No.

In the Supreme Court of the United States

SSC MYSTIC OPERATING COMPANY, LLC,
DOING BUSINESS AS PENDLETON HEALTH
AND REHABILITATION CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), authorizes the National Labor Relations Board to delegate certain statutory powers to its regional directors. The same statutory provision instructs that three Board members shall constitute a quorum of the Board "at all times." In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), this Court reserved judgment on whether regional directors can exercise the Board's statutory powers when the Board lacks a quorum. In addition, although the Board specifically asked this Court to defer to the Board's interpretation of § 153(b) using the framework established by either *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court did not apply any level of deference in rejecting the Board's assertion that a two-member subgroup of the Board can act when the Board has less than three total members.

In this case and in a companion case decided on the same day, a three-to-two majority of the D.C. Circuit upheld the Board's determination that regional directors can exercise the statutory powers delegated to them by the Board regardless of whether the Board has a quorum. In doing so, the majority held that the Board's interpretation of § 153(b) must be reviewed using the *Chevron* framework. The questions presented are:

1. Whether the Board's interpretation of § 153(b) is entitled to any level of judicial deference.

2. Whether the Board's interpretation of § 153(b) should be upheld.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding in the court of appeals. New England Health Care Employees Union, District 1199, SEIU, was a party to proceedings before the National Labor Relations Board, as was the Board's General Counsel, Richard F. Griffin, Jr.

Petitioner SSC Mystic Operating Company, LLC, doing business as Pendleton Health and Rehabilitation Center, is a Delaware limited liability company whose sole member is Connecticut Holdco, LLC. Connecticut Holdco, LLC is a Delaware limited liability company whose sole member is SSC Equity Holdings LLC. SSC Equity Holdings LLC is a Delaware limited liability company whose sole member is Master Tenant Parent Holdco, LLC. Master Tenant Parent Holdco, LLC is a Delaware limited liability company whose sole member is SavaSeniorCare, LLC. SavaSeniorCare, LLC is a Delaware limited liability company whose sole member is Proto Equity Holdings, LLC. Proto Equity Holdings, LLC is a Delaware limited liability company whose sole member is Terpax, Inc., a Delaware corporation.

No public company owns a 10 percent or greater interest in petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SSC Mystic Operating Company, LLC, doing business as Pendleton Health and Rehabilitation Center (Mystic), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–36a) is reported at 801 F.3d 302. The decision and order of the National Labor Relations Board (App., *infra*, 37a–47a) is reported at 360 NLRB No. 68. The opinion of the court of appeals in the companion case *UC Health v. NLRB* (App., *infra*, 48a–92a) is reported at 803 F.3d 669.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2015. The court of appeals denied Mystic's petition for rehearing en banc on February 12, 2016 (App., *infra*, 93a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), 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. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. 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. . . .

STATEMENT

1. Congress created the National Labor Relations Board in 1935 and delegated to it the power to conduct elections to determine whether a majority of employees in an appropriate bargaining unit desire to be represented by a union. *See* National Labor Relations Act (Wagner Act), ch. 372, §§ 3(a), 9(c), 49 Stat. 449, 451, 453 (1935) (codified as amended at 29 U.S.C. §§ 153(a), 159(c)). In its initial form under the Wagner Act, the Board was comprised of three members appointed by the President, by and with the advice and consent of the Senate. *Id.* § 3(a). The Wagner Act also specified that "two members of the Board shall, at all times, constitute a quorum." *Id.* § 3(b). Although the Wagner Act authorized the Board to appoint regional directors to assist the Board, the Wagner Act did not authorize the Board to delegate any of its statutory powers to regional directors. *See id.* § 4(a).

Congress expanded the Board's membership to five members in 1947. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 3(a), 61 Stat. 136, 139 (codified as amended at 29 U.S.C. § 153(a)). The Taft-Hartley Act authorized the newly expanded Board to delegate its powers to any group of three or more members. *Id.* § 3(b). However, the Taft-Hartley Act also increased the "at all times" quorum requirement from two members to three. *Id.*

In 1959, Congress granted the Board discretion to delegate certain of its statutory powers to regional directors. *See* Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, § 701(b), 73 Stat. 519, 542 (codified at

29 U.S.C. § 153(b)). The Landrum-Griffin Act did so by inserting the following new sentence into § 153(b):

> The Board is also authorized to delegate to its regional directors its powers under [29 U.S.C. § 159] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section [159] and certify the results thereof, except that upon the filling of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

Landrum-Griffin Act § 701(b).

The foregoing language was added to the underlying bill by House and Senate conferees. *See* H.R. Rep. No. 86-1147, at 37 (1959) (Conf. Rep.), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 941 (1985). A leading conferee, Senator Goldwater, explained that the new statutory language was "designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." 105 Cong. Rec. 19,770 (1959). Senator Goldwater also explained that regional directors could "exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the region-

al directors are required to . . . act in all respects as the Board itself would act." *Id*.

In 1961, the Board exercised its newly granted discretion by delegating to its regional directors the power to conduct representation elections. *See* Delegation of Authority, 26 Fed. Reg. 3911 (May 4, 1961).

2. In 2008, the Board was left with only two members. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 677–78 (2010). This Court subsequently held that a two-member subgroup of the Board could not act when the Board's overall membership dropped below three members. *Id.* at 676. Although the Board specifically asked this Court to defer to the Board's interpretation of § 153(b) using the framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or, alternatively, the framework established by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *see* Br. for NLRB at 32–33, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), 2010 WL 383618, the Court did not mention any deference-related precedent in rejecting the Board's interpretation of § 153(b), *see New Process Steel*, 560 U.S. at 679–88. However, the Court did expressly state that its decision did "not address" the "separate question" of what effect, if any, the loss of a Board quorum had on regional directors. *Id.* at 684 n.4.

The quorum issue resurfaced shortly after this Court decided *New Process Steel*. Between August 2010 and January 2012, the terms of three Board members expired and the Senate refused to confirm any of the President's nominees to fill those vacancies. App., *infra*, 50a. During a short break between *pro forma* sessions of the Senate in January 2012,

the President invoked the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, and appointed three individuals to serve as Board members. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014). It was not until August 2013 that the Senate confirmed a sufficient number of nominees to independently satisfy § 153(b)'s three-member quorum requirement. App., *infra*, 51a.

In *Noel Canning*, this Court held that the President's recess appointments were invalid. 134 S. Ct. at 2578. As a result, the Board did not have a lawful three-member quorum between January 2012 and August 2013. App., *infra*, 50a–51a.

3. Mystic operates a Connecticut nursing facility. App., *infra*, 2a. In February 2013, the New England Health Care Employees Union, District 1199 (Union) filed a petition with the Board seeking to be certified as the bargaining representative for a unit of Mystic employees. *Id.* In April 2013, a regional director of the Board conducted an election whereby a majority of employees in the bargaining unit voted in favor of the Union. *Id.* at 3a. The Board did not have a lawful quorum at the time of the election.

Mystic filed objections to the election, focusing primarily on improper pro-Union conduct by one of its supervisors. *Id.* at 3a. In May 2013, a hearing officer issued a report recommending that the Board reject Mystic's objections to the election. *Id.* at 4a. Several months later, after the Board regained a lawful quorum, a three-member panel of the Board rejected Mystic's objections to the election. *Id.*

Mystic refused to bargain with the Union in order to obtain judicial review of the election's validity. *Id.* The Union, in turn, filed an unfair-labor-practice

charge with the Board against Mystic. App, *infra*, 5a–6a.

The Board granted summary judgment against Mystic. App., *infra*, 37a. In relevant part, the Board's order rejected Mystic's argument that the regional director had no authority to conduct an election when the Board lacked a quorum. *Id.* at 39a n.1. Citing the Board's 1961 delegation of authority pursuant to § 153(b), the Board concluded that its regional directors "remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." *Id*.

The Board stated that its conclusion was supported by this Court's decision in *New Process Steel*, which, although it "did not expressly rule on the question," had supposedly "expressed doubt about a contention that the lack of a Board quorum voids the previous delegations of authority to nonmembers, such as Regional Directors." *Id.* The Board also asserted that its conclusion was supported by circuit case law addressing the ability of the Board's General Counsel to act when the Board lacks a quorum. *Id.* However, the Board order did not identify any ambiguity in the language of § 153(b) upon which the Board had based its decision, nor did the order cite *Chevron*, *Skidmore*, or any other deference-related precedent. *See id.* The Board order also did not address the fact that Congress established the General Counsel position in a statute other than § 153(b) and gave the General Counsel final authority over certain functions. *See id.*; *see also* 29 U.S.C. § 153(d).

4. Mystic filed a petition for review of the Board's order in the D.C. Circuit, and the Board filed a cross-petition for enforcement of that order. App., *infra*,

1a. A divided three-judge panel comprised of Judges Griffith, Srinivasan, and Sentelle denied Mystic's petition for review and granted the Board's cross-petition for enforcement. *Id.* at 23a.

a. Judge Griffith's majority opinion, which was joined by Judge Srinivasan, rejected Mystic's argument that the regional director had no authority to conduct an election when the Board lacked a lawful quorum. *Id.* at 7a–8a. The majority did so in relative short order by citing the majority opinion in *UC Health v. NLRB*, which was issued the same day in a case decided by a divided panel comprised of Judges Griffith, Edwards, and Silberman. *Id.*

i. Judge Griffith's majority opinion in *UC Health*, which was joined by Judge Edwards, enforced a Board order that used language identical to the Board order in this case in concluding that regional directors "remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." *UC Health*, 360 NLRB No. 71, at 1 n.2 (2014).

