Nos. 12-1514(L), 12-2000, 12-2065

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner/Cross-Respondent,

v.

ENTERPRISE LEASING COMPANY SOUTHEAST, LLC
Respondent/Cross-Petitioner.

HUNTINGTON INGALLS INCORPORATED,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
Intervenor.

ON PETITION FOR REVIEW/APPLICATIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

PETITION OF HUNTINGTON INGALLS INCORPORATED FOR REHEARING OR REHEARING EN BANC

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STATEMENT OF PURPOSE AND DISCUSSION[1]

Huntington Ingalls Incorporated ("HII" or the "Company") seeks rehearing of a ruling in the panel's decision. Pursuant to Local Rule 40(b), the undersigned counsel avers that the panel overlooked material legal matters in connection with that ruling. The ruling conflicts with decisions of this Court and other Courts of Appeals, conflicts that were not addressed in the panel's opinion. The holding at issue further presents questions of exceptional importance. Rehearing, or in the alternative consideration by the full Court, is necessary to secure and maintain uniformity of the Court's decisions.

In particular, HII seeks rehearing of the panel's ruling that it had to decide HII's challenge to the merits of a National Labor Relations Board ("Board") order that found HII violated the National Labor Relations Act ("NLRA") before it could address the Company's challenge to the Board's jurisdiction to issue the order. The panel held the constitutional avoidance doctrine mandated that approach because HII's jurisdictional challenge raised a "constitutional" issue, namely whether the Board lacked the quorum necessary under Section 153(b) of the NLRA, 29 U.S.C. § 153(b), to issue its ruling because the appointments of three of

[1] HII uses the consolidated caption on this case because the Court consolidated HII's case with Enterprise Leasing's case for purposes of oral argument, and HII is advised that the Clerk's office still reflects the cases as consolidated. However, HII files this petition for purposes of its case alone and seeks relief in just its case.

its members violated the Recess Appointments Clause of the Constitution. Slip op. at 7-8. This was error, and the portion of the panel's opinion addressing the substantive merits of the Board's order should be withdrawn for the reasons that follow.

Until challenges to the President's January 4, 2012 appointments to the Board began to be litigated, this issue had received little attention from the courts. As the circuits began to rule, a split developed on the question whether constitutional avoidance requires that a court resolve the merits of an agency adjudication before resolving a parallel challenge to the agency's power to have issued its decision, where that challenge implicates a constitutional law question. Like the panel, the District of Columbia Circuit recently held it must address the merits of a Board unfair labor practice order first, sidestepping on constitutional avoidance grounds the employer's identical Recess Appointments Clause challenge to the Board's quorum in that case. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

The Third Circuit did the opposite. In *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013), it addressed the same quorum challenge head on and in advance of the merits, holding that a challenge to the Board's statutory composition is a "threshold" question that goes to the agency's power to act and that must be considered before the underlying merits of its order. *Id.* at 210-13.

The panel's decision does not address this split. It overlooks that the Third Circuit took an opposite view and does not address that court's authorities and reasoning. Instead, the panel's discussion of the issue consists of the following sentence: "Before we can address [HII's] constitutional arguments, we must first attempt to resolve these cases on non-constitutional grounds, if possible." Slip. op. at 7. The sentence merely states the panel's conclusion. It does not explain that conclusion. More importantly, it does not reconcile constitutional avoidance with the need to decide threshold challenges to the agency's authority first.

To be sure, the two constitutional avoidance cases cited by the panel support the notion that a court generally should avoid deciding a case on constitutional grounds if an alternative ground exists on which to resolve the case. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936). But those citations merely recount the constitutional avoidance doctrine in general terms. Neither applies the doctrine where there is a threshold challenge to an agency's adjudicatory jurisdiction in addition to a merits-based challenge to the agency's decision. Nor does either reflect the fact that constitutional avoidance is a discretionary principle and is not required to be applied rigidly in every circumstance. *See, e.g., Pearson v. Callahan*, 555 U.S. 223 (2009) (courts not required to apply constitutional avoidance when addressing sovereign immunity challenges); *Blum v. Bacon*, 457 U.S. 132 (1982) (preemption

analysis not subject to avoidance even though it involves interpretation of Supremacy Clause).

With respect, the Third Circuit's decision in *New Vista* to resolve threshold jurisdictional issues first—even though they entail constitutional issues—is the correct approach in this circumstance and should have been followed by the panel. As here, the Board found in *New Vista* that the employer violated the NLRA by refusing to bargain with a union certified by the Board in a prior representation proceeding as representative of the employer's licensed practical nurses. The employer raised three challenges, two concerning whether the Board had a quorum under Section 153(b) and one concerning the propriety of the bargaining unit. One of the employer's Section 153(b) challenges was based on the same reading of the Recess Appointments Clause advocated by HII. The other was a non-constitutional one based on the date one of the Board members left office.

