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No. 08-1457

In the Supreme Court of the United States

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 564 F.3d 840. The decisions and orders of the National Labor Relations Board (Pet. App. 26a-81a) are reported at 353 NLRB Nos. 13 and 25.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. The petition for writ of certiorari was filed on May 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(b) of the National Labor Relations Act provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. 153(b).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA), Congress sought through “the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act.” *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress “confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal,” the National Labor Relations Board (NLRB or Board). *Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 489-490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: “A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.”

National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 449, 451.¹

In 1947, Congress enacted the “Taft-Hartley Act,” which enlarged the Board’s unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board’s size from three to five members. See Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board “to delegate to any group of three or more members any or all of the powers which it may itself exercise,” and amended the quorum requirements to provide that “three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation].” *Ibid.* Since 1947, the overwhelming majority of the Board’s decisions have been issued by three-member groups constituted pursuant to the Board’s Section 3(b) delegation authority.²

¹ Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 23, 1936; August 27 until November 26, 1940; and August 28 until October 11, 1941. See *NLRB Second Annual Report* 7 (1937); *NLRB Sixth Annual Report* 7 n.1 (1942); *NLRB Seventh Annual Report* 8 n.1 (1943). Those two-member Boards issued 3 published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1386 and 28 N.L.R.B. 1-79); and 224 published decisions in 1941 (reported at 35 N.L.R.B. 24-1334 and 36 N.L.R.B. 1-44).

² See *NLRB Thirteenth Annual Report* 8-9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Report on Labor-Management Relations* Pt. 3, at 9 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov’t Operations*, 100th

2. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, Department of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had only two members. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. On December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.³ *Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F.3d 469, 471 (D.C. Cir. 2009).

Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman's statement).

³ Also on that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Section 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Minute of Board Action (Dec. 20, 2007); NLRB Press Release, *Labor Board Temporarily Delegates Litigation Authority to General Counsel: Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007).

After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the Board had delegated to the three-member group.⁴ Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.⁵

3. Petitioner New Process Steel operates four steel processing plants in the United States and one in Mexico. Pet. App. 2a. In September 2006, petitioner commenced negotiating a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (Union), which was certified as the exclusive bargaining representative for employees at petitioner's plant in Butler, Indiana. *Id.* at 2a-3a. After extensive negotiations, representatives of petitioner and the Union reached a tentative agreement. *Id.* at 3a. The Union ratified the agreement according to its procedures, and petitioner's representatives then executed it. *Id.* at 5a-6a. But after petitioner subsequently received some employee complaints about the ratification procedure used for the agreement, petitioner withdrew its recognition of the Union. *Id.* at 6a.

The Union filed an unfair labor practices charge with the NLRB on September 17, 2007. Pet. App. 6a. In De-

⁴ On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

⁵ On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See BNA, 83 *Daily Labor Rep.* AA-1, at 1. The published decisions are reported in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (82 decisions as of September 28, 2009).

ember 2007, the Board's General Counsel filed a complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by wrongfully repudiating a valid collective-bargaining agreement. Pet. App. 6a-7a, 30a. After holding a hearing, an administrative law judge (ALJ) issued a decision in May 2008, finding that petitioner violated the Act as alleged. *Id.* at 7a, 26a. Later that month, the General Counsel issued a second complaint alleging that petitioner further violated its duty to bargain by withdrawing recognition of the Union during the term of a binding contract. *Id.* at 73a. The General Counsel filed with the Board a motion for summary judgment on the second complaint in July 2008, based on petitioner's admission that it had withdrawn recognition. *Id.* at 6a-7a.

The Board issued decisions resolving both complaints in September 2008. In the first decision, the Board adopted the ALJ's finding that petitioner violated the Act by repudiating the collective-bargaining agreement, and ordered petitioner to adhere to the contract, to restore and give retroactive effect to its terms, and to make the employees whole for their resulting losses. Pet. App. 26a-27a, 67a-69a. In its second decision, the Board granted the General Counsel's motion for summary judgment and ordered petitioner to cease and desist from its unlawful withdrawal of recognition during the term of the contract, and to recognize and bargain with the Union. *Id.* at 72a-80a.