As a threshold matter, the *UC Health* majority held that a court must use *Chevron*'s two-step framework in reviewing the Board's interpretation of § 153(b). App., *infra*, 52a, 55a–56a. Citing this Court's decision in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), the *UC Health* majority concluded that "[a]bsent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine." *Id.* at 52a. It did not matter to the *UC Health* majority that the Board order failed to cite *Chevron* or assert that § 153(b) was ambiguous. *Id.* at 55a n.1. Instead, the majority

found it sufficient that the Board's "reasoning rested on its interpretation of the extent of its prior delegation of authority to the Regional Director, backed by its reading of *New Process Steel* . . . and other case law." *Id.* at 56a n.1.

The *UC Health* majority also rejected the contention that this Court's decision in *New Process Steel* precluded applying *Chevron* to the Board's interpretation of § 153(b). *Id.* at 64a n.3. Although the *UC Health* majority acknowledged that this Court did not rely on *Chevron* in rejecting the Board's interpretation of § 153(b) in *New Process Steel*, the *UC Health* majority advanced a number of what it believed were "cogent explanations that might explain why the Court did not do so," including that "[p]erhaps the Court viewed the Board's entitlement to *Chevron* deference as forfeited because the Board had neglected to request deference at the court of appeals." *Id.*

Applying step one of the *Chevron* framework, the majority in *UC Health* found that § 153(b) was ambiguous on the question whether regional directors can exercise delegated powers when the Board lacks a quorum. *Id.* at 56a–57a. In doing so, the majority rejected the argument that the plain language of § 153(b)'s "at all times" quorum requirement limited the exercise of delegated authority by regional directors. *Id.* at 57a–58a. "The plain language of the Act applies the quorum requirement to the Board's authority to act," the *UC Health* majority concluded, "not the Regional Directors' ability to wield delegated authority." *Id.* at 58a.

Moving to step two of the *Chevron* framework, the majority in *UC Health* held that the Board's inter-

pretation of § 153(b) was reasonable and therefore entitled to judicial deference. *Id.* at 59a. Citing Senator Goldwater's statement that the statutory language permitting delegations to regional directors was "designed to expedite final disposition of cases by the Board," the *UC Health* majority concluded that "allowing the Regional Director to continue to operate regardless of the Board's quorum is fully in line with the policy behind Congress's decision to allow for the delegation in the first place." *Id.* The majority also concluded that the Board's interpretation of § 153(b) avoided "unnecessarily halting representation elections any time a quorum lapses due to gridlock elsewhere." *Id.* at 60a.

Lastly, the *UC Health* majority found that its decision was not foreclosed by circuit precedent established by *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3498 (2010) (No. 09-377). App., *infra*, 60a–72a. The *Laurel Baye* court addressed the ability of a two-member subgroup of the Board to act when the Board has less than three total members. *See* 564 F.3d at 470. The court in *Laurel Baye* found that the Board's interpretation of § 153(b) violated the statute's unambiguous "at all times" quorum requirement, as well as common-law agency principles. *Id.* at 472–73. However, the *UC Health* majority concluded that *Laurel Baye* did not control because it involved the exercise of the Board's "final" authority, while the Board order at issue in *UC Health* involved "nonfinal" authority given that § 153(b) provides that regional directors' decisions are subject to discretionary review by the Board. App., *infra*, 65a–70a.

ii. Judge Edwards authored a concurring opinion in *UC Health* focusing on the boundaries of *stare decisis* as applied to circuit precedent. App., *infra*, 73a–80a.

iii. Judge Silberman dissented in *UC Health*. App., *infra*, 81a–92a.

Judge Silberman first concluded that the majority had violated circuit precedent. *Id.* at 82a–85a. He rejected the notion that one could distinguish *Laurel Baye* "on the theory that a delegation to an agent with lesser authority (a regional director) somehow survives the disappearance of the principal, even though a more senior agent's authority would not." *Id.* at 84a. Noting that the majority had not cited any case with such a holding, Judge Silberman explained that the Board had never made what he characterized as "this cockamamie argument," observing in a parenthetical: "(I thought we avoided relying on arguments not presented by parties because to do so suggests we are result-oriented)." *Id.* at 84a–85a.

Judge Silberman then explained that even if *Laurel Baye* had never been decided, he would still reject the Board's contention that the "regional director's authority to certify an election extends indefinitely, even if the Board went out of existence for years, as an impermissible construction of the statute." *Id.* at 85a. Judge Silberman questioned the majority's determination that the absence of language within § 153(b) expressly addressing "whether the regional director's power lapses when the Board loses its quorum or ceases to exist" is a "statutory 'silence' under the *Chevron* doctrine, which the [Board] is authorized to fill." *Id.* He then found that applying

Chevron to the Board's interpretation of § 153(b) was inappropriate for two reasons.

First, the Board "never purported to interpret an ambiguity in the statute." *Id.* at 86a. Instead, Judge Silberman concluded that the Board's bold statement—that regional directors "remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment"—was an assertion as to what the Board believed was compelled by Congress in § 153(b). *Id.* Such statutory interpretations were not entitled to any judicial deference. *Id.*

Second, Judge Silberman concluded that this Court had already "rejected *Chevron*'s applicability to" § 153(b). *Id.* at 87a. "[T]he Supreme Court's opinion in *New Process Steel* never mentioned *Chevron* – despite the government's reliance on *Chevron* deference in its Supreme Court brief," Judge Silberman explained. *Id.* "Although the Court's opinion frankly acknowledged two possible interpretations of what it called [§ 153(b)'s] delegation clause, it simply picked the one it thought preferable . . . . It is, therefore, decisive, for our purposes, that the Court implicitly but necessarily concluded that, for whatever reason, *Chevron* deference was inappropriate in construing [§ 153(b)]." *Id.*

Finally, Judge Silberman explained that even if *Chevron* applied, the Board's statutory interpretation was "flatly unreasonable." *Id.* at 85a. "We must bear in mind that even if we are following *Chevron*'s second step, we are construing a Congressional act – the second step is not open sesame for the Agency." *Id.* Judge Silberman found it "quite incredible" that Congress would have "implicitly bestowed on region-

al directors permanent authority *ad infinitum*, even in the total absence of a supervising Board." *Id.*

b. Judge Srinivasan authored a concurring opinion in this case explaining his view that even if *Laurel Baye* had decided whether regional directors can exercise delegated authority when the Board lacks a quorum, the Board was free to adopt a contrary statutory interpretation under the doctrine of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). App., *infra*, 24a–33a.

c. Judge Sentelle dissented in this case. App., *infra*, 34a–36a. In addition to concluding that the majority had violated circuit precedent established by *Laurel Baye* (an opinion which he authored), Judge Sentelle rejected the majority's analysis "for the same reason the Supreme Court rejected the Board's rationale in *New Process Steel*: it 'dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention.'" *Id.* at 34a–35a (quoting *New Process Steel*, 560 U.S. at 681). Judge Sentelle also agreed with Judge Silberman's conclusion that *Chevron* did not apply and that, even if it did, the Board's interpretation of § 153(b) was unreasonable. *Id.* at 36a.

5. The court of appeals denied Mystic's petition for rehearing en banc after calling for a response from the Board. App., *infra*, 94a. Judges Brown and Kavanaugh voted in favor of granting rehearing. *Id.*[*]

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[*] The panel dissenters were ineligible to participate in that vote because of their senior status. *See* Fed. R. App. P. 35(a). The employer in *UC Health* did not seek rehearing in the court

(continued)

REASONS FOR GRANTING THE PETITION

By a vote of three to two, the D.C. Circuit has held that a court must apply *Chevron*'s deference framework when evaluating an agency's interpretation of its statutory charter dictating whether the agency can exercise *any* of the powers delegated to it by Congress. That unprecedented holding conflicts with this Court's decision in *New Process Steel*, which refused to grant the same agency any deference with respect to the same statutory subsection at issue here. Plenary review is also warranted because of the importance of the questions presented. For example, this case provides the Court with an opportunity to provide much-needed guidance regarding the analysis courts must perform in determining whether the preconditions to *Chevron*'s applicability have been satisfied, an issue on which several Members of this Court expressed fundamental disagreement in *City of Arlington*. Accordingly, this Court should grant review.

I. The Majority's Deference Ruling Conflicts With *New Process Steel*

In *New Process Steel*, the Board specifically asked this Court to apply the *Chevron* framework and defer to the Board's interpretation of § 153(b). Explaining that two courts of appeals had "determined that the Board's interpretation of [§ 153(b)] is entitled to the deference this Court accords under its decision in *Chevron*," the Board argued that "[t]o the extent . . . this Court views the language in [§ 153(b)] as suscep-

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of appeals. The time for it to file a petition for a writ of certiorari has elapsed with no petition being filed.

tible to more than one construction, the Court should defer to the Board's understanding of that provision." Br. for NLRB at 32, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), 2010 WL 383618. Alternatively, the Board cited *Skidmore* in arguing that, "[a]t the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of judicial deference owed to agency actions having persuasive authority." *Id.* at 33.