The Third Circuit explained initially that "'an administrative agency,' like an Article III court, 'is a tribunal of limited jurisdiction'" and has "only such adjudicatory jurisdiction as is conferred on them by statute." *New Vista*, 719 F.3d at 211 (quoting *Penthey Ltd. v. Gov't of Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966)). It further explained that the employer's challenges to the Board's quorum were threshold challenges that went "directly to the Board's power to hear a case."

New Vista, 719 F.3d at 244. As a consequence, the Third Circuit proceeded to take up those challenges before the underlying merits of the case.

Acknowledging its "'longstanding practice of avoiding constitutional questions in cases where we can reach a decision upon other grounds,'" the Third Circuit first considered "New Vista's nonconstitutional argument that the [Board] Order was issued by a delegee group of fewer than three members." *Id.* at 213 (citation omitted). The court concluded the employer's nonconstitutional quorum challenge had no merit. It then proceeded to the Recess Appointments Clause challenge, again before consideration of the underlying merits. Once the court concluded the Recess Appointments Clause does not allow intra-session recess appointments—the same ruling reached by the panel here—the court noted: "[W]e need not address whether the Board's substantive decision was correct." *Id*. at 244 (emphasis added).

The *New Vista* decision illustrates proper application of constitutional avoidance principles to the challenges raised in this case. The Third Circuit took up the employer's challenges to the Board's quorum at the outset, because those challenges went to the agency's power to act. As between the two, the court soundly applied the doctrine of constitutional avoidance in deciding the Recess Appointments Clause challenge only after concluding it could not find the Board lacked a quorum on the basis of the employer's nonconstitutional argument. But it

did not skip over the threshold question of the Board's composition and proceed prematurely to the merits in an attempt to avoid the employer's Recess Appointments Clause arguments.

The *New Vista* court's approach makes additional sense in light of the uniform manner in which this Court and other appellate courts treated challenges to the Board's statutory composition in the past. The last time a threshold challenge to the Board's jurisdiction was raised in this Court was in *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009). That case, like this one, involved a two-pronged challenge to an order that the Board made in an adjudicatory proceeding. One challenge contended the Board lacked the requisite quorum to have ruled in the case. The other disputed the merits of the Board's ruling. The Court addressed the issues in that order, noting that the case presented two issues: "(1) whether the Board Decision was properly issued by a two-member quorum and, if so, (2) whether the Board Decision deserves enforcement on the merits." *Narricot*, 587 F.3d at 656 (emphasis added). *See also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) (stating that "'the court is first required to decide whether the [agency] acted within the scope of [its] authority'") (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).

Narricot was one of several decisions challenging the Board's lack of a quorum that the Supreme Court reviewed in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). All of the Courts of Appeals that addressed the quorum challenges resolved in *New Process Steel* took up the question of the Board's statutory authority under Section 153(b) first when there also was a merits challenge. The Tenth Circuit in particular remarked explicitly on its obligation to take up the quorum challenge at the outset: "Before we can reach the merits of the unfair labor practice dispute, we must first determine whether [Section 153(b)] authorizes the NLRB to act with only two members." *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849, 850 (10th Cir. 2009)(emphasis added); s*ee also Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40 (1st Cir. 2009) ("The first issue raised is one of statutory interpretation of Section [153(b)]"); *Snell Island SNF LLC, v. NLRB*, 568 F.3d 410 (2d Cir. 2009) (dealing with quorum challenge first and addressing petitioner's "remaining" claim only after deciding Board could operate with two members); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 848 (7th Cir. 2009) ("We thus find that the NLRB had authority to hear the labor dispute in this case and to issue orders regarding the unfair labor practices claim . . . and proceed to the merits of the case").

The Supreme Court's ultimate decision in *New Process Steel*—that the Board cannot act without a proper delegation of three members—teaches that the

requirements of Section 153(b) of the NLRA represent a "threshold limitation," imposed by statute, on the scope of the Board's delegated powers. *Accord, Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006) (explaining that "threshold limitation[s] on a statute's scope" are jurisdictional). And as the *New Vista* court recently recognized in harmonizing its approach with the *New Process Steel* line of cases, compliance with that requirement "is a necessary condition for the Board to exercise its power to adjudicate a matter before it … [and] is therefore jurisdictional." *New Vista*, 719 F.3d at 212.

In other words, the quorum requirement, a statutory prerequisite for Board action, "goes directly to the board's 'power to hear a case,' which is exactly what jurisdictional questions relate to." *Id*. (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)). *See also Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980) (deciding quorum challenges to agency's composition on both constitutional and non-constitutional grounds before addressing merits of agency's order). Any challenge to that statutory prerequisite must be decided first, even though the reason the Board lacks a quorum implicates an interpretation of constitutional law.

