have The Effect Of Remanding All Final Judgments In Other Affected Cases To The Board.

The Board also asserts that under the "clear import" of *Noel Canning*—*i.e.*, that "no validly constituted Board has ruled on the General Counsel's motion for summary judgment"—the "motion is still pending before the Board." *Huntington Ingalls Inc.*, 361 NLRB at *2. But neither the Supreme Court nor the D.C. Circuit remanded the case to the Board. *Noel Canning*, 134 S. Ct. at 2578; *Noel Canning v. NLRB*, 705 F.3d at 515. Rather, the Supreme Court affirmed the decision of the D.C. Circuit, which denied the Board's petition for enforcement and vacated the Board's order. *See Noel Canning*, 134 S. Ct at 2578; *Noel Canning*, 705 F.3d at 515. The Board thus had no better jurisdiction over the Petitioner in *Noel Canning* than it does over Huntington Ingalls here. Nothing in the Supreme Court's opinion even *hints* that the

Court intended (or had the power to) implicitly remand every Board decision pending in the federal appellate courts for reconsideration by a properly constituted Board.

As further support for its tortured construction of *Noel Canning*, the Board cites *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011), and *NLRB v. Domsey Trading Corp.*, 636 F. 3d 33 (2d Cir. 2011), cases in which the courts remanded decisions to the Board in light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). In *Whitesell*, the court addressed whether its prior decision "denying the NLRB's application for enforcement precludes the NLRB from reconsidering this action." 638 F.3d at 889. As discussed at length in Huntington Ingall's opening brief, *see* Pet. Op. Br. at 26-28, this case is of marginal persuasive value even in the Eighth Circuit, given that the panel failed to follow that circuit's own controlling precedent, Supreme Court authority, or the plain text of the Act. It is of no value here, where, in addition to the foregoing flaws, it is also contrary to controlling Fourth Circuit precedent. *See Lundy*, 81 F.3d at 26.

Not only that, but *Whitesell* is distinguishable, as it came to the Eighth Circuit in a different procedural posture than this one, for two reasons. *First*, the Eighth Circuit's original decision in *Whitesell* came *after* the Supreme Court's holding in *New Process Steel* that the NLRA requires three Board members for a quorum and that a quorum is required to issue valid orders. *See NLRB v. Whitesell Corp.*, 385 F. App'x 613, 614 (8th Cir. 2010) (per curiam). Here, by contrast, this Court issued its decision denying enforcement *before* the Supreme Court decided *Noel Canning*. Unlike the

Eighth Circuit's decision following *New Process Steel*, the Supreme Court's decision in *Noel Canning* and its subsequent procedural history played no role in this Court's entry of final judgment.

Second, when the Supreme Court issued its decision in *New Process Steel v. NLRB*, it explicitly "remanded" that case "for further proceedings consistent with this opinion," 560 U.S. at 688, and the Seventh Circuit likewise "remand[ed] the matter to the [Board]," *New Process Steel, L.P.*, Nos. 08-3517, 08-3518, 08-3709, 08-3859, 2010 WL 4137308, at *1 (7th Cir. Aug. 3, 2010). In affirming the D.C. Circuit's opinion in *Noel Canning*, by contrast, the Supreme Court "vacated" the Board's decision but did *not* remand it. *See Noel Canning*, 134 S. Ct at 2578; *Noel Canning*, 705 F.3d at 515. Unlike *New Process Steel*, there is nothing in *Noel Canning* that suggests a remand is required. The Board is therefore mistaken to claim that the same issue was "presented squarely" in *Whitesell. Huntington Ingalls Inc.*, 361 NLRB at *2.

The Board's cursory citation to *Domsey Trading* fails too. As with *Whitesell*, *Domsey Trading* was "initially dismissed *pursuant to* the Supreme Court's decision in *New Process Steel*." *Domsey Trading Corp.*, 636 F.3d at 34 n.1. Moreover, the Second Circuit in *Domsey* initially denied the petition as premature and thus *specifically contemplated* "further proceedings before the [Board]." *NLRB v. Domsey Trading Corp.*, 383 F. App'x 46, 47 (2d Cir. 2010). Here, by contrast, no remand was contemplated in this Court's initial opinion and no remand was added at the Board's request on rehearing.