4. Petitioner filed petitions for review of the Board's orders in the United States Court of Appeals for the Seventh Circuit. The Board cross-applied for enforcement of the orders, and the court of appeals consolidated the cases. Pet. App. 7a. Petitioner challenged the authority of the two-member quorum of the delegee group

to issue the decisions and orders and also disputed the substance of the Board's unfair labor practice findings. *Id.* at 17a-18a. The court of appeals granted the Board's cross-applications for enforcement and denied petitioner's petitions for review.

Petitioner argued that the delegation clause of Section 3(b) prohibited the Board from delegating its power to a group of three members when the Board knew that the term of one of the three was about to expire. The upshot of petitioner's view, the court noted, was that "the first sentence of § 3(b) restricts the Board from acting when its membership falls below three." Pet. App. 10a. The court rejected that position, concluding that the plain language of Section 3(b) provides that the Board may act where, as here, the Board "delegated its full powers to a group of three Board members" and two of those members remain as a quorum. *Ibid.* The court reasoned:

As we read it, [Section] 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the [Board]'s delegation procedure.

Id. at 10a-11a (footnote omitted).

The court further explained that, contrary to petitioner's contention, that reading of Section 3(b) does not deprive its first sentence of meaning. "The first sentence," the court reasoned, "establishes a requirement

for delegation in the first instance, while the vacancy and quorum provisions allow the Board to proceed in the event that the terms of Board members subsequently expire.” Pet. App. 10a n.2. By contrast, the court continued, petitioner’s reading of Section 3(b) “appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.” *Ibid.*

The court of appeals also explained that its view of Section 3(b) was consistent with the legislative history of the Taft-Hartley Act, which contained no indication that Congress intended to prohibit the two-member quorum from acting in these circumstances, Pet. App. 13a-15a; with quorum principles applicable to public boards in other circumstances, *id* at 16a-17a; and with the First Circuit’s decision upholding the authority of the two-member quorum in *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009), Pet. App. 11a-12a.

On the merits, the court of appeals rejected petitioner’s challenges to the Board’s findings of unfair labor practices. Pet. App. 17a-25a.

ARGUMENT

The court of appeals correctly held that Section 3(b) of the NLRA, 29 U.S.C. 153(b), allows the NLRB to continue to function when its only two sitting members constitute a two-member quorum of a three-member group to which the Board validly delegated its powers. The NLRB agrees with petitioner, however, that review by this Court is warranted because this case presents a recurring question of substantial importance regarding the authority of the Board to act and the validity of

many of its orders, and the courts of appeals are in conflict on that question.

1. The court of appeals correctly held that the plain language of Section 3(b) of the NLRA permits the NLRB to operate with only two sitting members when four members of the Board had previously delegated the Board's full authority to a three-member group that includes the two current members. As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "any or all of the powers which it may itself exercise" to a group of three or more members; (2) a declaration that a vacancy in the Board "shall not impair" the authority of the remaining members to exercise the Board's powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board's delegation authority.

When the then-four-member Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board's powers had been lawfully delegated. Consistent with Section 3(b)'s second and third provisions identified above, those "two members" then continued to exercise the previously delegated powers, and their authority to do so was "not impair[ed]" by a vacancy in the other positions on the Board. 29 U.S.C. 153(b). The validity of the Board's actions thus follows from a straightforward reading of the Act.