The employer in *New Process Steel* countered that no deference was appropriate because the Act "contains no provision suggesting an intent to permit the [Board] to re-define quorum rules . . . ." Reply Br. of Pet'r New Process Steel, L.P. at 12, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), 2010 WL 783665. Acting as an amicus curiae, the Chamber of Commerce of the United States agreed, explaining: "While a two-step *Chevron* analysis of an agency's authority to act in a particular regard or with respect to a particular issue or subject may be appropriate when a statute is ambiguous, . . . it seems unlikely that such an analysis resulting in deferral to the agency's own view of its authority to act in any matter is apt where, as here, the question presented is the agency's primary power or authority to act at all." Br. for Amicus Curiae Chamber of Commerce of U.S. in Supp. of Pet'r at 14, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), 2010 WL 5190477.

In a majority opinion authored by Justice Stevens—who had authored *Chevron* over two decades earlier—this Court rejected the Board's statutory interpretation without affording it any deference whatsoever. *See New Process Steel*, 560 U.S. at 679–

82. Joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Stevens's majority opinion acknowledged that there were "two different ways to interpret" the language of § 153(b)'s first sentence permitting the Board to delegate its powers to a group of three members. *Id.* at 679. However, the Court ultimately rejected the Board's interpretation even though it was "textually permissible in a narrow sense . . . ." *Id.* at 681. Moreover, although the dissenting opinion authored by Justice Kennedy and joined by Justices Ginsburg, Breyer, and Sotomayor disagreed with the majority's conclusion, the dissent did not assert that the Board's interpretation of § 153(b) was entitled to any level of judicial deference. *See New Process Steel*, 560 U.S. at 689–701 (Kennedy, J., dissenting).

It is true that neither the majority opinion nor the dissent in *New Process Steel* explained why the Board's deference arguments were rejected. The majority in the D.C. Circuit speculated why that may have occurred. *See* App., *infra*, 64a n.3. The dissenters, in contrast, rejected such speculation and found that this Court had "implicitly but necessarily concluded that, for whatever reason, *Chevron* deference was inappropriate in construing [§ 153(b)]." App., *infra*, 87a. The splintered decisions below demonstrate that the deference question warrants further examination in this case.

II. The Questions Presented Are Important and Warrant Plenary Review

As demonstrated by the unusual three-to-two split below, this is no ordinary case. Instead, as outlined below, this case presents an opportunity for the Court to provide guidance on important principles of

federal administrative law affecting all agencies, not just the Board.

a. Review by this Court is warranted in order to provide lower courts with guidance on how to analyze the threshold question whether agency action must be reviewed under the *Chevron* framework. In *City of Arlington*, the Court reaffirmed the foundational principle that "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." 133 S. Ct. at 1874 (citing *United States v. Mead*, 533 U.S. 218 (2001)). However, in the process of applying that principle to the particular agency action and statutory scheme at issue in *City of Arlington*, several Members of this Court expressed significant disagreement as to the type of analysis courts should perform in deciding whether the "preconditions to deference under *Chevron*" have been satisfied. *Id.*

At issue in *City of Arlington* was a ruling of the Federal Communications Commission (FCC) that implemented a statute requiring that local governments process applications submitted by wireless facilities "within a reasonable period of time." 133 S. Ct. at 1866–67. The FCC ruling established certain presumptive timeframes for what constituted a "reasonable period of time." *Id.* at 1867. In challenging the FCC ruling, two cities argued that the FCC lacked authority to interpret the "reasonable period of time" statutory requirement. *Id.* The Fifth Circuit rejected the cities' argument and found that the FCC was entitled to *Chevron* deference in interpreting the scope of its statutory authority. *Id.*

This Court affirmed. Justice Scalia's majority opinion, which was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, rejected the broad contention that *Chevron* could never apply to "an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) . . . ." *Id.* at 1866. Justice Scalia found it sufficient to decide the particular case before the Court that Congress had "unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority." *Id.* at 1874. In his view, there was "no need to wade into" the "murky waters" of whether Congress had granted the FCC authority to interpret the specific statutory subsection at issue. *Id.*

Justice Breyer authored an opinion concurring in part and concurring in the judgment. In it, he explained that statutory ambiguity "is a sign—but not always a conclusive sign—that Congress intends a reviewing court to pay particular attention to (*i.e.*, to give a degree of deference to) the agency's interpretation." *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring in part and concurring in judgment). Justice Breyer stated that the "existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant." *Id.* For example, Justice Breyer noted that the "subject matter of the relevant [statutory] provision" and its "distance from the agency's ordinary statutory du-

ties" were relevant considerations. *Id.* Justice Breyer also explained that the "question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently." *Id.* at 1876.

Chief Justice Roberts, joined by Justices Kennedy and Alito, expressed "fundamental" disagreement with the approach taken by Justice Scalia's majority opinion. *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting). Quoting the language of *Chevron* itself, Chief Justice Roberts asserted that if a "congressional delegation of interpretive authority is to support *Chevron* deference, . . . that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the 'specific provision' and 'particular question' before the court." *Id.* at 1883 (quoting *Chevron*, 467 U.S. at 844). And that question was to be answered by the court without deference to the agency. *Id*.

Moreover, Chief Justice Roberts warned of the rising power of federal agencies, explaining that "with hundreds of federal agencies poking into every nook and cranny of daily life, [a] citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching." *Id.* at 1879. "An agency's interpretive authority, entitling the agency to judicial deference," Chief Justice Roberts emphasized, "acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive. Our duty to police the boundary between the Legislature and the Executive

is as critical as our duty to respect that between the Judiciary and the Executive." *Id.* at 1886.

Judge Silberman expressed similar concerns in his *UC Health* dissent by questioning his colleagues' determination that § 153(b)'s absence of language addressing the regional-director question "is a statutory 'silence' under the *Chevron* doctrine, which the [Board] is authorized to fill." App., *infra*, 85a. It is not, and the Court should use this opportunity to further examine the threshold legal analysis courts must perform in deciding whether the *Chevron* framework applies.

b. Review is also warranted because the court of appeals with jurisdiction over disputes involving countless federal agencies has adopted an expansive—and incorrect—interpretation of this Court's decision in *City of Arlington*. The majority opinions in this case and *UC Health* enunciate the same interpretation of *City of Arlington*. Specifically, the majority opinions below contain an identical sentence stating: "Absent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013)." App., *infra*, 7a, 52a. In other words, the majority below interpreted *City of Arlington* as creating a bright-line rule whereby if a statute involves the agency's authority to act, a court must apply *Chevron* deference unless the agency's interpretation violates the "plain meaning" of the statute.

That is incorrect. *City of Arlington* did not hold that the *Chevron* framework applies automatically if the statute the agency claims to have interpreted

involves the agency's authority to act. Instead, in rejecting a bright-line rule whereby questions of jurisdiction would never qualify for *Chevron* deference, *City of Arlington* confirmed that a court must still determine that the agency has "received congressional authority to determine the particular matter at issue in the particular manner adopted." 133 S. Ct. at 1874 (citing *Mead*, 533 U.S. 218). Although the majority in *City of Arlington* found that the FCC had received such authority in light of the broad statutory grant of rulemaking power at issue in that case, the majority still applied what has become commonly known as *Chevron* "step zero." *See* Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 779 (2014).

The incorrect interpretation of *City of Arlington* contained in the majority opinions below has significance consequences for federal administrative law generally. The D.C. Circuit is the leading arbiter of federal administrative law given its geographic location in the Nation's capital and Congress's proclivity for granting the D.C. Circuit exclusive jurisdiction over disputes involving various types of agency action. As one recent study explained, the D.C. Circuit "reviews, as a percentage of its docket, almost twice as many cases involving administrative law and petitions concerning the federal government as do the other circuits." Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 142 (2013). Therefore, while the D.C. Circuit was the first court of appeals to adjudicate the Board's claim for deference with respect to the authority of regional directors to act when the Board lacks a quorum, allowing that question to percolate

further is unwise given that the D.C. Circuit's incorrect interpretation of *City of Arlington* could affect all manner of disputes involving federal agencies, not just those involving the Board. In addition, the D.C. Circuit's mistaken deference analysis has already spread to a neighboring circuit. *See NLRB v. Bluefield Hosp. Co.*, --- F.3d ---, No. 15-1203, slip op. at 17–19 (4th Cir. May 6, 2016) (adopting *UC Health* majority's *Chevron* analysis).

c. As this Court confirmed last Term, *Chevron* does not apply to every statutory interpretation promulgated by an agency using formal procedures. *See King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015). Instead, the *Chevron* framework "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* at 2488–89 (internal quotation marks and citations omitted).