In short, what happened in the Eighth and Second Circuits after *New Process Steel* does not control what happens in this Circuit after *Noel Canning*. The Supreme Court's failure to remand in *Noel Canning*, this Court's failure to remand in this case, the relevant statutory text, the controlling precedent, and the Board's inability to cite any authority providing it with an automatic remand make this clear. This Court should therefore reject the Board's power grab and grant the Petition for Review.

III. The Board's Rule Would Undermine The Certainty Necessary For Business Planning And Economic Growth.

Finally, adopting the Board's rule would create significant uncertainty regarding the finality of judicial decisions—certainty that is a vital component of business planning and economic growth. *See Arrow Auto. Indus., Inc. v. NLRB*, 853 F.2d 223, 231-32 (4th Cir. 1988) (explaining the "need for certainty in the conduct of business affairs"). The Supreme Court has long recognized that the finality of decisions is an essential component of long-term business planning by companies subject to Board oversight. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981) (noting that a company "must have some degree of certainty beforehand as to when it may proceed to reach decisions"). These businesses would otherwise be in "fear of later evaluations labeling its conduct an unfair labor practice"—a contingency that would make it difficult for them to respond to labor rulings, manage their workforces, and plan for the future without fear of re-litigation over stale disputes. *Id.*; *see also*

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 168 (1983) (describing the "relatively rapid final resolution of labor disputes favored by federal law").

This principle is especially important in the labor context. The Board adjudicates disputes between employers and their often-sprawling workforces. The disputes the Board adjudicates frequently involve matters of compensation as well as other important terms and conditions of employment. Once final judgment is entered in Board adjudication, employers and employees move quickly to implement that judgment—*e.g.*, by paying back payments due, adjusting future compensation as needed, and altering the conditions of the workplace if necessary. Knowing that those judgments are, in fact, final, is essential to making this system work. After all, employers will not be able to hire and fire appropriately or properly manage their workforces if there is a looming specter of re-litigation that might require them to make more payments or additional, costly changes to their employment policies. As for employees, they, like any individuals managing household budgets, need to know that any back pay they might receive following a final judgment is theirs to keep and will not be potentially subject to recapture by the employer in some future re-litigation before the Board. The legal arena the Board oversees thus exemplifies the basic purposes of finality. *See, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (finality provides "'there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties'" (quoting *Baldwin v. Traveling*

Men's Assn., 283 U.S. 522, 525 (1931)); *BellSouth Corp. v. F.C.C.*, 96 F.3d 849, 851 (6th Cir. 1996) (once final judgment is entered, "the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy").

By cleaving an exception of uncertain scope—and with no clear temporal limit—into this foundational doctrine, the Board's proposed rule would undermine these values by enabling the Board to perpetuate disputes and retroactively amend final judgments. Such uncertainty would seriously interfere with the "stability of investment" and "security" that companies require in order to effectuate a business plan and pursue economic growth. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring); *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 214-15 (1990) (Stevens, J., dissenting) (explaining the dangers of "jolting the expectations of parties"). Businesses and their employees would be faced with the prospect of "elaborate," "extensive and complex," re-litigation "of a challenged business practice," *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 (1982), disabling the parties from moving past their dispute. "At some point, litigation must come to an end," *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011), and the simple reality is that win or lose, litigants need to know the final result so they can stop fighting about the past and begin planning for the future. The Board's proposed exception would leave final judgments up for grabs. This Court should decline to endorse it.

CONCLUSION

For these reasons, and those raised in Huntington Ingalls's opening brief, the Court should grant Huntington Ingalls, Incorporated's Petition for Review.

Dated: January 12, 2015

Respectfully submitted,

/s/ Noel J. Francisco

Noel J. Francisco
Counsel of Record
James M. Burnham
Sarah A. Hunger
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
njfrancisco@jonesday.com

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20001
(202) 463-5337

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,041 words, excluding the portions exempted under F. R. App. P. 32(a)(7)(B)(iii).

This brief has been prepared in Microsoft Office Word 2007 using the proportionally spaced typeface "Garamond" in 14 point, in conformity with Rules 32(a)(5) and 32(a)(6).

Dated: January 12, 2015

/s/ Noel J. Francisco
Noel J. Francisco

Counsel for Amicus Curiae

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I certify that on January 12, 2015, I caused the foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

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/s/ Noel J. Francisco
Noel J. Francisco

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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