Petitioner relies (Pet. 9-12) on the reasoning of the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (2009) (*Laurel Baye*), which held that the two remaining Board members may not act on behalf of the Board.⁶ The D.C. Circuit focused in *Laurel Baye* largely on the portion of Section 3(b) stating that “three members of the Board shall, at all times, constitute a quorum of the Board.” As the court read that language, the three-member quorum requirement must be satisfied at all times in order for any portion of the Board to act, “regardless of whether the Board’s authority is delegated to a group of its members.” 564 F.3d at 472. That interpretation fails to give proper weight to the modifying phrase that directly follows: “except that two members shall constitute a quorum of any group designated pursuant to [the delegation clause].” 29 U.S.C. 153(b).

The ordinary meaning of the word “except” is “with the exclusion or exception of.” *Webster’s Third New International Dictionary* 791 (1961). Thus, the ordinary meaning of the quorum provisions in Section 3(b) is that the special two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full Board. The full Board must have three or more participating members in order to take any action, including to delegate any of its powers to a group of three of its members. And that delegatee group in turn must have at least two participating members in order to exercise any of the powers delegated to it. But where, as here, the Board previously delegated all of its powers to a three-

⁶ The Board is filing a petition for a writ of certiorari in *Laurel Baye* simultaneously with the filing of its response in the instant case.

member group, any two members of that group constitute a quorum and may continue to exercise the delegated powers. The legality of such actions does not depend on whether the Board as a whole also has a quorum, because the Board has already delegated its full authority to the delegee group, which appropriately acts through a quorum of two members. See *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) (*Northeastern*).

Although the D.C. Circuit in *Laurel Baye* purported to apply the rule that a statute should be construed so that “no provision is rendered inoperative or superfluous, void or insignificant,” 564 F.3d at 472, the court in fact treated the statute as though it did not contain the word “except.” The court reasoned that “the word ‘except’ is * * * present in the statute only to indicate that the delegee group’s ability to act is measured by a different numerical value” than the larger Board’s ability to act. *Ibid.* But Congress could have accomplished that result by leaving out the word “except” altogether and instead setting forth two independent clauses or sentences, the first stating that “three members of the Board shall, at all times, constitute a quorum of the Board,” and the second stating that “two members shall constitute a quorum of any group designated pursuant to [the delegation clause].” 29 U.S.C. 153(b). Rather than doing that, Congress linked the two clauses with a comma and word “except,” which means that the special quorum rule in the second clause constitutes an exception to the general quorum rule in the first. Indeed, Congress has used the construction “at all times * * * except” in a number of statutes to accomplish exactly what it did here—to provide that a general rule should

apply at all times *except* in the instances specified in the statute. See, *e.g.*, Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328, (to be codified at) 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report * * * *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).⁷

The D.C. Circuit in *Laurel Baye* also failed to give the word “quorum” its ordinary meaning, which is “[t]he minimum number of members (usu[ally] a majority of all the members) who must be present for a deliberative assembly to legally transact business.” *Black’s Law Dictionary* 1370 (9th ed. 2009). Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business with two of its members. Under the reasoning of the *Laurel Baye* decision, however, the presence of a two-member quorum of a delegee group possessed of all the Board’s powers is never in itself sufficient to permit the legal transaction of business by that group unless there also happens to be a third sitting Board member. That reading untethers the quorum requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation* level required before

⁷ Accord 42 U.S.C. 4954 (a) (full-time commitment of VISTA volunteer “shall include a commitment to live among and at the economic level of the people served * * * *at all times* during their periods of service, *except* for authorized periods of leave”) (emphasis added); 4 U.S.C. 6, historical note; Proclamation No. 4064, 36 Fed. Reg. 12,967 (1971), (“the flags of the United States displayed at the Washington Monument are to be flown *at all times* during the night and day, *except* when the weather is inclement”) (emphasis added).

a body may take action. Under the D.C. Circuit’s reading, the full Board quorum provision in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied in order for a delegee group to act, even though the non-group members of the full Board would not participate in the delegee group’s action.