This is one such case. The interpretation of a statutory provision permitting an agency to delegate certain powers to subordinate agency officials, while also imposing an "at all times" quorum requirement on the agency, is far outside the Board's substantive expertise in the day-to-day intricacies of labor relations. For example, unlike the Board's interpretation of specialized, open-ended statutory terms such as what constitutes an "appropriate" bargaining unit under the Act, *see Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609–10 (1991) (upholding Board regulations defining appropriate bargaining units in inpatient hospitals), courts are just as capable as the

Board in interpreting § 153(b)'s delegation and quorum provisions, *see, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (declining to apply *Chevron* where the agency lacked relevant expertise).

There are sound reasons for not entrusting agencies with the authority to decide for themselves whether they may continue to exercise the powers delegated to them by Congress when the Legislative Branch has refused to do the very act which, according to the agency's statutory charter, must be done to give the agency continued life. After all, "[a]gencies are creatures of Congress; an agency literally has no power to act . . . unless and until Congress confers power upon it." *City of Arlington*, 133 S. Ct. at 1880 (Roberts, C.J., dissenting) (internal quotation marks and citation omitted). One can hardly be surprised that an agency threatened with an existential crisis will interpret its statutory charter to perpetuate the status quo for as long as it can.

The Board's belief that allowing its regional directors to exercise authority regardless of whether the Board has a quorum may very well be well-intentioned in the short term because the Board believes that it mitigates the immediate impact of political disagreement between the President and the Senate as to who should serve on the Board. However, this Court has found that such considerations do not permit the Board to "create a tail that would not only wag the dog, but would continue to wag after the dog died." *New Process Steel*, 560 U.S. at 688. That is precisely what the Board has done here, as recognized by both dissenters below. App., *infra*, 34a, 87a.

Moreover, the Board's order is a particularly poor candidate for any level of judicial deference. As noted by the panel dissenters, the order does not even attempt to identify a statutory ambiguity on which to base its decision. App., *infra*, 86a. Instead, the order states the Board's conclusion and then asserts that the conclusion is supported by an interpretation of (1) this Court's decision in *New Process Steel*, which expressly *declined* to decide the regional-director question; and (2) circuit case law addressing the authority of the Board's General Counsel to act when the Board loses a quorum, which is a separate legal question involving an official appointed by the President, by and with the advice and consent of the Senate, to whom Congress has expressly delegated final authority to act under a *different* statutory provision. App., *infra*, 39a n.1; *see also* 29 U.S.C. § 153(d) (creating the General Counsel position and granting it "final authority" over certain functions).

The pendulum of deference jurisprudence has swung much too far in favor of agencies if courts, including this one, must defer to an agency's interpretation of federal case law. *But see, e.g.*, *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("[U]nlike an administrative action that requires significant expertise and entails the exercise of judgment grounded in policy concerns, . . . an agency has no special competence or role in interpreting a judicial decision. . . . And certainly an agency is no better suited to interpret a judicial decision than the court that rendered it.") (internal brackets, quotation marks, and citations omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14-1045, 14-1089

SSC MYSTIC OPERATING COMPANY, LLC,
DOING BUSINESS AS PENDLETON HEALTH AND
REHABILITATION CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decided: September 18, 2015

Before: GRIFFITH and SRINIVASAN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Concurring opinion filed by *Circuit Judge* SRINIVASAN.

Dissenting opinion filed by *Senior Circuit Judge* SENTELLE.

GRIFFITH, *Circuit Judge*:

After agreeing to a representation election in which the union prevailed, employer SSC Mystic challenged the results. For the reasons set forth below, we reject each of Mystic's arguments and affirm the decision of the National Labor Relations Board upholding the outcome.

I

SSC Mystic (Mystic) operates Pendleton Health & Rehabilitation, a nursing home in Mystic, Connecticut. On February 25, 2013, the Service Employees International Union, Local 1199 (Union), filed a petition with the National Labor Relations Board (NLRB) seeking to represent nurses at the facility. In response, the NLRB Regional Director issued a Notice of Election. The Union and the company entered a Stipulated Election Agreement that, among other things, provided that either party could ask the Board to review any decision the Regional Directors made. *See* 29 C.F.R. § 102.69(c).

Mystic vigorously opposed the Union. Its campaign included posting anti-union material in the workplace and sending the material by mail to employees' homes. Mystic also held meetings at work to make the case against the Union to its employees, who were required to attend. It also distributed anti-union bracelets for employees to wear.

Separately, a supervisor named Diane Mackin engaged in a campaign of urging employees to sign Union authorization cards and to vote for the Union in the election. She frequently discussed the virtues of organizing. To those who opposed the Union, Mackin would speak coldly or refuse to speak at all. Mackin also claimed that the Union would help her get her job back if Mystic fired her for her advocacy.

After an employee reported Mackin's pro-union conduct to management, the company reprimanded her on March 12, 2013. Mystic explained to Mackin that her conduct violated her professional responsibilities as a supervisor and, more seriously, might be illegal pressure on employees in violation of the Na-

tional Labor Relations Act (NLRA). Mystic warned Mackin that she would be fired if she did not end her support for the Union. Mystic then posted a notice in the workplace acknowledging, without identifying Mackin by name, that a supervisor had been involved in electioneering advocacy on behalf of the Union. In an effort to limit any effect Mackin's conduct may have had on employees' plans to vote, the notice explained that neither the company nor its supervisors intended to place pressure on employees. Despite all this, Mackin continued to openly advocate for the Union in the election and Mystic fired her on March 19, 2013.

The election continued for the next sixteen days. On April 4, 2013, the Union won the election. Of the 112 employees in the bargaining unit, 104 voted in the election: 64 supported the Union while 40 opposed.

Mystic filed objections to the election with the NLRB arguing principally that Mackin's conduct had tainted the election so thoroughly that its result should be set aside. Mystic also alleged that Mackin was acting as an agent of the Union when she "polled" employees, or interrogated them regarding their support for the Union in a way that could coerce them and infringe on their free choice. Because Mackin was allegedly acting as a Union agent, the company argued that the Union should be held responsible for that misconduct.[1] Finally, Mystic in-

[1] Mystic also originally claimed that Mackin had threatened the job security of employees who did not support the Union and had accused the company of criminal behavior. Mystic has abandoned these arguments on appeal.

sisted, relying on our decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013),[2] that the NLRB lacked a quorum because three of its members had been placed in their posts through unconstitutional recess appointments and so had no authority to conduct the election at all.

On May 8 and 9, 2013, an NLRB Hearing Officer held a hearing to consider Mystic's objections. A party to a representation proceeding may apply for and receive a subpoena for the production of any evidence. 29 C.F.R. § 102.31. Exercising that power, Mystic subpoenaed any records of telephone calls between Mackin and the Union organizer assigned to the election. The Union opposed this subpoena. Mystic argued that it needed these records to prove that Mackin was a Union agent when she coercively interrogated employees regarding their support for the Union. The Hearing Officer refused to enforce the subpoena, concluding that records could not prove that Mackin was acting as the Union's agent. Instead, the Hearing Officer directed the Union to produce the organizer himself to testify about his relationship with Mackin. The Union did not do so. Neither the parties nor the Hearing Officer mentioned the subpoena or the organizer again on the record.

At the close of the hearing, the Hearing Officer upheld the election result, concluding that even

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[2] After Mystic filed its objections with the NLRB and after both the Hearing Officer and the Board made their decisions, the Supreme Court affirmed our judgment in *Noel Canning* but on different grounds. *See NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

though Mackin had exerted impermissible pressure on employees, her misconduct had not materially affected the outcome of the election. The Hearing Officer also rejected Mystic's argument that Mackin was acting as a Union agent, reasoning that the company had failed to present any evidence supporting its claim. Finally, the Hearing Officer concluded that the Board should continue conducting elections and adjudicating disputes until the Supreme Court decided the legality of the Board's composition in *Noel Canning*.

Mystic filed objections to the Hearing Officer's ruling with the Board, arguing that the Hearing Officer's findings and conclusion were in error. Nonetheless the Board ratified the Hearing Officer's legal and factual determinations and certified the election result. *SSC Mystic Operating Co*., No. 01-RC-098982, 2013 WL 6252453 (Dec. 3, 2013) (unreported). The Board agreed with the Hearing Officer that Mackin's impermissible conduct had not affected the outcome of the election, especially on the ground that Mackin's activities were offset when Mystic "engaged in an extensive [anti-union] campaign that included a string of mandatory meetings during the critical period, the dissemination of [anti-union] literature via mailings, handouts, and postings, and the distribution of [anti-union] bracelets." *Id*. at *1 n.2.

Once the Board had certified the election result, the Union asked Mystic to bargain, but the company refused. Accordingly, the Union filed an unfair labor practice charge against Mystic, alleging that its refusal to bargain violated the NLRA. *See* 29 U.S.C. § 158(a)(1), (5) (prohibiting an employer from refusing to bargain with representatives of its employees

or interfering with employees' rights to organize). The Board's General Counsel issued a complaint and moved for summary judgment. In response, Mystic argued that the Hearing Officer erred in refusing to enforce Mystic's subpoena and should have held that Mackin's conduct impermissibly contaminated the election. For the first time, Mystic also raised the argument that the Regional Director, as opposed to the Board itself, had no power to conduct the representation election because he could not exercise the Board's delegated authority when the Board had no quorum and could not act itself.