Indeed, there is an especially compelling reason for adherence to that approach here since the quorum requirement arguably implicates this Court's appellate jurisdiction. Section 10(f) of the NLRA, 29 U.S.C. § 160(f), limits

appellate review to a "final order" of the Board. If the Board lacked a quorum and therefore had no authority to act, the order under review is void *ab initio*. Put plainly, the Board's order is void if the Board lacked a quorum and no "final order" exists. Of course, the Court always has jurisdiction to decide if it has jurisdiction. *Armstrong v. Armstrong*, 350 U.S. 568, 574 (1956). But the cases cited above uniformly demonstrate the Court should decide that issue first—even it implicates a constitutional question—and then stand down from any consideration of the underlying merits if the Court concludes the Board lacked adjudicatory jurisdiction and its order is not "final" as required by Section 10(f).

This approach comports with how the constitutional avoidance doctrine is applied in appeals of district court judgments. Like agencies, district courts have limited jurisdiction, and challenges to their jurisdiction must be resolved on appeal before any consideration of the merits of their judgment. This command is "inflexible and without exception." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). *Accord, e.g., Ruhrgas AG v. Marathon Oil Company,* 526 U.S. 574, 583 (1999); *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.,* 471 F.3d 544, 548 (4th Cir. 2006) (holding that it is "improper" to review issue relating to merits of a dispute "without resolving threshold questions of jurisdiction").

This is true even where the jurisdictional challenge raises a constitutional issue. A court of appeals cannot avoid the constitutional issue implicated in a jurisdictional challenge by holding that the district court erred on the merits of its judgment. It must decide the constitutional issue first. *E.g., Steel Co.,* 523 U.S. at 94 (holding that courts must decide question of plaintiff's standing—a constitutional issue affecting the court's jurisdiction—before consideration of the merits). *Accord, e.g., Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 385-86 (4th Cir. 2001).

The panel did not explain why it concluded it should follow an opposite approach from these cases. The panel's interpretation of the constitutional avoidance doctrine also overlooked the fact that the Company's quorum challenge is a threshold challenge to the Board's authority to have acted in this case. Consequently, the panel sidestepped initially a challenge that necessarily preceded consideration of the underlying merits of the Board's decision. This resulted in an opinion that reaches and rules on the merits of a decision the panel itself later held was void and *ultra vires*.

There are important reasons why the Court should address this issue now. The cases cited above—except for *New Vista*—do not purport to harmonize constitutional avoidance principles with situations involving threshold challenges to an agency's adjudicatory jurisdiction. Given the importance of this issue and

the likelihood this Court will face such challenges both in this context and others, the Court should do so. The panel—or the *en banc* Court—should make clear that constitutional avoidance does not provide the judiciary free reign to issue advisory opinions on the merits of agency decisions they later invalidate. Allowing such an approach to stand could bind inequitably the parties' hands in future related proceedings. Indeed, the Board and Intervenor have already petitioned to have this case remanded notwithstanding this Court's pronouncement the Board's order is invalid and cannot be enforced. A new, properly constituted Board—whether on remand or in an entirely new proceeding—should have the freedom to decide anew the issues in this case unconstrained by a prior order the panel itself concluded was *ultra vires* and void.

For relief, HII respectfully requests that the panel's opinion on the substance of the Board's decision that HII violated the NLRA by refusing to bargain with the Union be withdrawn.

In closing, HII notes that the Supreme Court's grant of certiorari in *NLRB v. Noel Canning*, 133 S. Ct. 2861 (June 24, 2013) does not obviate the need for this relief. The Supreme Court granted certiorari in that case on whether the Board appointments that are also at issue in this case violated the Recess Appointments Clause. The petitioner, however, did not raise any question concerning the order of decision. The Supreme Court's ruling in *Noel Canning* thus will not resolve the

issues presented by this petition although it could affect the ultimate outcome of the case if the Supreme Court reverses the D.C. Circuit's ruling on the Recess Appointments Clause issues. We also note that the Board's petition for rehearing in this case indicates the Board likely will petition the Supreme Court for certiorari in this case with a suggestion that the Supreme Court hold such a petition pending its decision in *Noel Canning*. The Board also has petitioned the Third Circuit for rehearing in *New Vista*, and the Third Circuit has stayed that petition pending the outcome of *Noel Canning*.

Thus, while HII respectfully requests that its petition be granted, alternatively the Company recognizes it may be prudent for the Court to hold this petition and its mandate in abeyance pending decision in *Noel Canning*.

Respectfully submitted,

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August 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Since all parties are represented by attorneys with active CM/ECF registrations, this will constitute service on all parties under the Court's rules.

/s/ Gregory B. Robertson