Contrary to the D.C. Circuit’s conclusion, however, when the full Board takes an action, that action—whether a regulation or an order or a delegation to a three-member group—acquires the force of law in its own right. There is no basis in Section 3(b) for concluding that such an action is deprived of its legal force and effect if the full Board thereafter loses its quorum. Cf. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2194-2195 (2009) (noting that the “expiration of *authorities* * * * is not the same as cancellation of the *effect* of the President’s prior valid exercise of those authorities”). Because the full Board validly delegated all of its powers to a three-member group when the Board had four members, any subsequent loss by the full Board of its quorum and ability to act did not abrogate the legal effect of the Board’s prior completed act of delegation.

That conclusion is supported not only by the plain text of the Act, but also by the compelling public interest in the continuity of government operations and the enforcement of an Act that is central to promoting labor peace and the free flow of commerce.

2. Review by the Court is warranted because there is a circuit conflict on the question of the authority of the two-member quorum of the delegee group of the Board to act in these circumstances, and because the issue is important and recurring.

a. The decision below is in agreement with decisions of the First and Second Circuits. *Northeastern*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009); *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410, 423 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (*Snell Island*). The First Circuit reasoned that, once the Board delegated its authority to the three-member group pursuant to Section 3(b), the subsequent “vacancy, which left the two-member quorum remaining, may not, under the terms of [S]ection 3(b), impair the right of the two-member quorum to exercise all powers of the Board.” *Northeastern*, 560 F.3d at 41. The Second Circuit found that the language of Section 3(b) is ambiguous, but deferred to the Board’s interpretation of Section 3(b) in holding that the two-member quorum of the delegee group could continue to exercise the powers of the Board. *Snell Island*, 568 F.3d at 420-424.⁸

The court of appeals’ decision directly conflicts, however, with the D.C. Circuit’s decision in *Laurel Baye*. As discussed above, the D.C. Circuit held that Section 3(b)’s Board quorum provision prohibits the Board or any delegee group of the Board from acting when the Board’s overall membership falls below three, regardless of whether the delegee group has a quorum. The contrary decision in *Laurel Baye*, moreover, has a disproportionate effect on the Board’s ability to fulfill its

⁸ The decisions in *Northeastern*, *Snell Island*, and the instant case are also consistent with the Ninth Circuit’s decision in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (1982). Although the Ninth Circuit in that case did not have occasion to consider the question presented here, it held that two members of a three member group to which authority to decide a case had been delegated could issue a decision in that case after the resignation of the third member of the group. *Id.* at 122-123.

statutory obligations because Section 10(f) of the NLRA permits any “person aggrieved” by a Board order to challenge the order in the D.C. Circuit. 29 U.S.C. 160(f).

For that reason, simultaneously with the filing of this brief, the Solicitor General is filing a petition for a writ of certiorari in *Laurel Baye*, and suggesting that the Court hold that petition pending the Court’s disposition of this case.

b. The question whether the remaining two-member quorum of the three-member group to which the Board delegated its powers may continue to exercise those powers is important and recurring. Congress charged the NLRB with the job of safeguarding the free flow of commerce by promptly resolving labor disputes. 29 U.S.C. 151; S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947) (“There is no field in which time is more important.”). Since January 1, 2008, the two-member quorum of the Board’s delegee group has issued hundreds of decisions resolving allegations of unfair labor practices and disputes over union representation, including cases involving employers’ discharges of employees for exercising their organizational rights;⁹ disputes over secret ballot elections to select a union representative;¹⁰ employers’ unlawful withdrawals of recognition of union

⁹ See, e.g., *American Directional Boring, Inc.*, 353 N.L.R.B. No. 21 (Sept. 30, 2008), petition for review pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009); *Saigon Gourmet Restaurant, Inc.*, 353 N.L.R.B. No. 110 (Mar. 9, 2009).