The Board granted summary judgment against Mystic on March 31, 2014. *SSC Mystic Operating Co. LLC d/b/a Pendleton Health & Rehab. Ctr.*, 360 N.L.R.B. No. 68 (2014). The Board rejected Mystic's arguments that the Hearing Officer had made substantive and procedural errors, finding that Mystic had not produced any arguments or evidence not already made and rejected when the Board certified the election result. The Board also rejected Mystic's new argument that the Regional Director lacked authority to administer this representation election because the Board lacked a quorum. The Board interpreted the statute to mean that the Regional Directors "remain vested with the authority to conduct elections," pursuant to the Board's original delegation of that authority in 1961, "regardless of the Board's composition at any given moment." *Id*. at *1 n.1.

Mystic filed a timely petition for review of the Board's order, and the Board cross-applied for enforcement. We have jurisdiction under 29 U.S.C. § 160(e), (f).

On appeal, Mystic raises three challenges, each with its own standard of review. First, Mystic argues that the Board could not interpret the NLRA to permit Regional Directors to continue conducting elections when the Board lacked authority to act due to lack of a quorum. Absent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013).

Second, Mystic argues that substantial evidence did not support the Hearing Officer's decision to certify the election results. We review the substance of NLRB decisions under a "highly deferential standard" and will set them aside only "if the Board 'acted arbitrarily or otherwise erred in applying established law to the facts at issue, or if its findings are not supported by substantial evidence.'" *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 650 (D.C. Cir. 2003) (quoting *Plumbers & Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 32 (D.C. Cir. 1995)).

Finally, Mystic challenges the Hearing Officer's refusal to enforce its subpoena. We review refusals to enforce subpoenas for abuse of discretion. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153 (D.C. Cir. 2000).

II

A

Mystic insists that the Regional Director did not have authority to conduct this election because the Board had no quorum at the time the representation election took place. We disagree; as we recently explained in *UC Health v. NLRB*, No. 14-1049, slip op.

at 8-19 (D.C. Cir. 2015), we must defer to the Board's reasonable interpretation that the lack of a quorum at the Board does not prevent Regional Directors from continuing to exercise delegated authority that is not final because it is subject to eventual review by the Board.

As an initial matter, the Board argues that Mystic waived this argument by failing to raise it during the representation proceeding. The Board made the same argument in *UC Health*, and we rejected it there. We do so here for the same reasons: Our precedents make clear that a challenge to agency action based on the agency's lack of authority to take any action at all need not be raised below and may be made for the first time on appeal. *See UC Health*, No. 14-1049, slip op. at 6-7.[3] Nor do we agree with the Board that Mystic abandoned this argument when it executed the Stipulated Election Agreement. *Id*. at 7-8. Nonetheless, just as in *UC Health*, we disagree with Mystic on the merits of its claim. The Regional Director had authority to conduct this election even though the Board had no quorum. *See id*. at 8-19.

Mystic makes one additional argument on this score that we did not confront in *UC Health*. Mystic

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[3] We note that the employer in *UC Health* and in this case raised their objections to the authority of the Regional Director at different points in the administrative process. But these slight factual differences between the cases are immaterial because, as we explained in *UC Health*, our precedents make clear that an employer can raise for the first time on appeal a challenge to the authority of the Board to take any action at all, irrespective of whether the employer ever made that objection below. *See UC Health*, No. 14-1049, slip op. at 6-7.

insists that Regional Director Jonathan Kreisberg did not have authority to conduct this election even if the Regional Directors as a class could do so. In 2010, Kreisberg was appointed as the Regional Director for Connecticut, which was at that time Region 34 of the NLRB's regions. In 2012, while the Board lacked a quorum, the NLRB reorganized the regions and Kreisberg's jurisdiction expanded to cover both Connecticut and Massachusetts, now identified as new Region 1. Mystic insists that because the Board had no quorum in 2012, it could not validly appoint Kreisberg to his new post as the Regional Director of new Region 1 at that time.

The Board again argues that Mystic waived this argument because it was never made until the opening brief in this appeal. We disagree. Because this challenge and the argument that Regional Directors may not conduct elections while the Board lacks a quorum are both premised on the Board's lack of authority to act, we believe both are properly before us no matter when they were first raised. Nonetheless we reject Mystic's argument on the merits here as well. Mystic's nursing home is located in Mystic, Connecticut, inside the boundaries of old Region 34, which covered Connecticut alone. Mystic does not and could not contest that Kreisberg was validly appointed to administer old Region 34. There may be some question whether the Board had authority in 2012 to expand Kreisberg's jurisdiction to include Massachusetts, but that seems irrelevant to the question of whether he continued to have authority to conduct elections in Connecticut as he had since 2010. Surely adding Massachusetts to his jurisdiction or renaming the region he administered did not

impair his preexisting authority. Therefore we believe that his ability to conduct this election remains beyond dispute.[4]

B

Mystic argues that Diane Mackin's supervisory misconduct tainted the outcome of the election. We find that substantial evidence supports the Board's conclusion to the contrary.

1

Section 7 of the NLRA secures the rights of employees "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining," as well as to refrain from all such activities. 29 U.S.C. § 157. To ensure that employees are fully able to exercise their section 7 rights, the Board requires that elections take place under "laboratory conditions" free from coercion by the union or the employer. *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906,

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[4] Mystic made two other arguments attacking other potential bases for Kreisberg's authority: The Acting General Counsel, despite an authorization to manage the Board's internal administrative affairs while it lacked a quorum, did not have authority to appoint Kreisberg as Regional Director over new Region 1 in 2012; and a *nunc pro tunc* order the Board issued in 2014 to approve retroactively the acts it took while it lacked a quorum could not legitimately ratify Kreisberg's control of new Region 1. The Board has clarified that it does not rely on either of these rationales to justify Kreisberg's power to conduct this election and so we need not consider Mystic's arguments against them.

909 (2004). Neither employers nor unions may "interfere with, restrain, or coerce employees in the exercise" of their section 7 rights. 29 U.S.C. § 158(a)(1), (b)(1)(A). Supervisors, defined as individuals with authority to direct, reward, or punish employees, *id*. § 152(11), do not hold section 7 rights. To the contrary, supervisors may not participate in or try to influence the outcome of an election any more than an employer itself is permitted to do so: "Election campaign statements by supervisors which reasonably cause [pro-union] employees to fear reprisal or to expect reward if they exercise their section 7 rights will ordinarily be attributed to the employer and found objectionable." *Harborside*, 343 N.L.R.B. at 906.

Of course, as a general matter, supervisors may be more likely to urge employees to oppose union organization than to support it because their interests are more aligned with those of the employer than those of the employees who seek to organize. However, pro-union supervisory conduct is just as impermissible because it poses the same risk of interfering with the free choice of employees. *Harborside*, 343 N.L.R.B. at 906. In other words, the law always forbids a supervisor from trying to influence the free choice of employees in exercising their section 7 rights, regardless of what outcome the supervisor is seeking to achieve. "This is true whether or not the statements or actions of the supervisor are consistent with the views of the employer." *Id*. at 907. After all, the average "employee is more concerned about the attitude of his immediate supervisor[s] than he is with the feelings of the company president," as his immediate supervisors "control his

day to day life." *Id*. at 907 n.3 (quoting *Turner's Express, Inc. v. NLRB*, 456 F.2d 289, 292-93 (4th Cir. 1972)).

In *Harborside*, the Board established a two-step inquiry to determine "whether supervisory [pro-union] conduct upsets the requisite laboratory conditions for a fair election" such that the election result is invalid. 343 N.L.R.B. at 909. At the first step, the Board asks "[w]hether the supervisor's . . . conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election." *Id*. If so, the Board moves to the second step and asks "[w]hether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election." *Id*. The effect of an individual episode of supervisory misconduct depends on "factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct." *Id*. In other words, even conduct that actually interferes with employee choice will not invalidate the election result unless it actually influenced the outcome. But if a supervisor's pressure on employees played a meaningful role in the union's victory or the union's defeat, the Board will throw out the result and order a new election.

The Board measures the effect of a supervisor's impermissible conduct by also taking into account any "mitigating circumstances" that may have "sufficiently negated" the coercive activities such that the election result was not materially affected. *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1272

(D.C. Cir. 2012) (quoting *SNE Enters., Inc.*, 348 N.L.R.B. 1041, 1042 (2006)). For example, the employer can mitigate a supervisor's conduct if it "'takes timely and effective steps to disavow' the conduct." *SNE Enters.*, 348 N.L.R.B. at 1043 (quoting *Harborside*, 343 N.L.R.B. at 914). That is, if the employer publicly announces that a supervisor lobbying on the union's behalf is acting against the employer's wishes, the employer limits the risk that employees will feel coerced. Employees will understand that the supervisor is simply a rogue agent and does not have the employer's support.

Separately, the Board also determines whether any anti-union effort by the employer itself had the effect of counteracting a supervisor's pro-union conduct. *Harborside*, 343 N.L.R.B. at 914. Of course, the NLRA forbids employer anti-union campaigns just as surely as it forbids pro-union lobbying by supervisors. However, the Board's inquiry focuses on the validity of the election as a whole, not simply on whether inappropriate conduct took place during the election period. An employer's effort to defeat a union does not violate the law if the union wins. More to the point, if the employer works at cross-purposes to a supervisor's pro-union activity during an election, the employer may end up neutralizing the supervisor's wrongdoing and inadvertently preserve the conditions necessary to reach a valid election result.