¹⁰ See, e.g., *Snell Island SNF, LLC*, 352 N.L.R.B. No. 106 (July 18, 2008), enforced, 568 F.3d 410, 423 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Eagle Ray Elec. Co. & IBEW, Local No. 1*, 354 N.L.R.B. No. 27 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009).

representatives;¹¹ refusals by employers or unions to honor their obligation to bargain in good faith;¹² and requirements that employees pay union dues as a condition of employment.¹³ If the disagreement among the courts of appeals is permitted to stand, the Board will be unable to redress such issues in many instances. In particular, as noted above, the D.C. Circuit's decision in *Laurel Baye* will have a disproportionate impact on the Board's ability to administer the NLRA throughout the country because Section 10(f) of the Act permits any "person aggrieved" by a Board order to challenge the order in the D.C. Circuit. 29 U.S.C. 160(f).

Although the Board in the past had declined to issue decisions when it had only two sitting members,¹⁴ the

¹¹ See, e.g., *Bentonite Performance Minerals, LLC*, 353 N.L.R.B. No. 75 (Dec. 31, 2008), petition for review pending, No. 09-66034 (5th Cir. filed Jan. 21, 2009); *SFO Good-Nite Inn, LLC*, 352 N.L.R.B. No. 42 (Mar. 20, 2008), petition for review pending, No. 08-1148 (D.C. Cir. filed Apr. 4, 2008).

¹² See, e.g., *Wayneview Care Ctr. & Victoria Health Care Ctr.*, 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008); *Hartford Head Start Agency, Inc.*, 354 N.L.R.B. No. 15 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009); *Local 17B, Graphic Commc'ns Conference, Int'l Bhd. of Teamsters*, 353 N.L.R.B. No. 4 (Sept. 12, 2008); *Local 155, Int'l Union, United Auto Workers*, 352 N.L.R.B. 1122 (2008); *Laborers' Int'l Union, Local No. 169*, 352 N.L.R.B. 33 (2008), petition for review pending, No. 08-71053 (9th Cir. filed Mar. 13, 2008).

¹³ See e.g., *United Food & Commercial Workers Union, Local 4*, 353 N.L.R.B. No. 47 (Oct. 31, 2008), petition for review pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009); *Laborers Int'l Union of N. Am. Local 578*, 352 N.L.R.B. 1005 (2008), enforced, No. 08-71053, 2009 WL 1955815 (9th Cir. Jun. 23, 2009).

¹⁴ See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1274 (2000) ("where the Board has fallen below

Board in 2002 sought the opinion of the Office of Legal Counsel on whether the Board had the authority to issue decisions when only two of its five positions were filled, if the two sitting members constituted a two-member quorum of a three-member delegee group. OLC concluded that the Board has that authority, and the Board relied on that opinion on December 28, 2007, when it delegated all of its powers to the three-member group that included the two current members.¹⁵ Although the current period—now more than 20 months long—is the longest the Board has ever been with only two sitting members since Section 3(b) was amended in 1947, the Board has previously had only two members and may again in the future. Resolution of the question whether the Board may act with a two-member quorum of a three-member group is, therefore, important to the Board’s future ability to enforce the NLRA—and vital to its current ability to do so.

three members, the Board has declined to rule on pending contested matters until a third member has been appointed”); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board’s Response*, 16 Lab. Law. J. 1, 6 n.20 (2000) (noting the existence of an inactive two-member Board from November 26, 1993, through January 23, 1994, when no decisions were issued).

¹⁵ The Board first relied on the OLC opinion on August 26, 2005, when the three sitting members delegated all of the Board’s powers to themselves as a three-member group in anticipation of the expiration of Member Schaumber’s term on August 27, 2005. See BNA, 166 *Daily Labor Rep.*, A-1 (Aug. 29, 2005). Between August 28 and August 31—when Member Schaumber was reappointed through a recess appointment—the two-member quorum issued a few unpublished orders and one published ruling on a procedural motion. See *Extendicare Homes, Inc.*, 345 N.L.R.B. 905 (2005). None of its rulings was challenged on the ground that the two remaining members did not have the authority to act.

For these reasons, and in light of the circuit conflict, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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