The record is clear and both parties acknowledge that Mackin's pro-union conduct satisfies the first step of the *Harborside* analysis. Nonetheless, at the second step of *Harborside*, the Board reasonably determined that Mackin's efforts did not materially affect the election's outcome because Mystic ade-

quately made up for them by disavowing Mackin's conduct and by running its own anti-union campaign.

Substantial evidence supported this determination. Mystic required employees to attend anti-union meetings, sent materials to their homes, posted materials in the workplace, and even distributed anti-union bracelets for employees to wear at work as a way of showing their opposition to the Union. Mystic's campaign was much like another employer's efforts to defeat a union that the Board found neutralized prounion conduct by supervisors. In *Terry Machine Co.*, 356 N.L.R.B. No. 120 (2011), supervisors who oversaw the bargaining unit were "actively involved" in a union organizing drive. *Id*. at *2. At the same time, the employer "engaged in an extensive [anti-union] campaign," including mandatory company-wide meetings, individual meetings with employees, anti-union videos, anti-union postings, home mailings, and distribution of anti-union buttons to wear at work. *Id*. at *3. The Board upheld the election result despite the supervisors' substantial pro-union conduct, concluding that the employer's own anti-union campaign had adequately offset the supervisors' efforts. *Id*. at *5. The Board here reasonably concluded, just as it did in *Terry Machine*, that the combination of tactics Mystic deployed in its extensive effort to defeat the Union cancelled out Mackin's own attempt to help the Union prevail.

Mystic argues otherwise by attempting to minimize the significance of each element of its own anti-union program. It insists that few employees saw the anti-union materials, attended the anti-union meetings, or understood the intent behind the anti-union

bracelets. None of these challenges to the Board's determination succeed. A number of employees testified that they received Mystic's anti-union materials through the mail or saw them posted in the workplace, and one even testified that she knew of other employees who had discussed the materials during the election. Although some employees testified that the anti-union meetings were sparsely attended, there was also testimony that "a lot" of the staff attended a meeting at one point or another. And while one employee testified that she did not recognize Mystic's anti-union bracelet, a number of other employees testified that they knew what the bracelets were for, wore bracelets themselves, and saw others wearing them. We cannot say that "no reasonable factfinder" could decide, as the Board did here, that Mystic's campaign was effective at neutralizing Mackin's pro-union advocacy. *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011) (quoting *United Steelworkers of Am., AFL-CIO-CLC, Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)).

Substantial evidence also supported the conclusion that Mystic limited the effect of Mackin's conduct when it posted a public notice that disavowed her pro-union behavior, discussed the notice at mandatory employee meetings, and ultimately fired her. *See, e.g., Terry Machine*, 356 N.L.R.B. No. 120, at *3 (finding that an employer's "explicit disavowals" and "widely disseminated termination threat . . . relieved any potential continuing pressure employees might have felt" from pro-union supervisory conduct). Mystic argues otherwise by suggesting that few employees ever saw the notice, that most employees did not

attend the mandatory meetings and so would never have heard it discussed, and that any employees who were aware that the notice existed would not have realized it referred to Mackin because it did not identify her by name. We think the Board could reasonably reach the opposite conclusion on each count. Five employees testified that they saw the notice, and we have already noted that there was testimony indicating that "a lot" of employees attended the mandatory anti-union meetings at which the notice was discussed. One employee who saw the notice indicated that she knew the notice applied to Mackin in particular. Another testified that she understood the notice to refer to all supervisors who may have been inappropriately discussing the election—obviously including Mackin. Most significantly, Mackin told a number of employees around the time the notice was posted that Mystic had reprimanded her for advocating on behalf of the Union. In one case, she told an employee that the notice addressed her own behavior in particular. The Board could reasonably rely on all this evidence to conclude that employees knew of the notice and understood that Mystic was disavowing Mackin's conduct.

Even if employees somehow missed the existence or significance of the notice, they could not have misunderstood that Mystic was disavowing Mackin's pro-union behavior when it took the much more dramatic step of firing her. Though some employees testified that they did not know why Mackin was terminated, the Hearing Officer specifically found, and the Board subsequently agreed, that this testimony was not credible. *See SSC Mystic*, 2013 WL 6252453, at *1 n.2. Mystic has not challenged that

credibility determination on appeal. Thus the only credible testimony before us comes from employees who said that they knew Mackin had been fired because of her pro-Union efforts. Joint Appendix 152. The Board was entitled to rely on this undisputed testimony to reach the commonsense conclusion that employees knew Mystic was conclusively disavowing Mackin's conduct by firing her. *See SNE Enters.*, 348 N.L.R.B. at 1043 (noting that an election result can be valid despite inappropriate pro-union supervisory conduct where an employer "'takes timely and effective steps to disavow' the conduct" (quoting *Harborside*, 343 N.L.R.B. at 913)).

We also agree with the Board that Mackin's firing limited the effect of her conduct despite the fact that she assured employees that the Union would help her get her job back. Mystic insists to the contrary that these assurances "blunted the impact" of Mackin's discharge by leading employees to believe that she would return to the workplace and regain the power to retaliate against the Union's opponents. But the opposite seems to be true. The record shows that several different employees who were subject to Mackin's pro-union pressure ended up opposing the Union by the time of the election, two weeks after Mackin was fired. Whatever the immediate effect of Mackin's campaign, employees who were among its targets were unafraid to oppose the Union after her discharge. And Mystic produced no evidence indicating that employees she pressured to support the Union actually did so. The Board was entitled to conclude from this that Mackin's firing had broken whatever hold she might have exercised over employees.

In short, substantial evidence supports the Board's conclusion that Mystic's efforts to limit Mackin's effectiveness and its own anti-union campaign cancelled out Mackin's efforts on the Union's behalf and preserved the environment necessary for a valid representation election.

The Hearing Officer also noted that a number of other factors diminished the likelihood that Mackin influenced the election result. For example, Mackin was the sole pro-union organizer, naturally limiting the total amount of pressure that could be brought to bear on the Union's side of the ledger. And the election was not a close one. The Union won by sixty-four votes to forty, or almost one quarter of the entire voting population, indicating that any influence Mackin might have wielded over a few employees could not possibly have altered the result. Nor did Mackin's conduct "linger[]," *Harborside*, 343 N.L.R.B. at 909, as any influence she might have wielded at one time apparently dissipated before the end of the election period. The Board was entitled to rely on all these factors as part of its conclusion that Mackin's campaign did not materially alter the election outcome.

The Board was also entitled to conclude that the length of the time between Mackin's discharge and the election further limited the impact Mackin's efforts could have had on the outcome. Mystic insists that this decision was forbidden in light of Board decisions in which, it argues, the Board invalidated an election despite even longer intervals between the end of inappropriate supervisory conduct and an election. But in each of the cases Mackin [sic] cites, supervisors either continued to lobby for the union

throughout the election period, or the interval was immaterial because other factors helped the supervisors' influence linger. For example, in several of the cases, supervisors continued to campaign for the union "right up until the . . . election" took place. *Madison Square Garden CT, LLC*, 350 N.L.R.B. 117, 122 (2007); *see also Millard Refrigerated Servs., Inc.*, 345 N.L.R.B. 1143, 1144 (2005); *Harborside*, 343 N.L.R.B. at 913-14. And in the others, though the supervisors stopped campaigning before the election, the employer never publicly disavowed the supervisors' conduct and the supervisors remained in the workplace, allowing their pro-union pressure to linger. *See SNE Enters.*, 348 N.L.R.B. at 1044; *Chinese Daily News*, 344 N.L.R.B. 1071, 1072 (2005). This case is quite different. Mystic forcefully disavowed Mackin's conduct and fired her, dispelling the influence she might otherwise have exercised. No case forbids the Board's conclusion on this score. Absent such precedent, we cannot say the Board was wrong to decide that the effects of Mackin's conduct had at least in part evaporated by the time the election took place, especially when considered in conjunction with the other factors we have already discussed that limited Mackin's possible influence on the election.

Mystic points to *Veritas Health Services*, arguing that much more is required to neutralize the impact of a supervisor's pro-union activity than was present here. In Veritas, supervisors who pressured employees on behalf of the union ultimately switched sides and became fervent anti-union advocates, speaking directly to employees in the workplace and sending letters to most of the staff explaining that they no longer supported unionization. *Veritas*, 671 F.3d at

1273. This about-face, the Board found, neutralized the supervisors' previous pro-union conduct. *Id*. Mystic relies on *Veritas* to argue that Mackin's pro-union conduct was not mitigated here because Mackin herself never disavowed her past support for the Union. But *Veritas* does not suggest that the only permissible form of mitigation is personal disavowal by the supervisor. And the Board has elsewhere found that an employer's own anti-union campaign can cancel out supervisory conduct like Mackin's. *See, e.g., Terry Machine*, 356 N.L.R.B. No. 120, at *3, *5. The Board was entitled to do the same here.

Finally, Mystic insists that the Board unfairly showed more lenience toward Mackin's pro-union conduct than it would have shown had Mackin successfully urged employees to vote against the Union instead. *See Harborside*, 343 N.L.R.B. at 906-07 (holding that both pro- and anti-union coercion are equally impermissible). We need not engage with the hypothetical circumstance Mystic would have us imagine. Mystic has offered no support for its assertion that the Board displayed bias. The Board ruled that Mystic's anti-union campaign made up for Mackin's impermissible pro-union conduct, just as it has found in the past. There is no basis to criticize the Board's conclusion regarding what actually transpired here.

Mackin's campaign to help the Union succeed was inappropriate. However, a number of factors showed its limited effectiveness: Mackin acted alone; she was dismissed from the workplace well before the election took place; her conduct apparently had little lingering effect; and the Union prevailed by a substantial margin. By disavowing Mackin's pro-union advocacy

and ultimately firing her, Mystic further minimized her impact on the result of the election. And Mystic's own efforts to defeat the union provided a powerful counterbalance to Mackin's lobbying. Based on this record, the Board was entitled to conclude that the election result challenged here was valid.

C

Finally, Mystic argues that the Hearing Officer erred by refusing to enforce Mystic's subpoena of Mackin's telephone records, which the company claims would show that Mackin was acting as the Union's agent. Refusing to enforce this subpoena did not prejudice Mystic. *See Ryerson*, 216 F.3d at 1154 (noting that we will only reverse the Board's decision not to enforce a subpoena "if prejudicial"). Even proving that Mackin was a Union agent would not have altered the Board's determination that the election was valid. It is true that coercively interrogating an employee is yet another way in which employers and unions can violate the section 7 rights of employees. *See Millard Refrigerated Servs.*, 345 N.L.R.B. at 1146. But we have already found that substantial evidence supports the Board's determination that all of Mackin's inappropriate conduct was adequately offset by Mystic's own conduct with respect to Mackin in particular and the overall election in general. The Board's ultimate conclusion as to the propriety of the election remains valid regardless of whether Mackin was acting as an agent of the Union.

Mystic insists otherwise and points to our recent decision in *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015). There, an NLRB hearing officer had refused an employer's effort to subpoena documents it believed might show

that employees who had advocated on behalf of the union during a representation election were union agents who had played a large role in influencing the election. We found that refusing to enforce the subpoena in that case was prejudicial because obtaining the records would have given the employer critical advantages that it otherwise lacked in putting on its case. But those considerations are not present here. The records would not have revealed any information other than the existence of conversations between Mackin and the Union organizer, two individuals already well known to Mystic. The records could not have served as new evidence or helped to identify new leads or witnesses. And because Mystic failed to call either Mackin or the Union organizer to testify, the records could not have helped impeach or examine them. *Id*. at 585. Admittedly, the Hearing Officer directed the Union to produce the organizer and the Union failed to do so. But Mystic also failed to remind the Hearing Officer of her instruction or to mention the organizer or the subpoena again in any way. Mystic cannot complain that it was prejudiced when it failed to call the only witness whose testimony might have made the records relevant.

Mystic also argues that the Board's decision in this case is undermined by its decision in *Voith Industrial Services, Inc.*, No. 09-CA-075496, 2012 WL 4169024 (Sept. 19, 2012). In *Voith*, the Board found an abuse of discretion where a Hearing Officer refused to enforce a subpoena for records regarding the relationship between an employer and the union that represented its employees because the records were at least "potentially relevant." *Id*. at *1. But here, regardless of whether the records were relevant to

the question of Mackin's status as a Union agent, they could not have altered the Board's decision that Mackin's lobbying did not contaminate the election result because it was offset by Mystic's public discipline of Mackin and Mystic's own anti-union conduct. Mystic was not prejudiced because these records simply could not have changed the outcome. And absent any prejudice we have no basis to reverse the Board with respect to the subpoena. *Ryerson*, 216 F.3d at 1154.

III

For the foregoing reasons, we deny Mystic's petition for review and grant the NLRB's cross-application for enforcement of its order.

SRINIVASAN, *Circuit Judge*, *concurring*: I join the court's opinion, including its rejection of Mystic's argument that the Regional Director had no authority to conduct the representation election given the absence of a Board quorum. In rejecting that argument, our opinion relies on the explanation set forth in *UC Health v. NLRB*, __ F.3d __ (D.C. Cir. 2015), which rejected the same argument in an opinion issued contemporaneously with ours in this case. I fully agree with the conclusion of *UC Health* as described in our opinion here: that we "must defer to the Board's reasonable interpretation that the lack of a quorum at the Board does not prevent Regional Directors from continuing to exercise delegated authority." *Ante* at 8.

I write separately to note that, with regard to one aspect of the explanation in *UC Health* for rejecting the Board-quorum argument, I see things a bit differently. In both cases, the employer argues that our prior decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), precludes the Board from adopting the interpretation of the quorum statute we now review. I agree with the *UC Health* majority that *Laurel Baye* poses no bar to the Board's reaching that interpretation. My reasons for reaching that conclusion, though, vary in some measure from those of the *UC Health* majority.

I would rely on the approach set out in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, the Supreme Court established a rule for determining when a prior judicial interpretation of a statute forecloses an agency from adopting a contrary reading. The rule set forth in *Brand X* governs an agency's

freedom to depart from a prior judicial interpretation regardless of whether that interpretation was set out in a "pre-*Chevron* judicial decision," *UC Health*, slip op. at 7-8 (Silberman, J., dissenting), or instead in a post-*Chevron* judicial decision, as was the case in *Brand X* itself. *See* 545 U.S. at 979-80. In either situation, *Brand X* establishes that an agency remains free to construe a statute it administers in a manner at odds with the prior judicial interpretation *unless* the court's decision purported to define the "*only permissible* reading" of the statute, *id*. at 984—"the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate," *id*. at 982. If the court instead articulated only the "*best* reading" of the statute, the agency retains discretion to implement a contrary interpretation. *Id*. I believe *Laurel Baye* is best read to have done the latter.

As a result, while the *UC Health* majority and dissent disagree over whether *Laurel Baye*'s statutory holding governs delegations of the Board's authority to Regional Directors (as the dissent contends) or instead pertains only to delegations to Board subgroups (as the majority holds), *see* 29 U.S.C. §153(b), I view that question to be beside the point. *Laurel Baye*'s holding, regardless of whether it reaches delegations to Regional Directors, does not purport to adopt the *only permissible* reading (as opposed to merely the *best* reading) of the statute. *Brand X* therefore left the Board room to adopt a contrary reading, which the Board has now done.

Of course, there would be no dispute about how best to understand *Laurel Baye* if our court had occasion in that case expressly to apply *Chevron*'s two-

step framework. Had we had occasion to do so, and had we resolved the interpretive question at *Chevron* step one, we would have confirmed that our interpretation was the "only permissible" one. *See Brand X*, 545 U.S. at 982-83. But *Laurel Baye* contains no mention of *Chevron*, much less any express application of its two-step test. That is presumably because the Board did not seek *Chevron* deference in *Laurel Baye*. And insofar as the applicability of *Chevron* presents no issue of jurisdiction, *see Lubow v. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015), we had no obligation to walk through the *Chevron* framework in our opinion in the absence of a request by the Board to do so. I assume the *Laurel Baye* court made no express reference to *Chevron* for that reason.

In saying so, I am in no way "essentially accus[ing] the *Laurel Baye* panel of disregarding governing law applying to judicial review of agency statutory interpretations," *i.e.*, *Chevron* deference. *UC Health*, slip. op. at 7 (Silberman, J., dissenting). The point here is not that the *Laurel Baye* court shirked any requirement to apply the *Chevron* framework. The point instead is that, because the Board did not claim any entitlement to *Chevron* deference, the *Laurel Baye* court presumably felt it had no obligation expressly to march through *Chevron*'s two steps in its opinion. Regardless of whether, by failing to argue any entitlement to it, an agency can forfeit a claim to *Chevron* deference, it is fully understandable why the *Laurel Baye* opinion makes no effort expressly to apply *Chevron*'s two-step test. Why walk through *Chevron*'s two-step deference framework in the opinion if the Board made no claim

of entitlement to *Chevron* deference in the first place?

This is all a fairly roundabout way of making what I see as the ultimate point for purposes of determining whether the Board retained freedom under *Brand X* to disagree with the *Laurel Baye* court's interpretation: because *Laurel Baye* did not explicitly invoke the *Chevron* framework (understandably, given that the court was not asked to), we simply do not know from the *Laurel Baye* decision whether its rejection of the Board's interpretation fell at *Chevron* step one. Judge Silberman, in his dissent in *UC Health*, posits that, even though *Laurel Baye* does not say a word about *Chevron*, its rejection of the Board's interpretation *must* have been at *Chevron* step one. He suggests that, in the era of *Chevron*, a reviewing court can *never* adopt merely a "best reading" of a statute when—as in *Laurel Baye*—the court is faced with a contrary agency interpretation. *Id*. at 7-9.

I disagree. For instance, what if an agency's interpretation is ineligible for *Chevron* treatment because it was issued without the requisite procedures? *See United States v. Mead Corp*., 533 U.S. 218, 231-32 (2001). In that event, a reviewing court surely can reject the agency's interpretation in favor of the court's "best reading" without necessarily having to decide whether the "best reading" is also the "only permissible" one (or without remanding to the agency). *See Christensen v. Harris Cty.*, 529 U.S. 576, 586-87 (2000); *Miller v. Clinton*, 687 F.3d 1332, 1342, 1352 (D.C. Cir. 2012). As we have said in such a situation, "[w]ith *Chevron* inapplicable," we "must decide for ourselves the best reading." *Miller*, 687

F.3d at 1342 (internal quotation marks omitted); *see id*. at 1352. If the court then were to reach a "best reading" contrary to the agency's interpretation, the agency, as *Brand X* makes clear, could later disagree and issue a new interpretation (which, if adopted pursuant to the requisite procedures, would be entitled to *Chevron* deference). *See* Richard J. Pierce, Jr., 1 Administrative Law Treatise §3.5, at 182 (5th ed. 2010). In short, there certainly can be situations in which a reviewing court rejects an agency's interpretation in favor of the "best reading" (rather than in favor of the "only permissible reading"), in which case the agency would retain leeway under *Brand X* to disagree.

So where does that leave us here? The question is whether, notwithstanding the *Laurel Baye* court's understandable decision to refrain from expressly invoking *Chevron*'s two-step framework, we somehow know that the court in fact rejected the Board's interpretation as a step one "only permissible reading" resolution. We do not. Even assuming, *arguendo*, that the *Laurel Baye* court was required to entertain *Chevron* at all despite the Board's failure to claim any entitlement to *Chevron* deference (and assuming that the *Laurel Baye* court believed it was required to do so), we do not know why the court declined to give effect to the agency's interpretation.

As Judge Silberman suggests, it *might* have been based on a conclusion that the Board, rather than arriving at an interpretation as a matter of discretion, simply believed its reading to be compelled by the statute (in which case, for the reasons he argues, the absence of a remand would tend to indicate a step one resolution). *UC Health*, slip op. at 6, 8 (Sil-

berman, J., dissenting). But perhaps the court instead believed that the Board, as the petitioning company argued, lacked *Chevron* authority to construe this particular statute in the first place because it "presents a question of power or jurisdiction[.]" Brief for Petitioner at 10, *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. Nos. 08-1162(L), 08-1214). That argument could have had more purchase before the Supreme Court's decision in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), when this court had held that "the existence of ambiguity is not enough per se to warrant deference to the agency's interpretation" because the agency may lack delegated authority "to make a deference-worthy interpretation of the statute" at issue. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005); *see Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002); *see also* Nathan Alexander & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1499-1500 (2009) (describing *Am. Bar Ass'n* as a decision about "agency jurisdictional determinations"). After all, the Board in its brief raised no objection to that argument by the company. If the *Laurel Baye* court thought *Chevron* might be inapplicable for that reason, the court would have been free to reject the agency's interpretation based on a "best reading." The bottom line is that we cannot be certain from the *Laurel Baye* opinion that the court issued the equivalent of a *Chevron* step one "only permissible reading."

While the *Laurel Baye* court understandably did not expressly work through *Chevron*'s two-step

framework given the absence of any request by the Board to do so, there is another way in which the *Laurel Baye* court could have removed any doubt about whether it considered its rejection of the Board's interpretation to rest on the "*only permissible* reading" of the statute. *Brand X*, 545 U.S. at 984. The court could have said so. *Laurel Baye* came after *Brand X*. And post-*Brand X*, we issue decisions in awareness of the interpretive backdrop against which our opinions construe statutes administered by an agency. Following *Brand X*'s roadmap, a court could preclude an agency's adoption of a contrary interpretation by saying expressly that the court's holding rests on the "*only permissible* reading" of the statute, *id*., or by explicitly "hold[ing] that the statute unambiguously requires the court's construction," *id*. at 985. In the absence of any definitive formulation of that variety, we are in the position of having to parse a prior opinion's language to divine whether it expressed with adequate clarity the equivalent of a *Chevron* step one holding—*i.e.*, an "only permissible reading" resolution.

I do not read *Laurel Baye* to have done so. The opinion stops short of concluding that the statutory terms accommodate only one permissible interpretation concerning whether a Board delegee can continue to act if the Board ceases to maintain a three-member quorum. To be sure, the opinion necessarily holds that such a reading at least presents the *best* interpretation of the statute. But we did not go further to—and we had no necessary occasion to—decide that the best reading also was the only permissible one. To the contrary, we said that "the case before us presents a *close question*," and that the

Board's interpretation was not "entirely indefensible" (which is essentially to say, it was "defensible"). *Laurel Baye*, 564 F.3d at 476 (emphasis added). Those words suggest something considerably less than a definitive, *Chevron* step one interpretation.

Of course, we also did not go so far as to say that a contrary reading necessarily would be reasonable. One can certainly locate language in the opinion that might have been used in service of an "only permissible reading" resolution. *E.g., id*. at 473 (noting that, because "[t]he statute confers no authority on" the delegee and "[t]he only authority by which the [delegee] can act is that of the Board," if "the Board has no authority, it follows that the [delegee] has none"). But when read in the context of an opinion that considered the question to be "close" and a contrary reading to be somewhere in the neighborhood of a "defensible" one, the cited language is no less consistent with a "best reading" holding than with an "only permissible reading" holding. And while *Laurel Baye* at times invokes terms such as "unequivocal[]" and "clearly" in discussing the statute, it does so only in making the predicate point that—as the plain terms of the statute themselves specify—the Board must "at all times" satisfy a three-member quorum requirement. *Id*. (quoting 29 U.S.C. § 153(b)). In my reading, we did not use those sorts of definitive terms in resolving the subsequent question ultimately at issue: whether a delegee appointed by a properly constituted Board can itself continue to act in the event the Board later slips below three members. As to the latter question, I understand our opinion to have reached a "best reading," not an "only permissible reading."

The cited language and other such passages, at most, would render it fairly debatable whether *Laurel Baye* intended to adopt the equivalent of a *Chevron* step one holding. I would not strain to find a step one resolution in an opinion amenable to a contrary understanding. If anything, I would err on the side of construing a decision to have reached a "best reading" (rather than an "only permissible reading") resolution.

Mistakenly understanding a prior decision to have adopted a step one interpretation would have significant consequences. In that event, we would erroneously freeze in place our "best reading" of a statute even though Congress, according to the basic assumptions underlying *Chevron*, would have intended to delegate to an agency primary authority to construe the statute as it sees fit within the scope of its delegation. The result would be one *Brand X* specifically sought to avoid: "'ossification of large portions of our statutory law,' by precluding agencies from revising unwise judicial constructions of ambiguous statutes." 545 U.S. at 983 (quoting *Mead*, 533 U.S. at 247 (Scalia, J., dissenting)).

Now suppose, conversely, that we instead err in favor of perceiving a "best reading" resolution in a prior opinion that in fact intended to go further and establish the "only permissible reading" of a statute (and thus to preclude an agency from adopting a contrary interpretation). In that event, the error would have become salient only because the agency later elected to implement a reading of the statute contrary to our prior interpretation. And the error would be short-lived: Our court (or the Supreme Court), in the process of judicial review, would have

the final word on whether the agency's reading could be squared with the statute. Our review of the Board's interpretation in this case (and in *UC Health*) perfectly illustrates the point.

For those reasons, I read *Laurel Baye* to have decided the best reading of the Board quorum statute, not the only permissible reading, leaving the Board free under *Brand X* to adopt a contrary interpretation. The Board has done so, and here (and in *UC Health*)—unlike in *Laurel Baye*—seeks *Chevron* deference for its interpretation. For the reasons explained by the *UC Health* majority, I believe the Board is entitled to that deference.

SENTELLE, *Senior Circuit Judge*, dissenting: Relying on *UC Health v. NLRB*, __ F.3d __ (D.C. Cir. 2015), the majority concludes that a regional director has the authority to conduct an election even if the Board lacks a quorum. I disagree and would instead set aside the election because the regional director's authority to act "ceased the moment the Board's membership dropped below its quorum requirement of three members." *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009).

Section 153(b) contains four provisions: (1) the delegation clause; (2) the vacancy clause; (3) the Board quorum requirement; and (4) the group quorum provision. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 680 (2010) (summarizing 29 U.S.C. § 153(b)). In *Laurel Baye*, we held that the third provision, the quorum requirement, "clearly requires that a quorum of the Board is, 'at all times,' three members." 564 F.3d at 473. The phrase "at all times," we explained, is "unambiguous" and "denotes that there is no instance in which this Board quorum requirement may be disregarded." *Id.*; *see also id.* ("Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times."). Simply put, we held that "the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied." *Id.*

The majority in *UC Health* purports to create an exception for regional directors. I reject *UC Health*'s analysis for the same reason the Supreme Court rejected the Board's rationale in *New Process Steel*: it

"dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention." 560 U.S. at 681. Even though *New Process Steel* did not rely on our discussion of agency, *see id.* at 684 n.4 ("our decision does not address" that "separate question"), neither did the Supreme Court overrule our decision in *Laurel Baye*. We remain bound by it as circuit law.

I see little point in rehashing the debate between Judge Silberman in the companion case and Judge Srinivasan in this one over the absence of a *Chevron* discussion in *Laurel Baye*. I do think it worth at least passing mention that in the Supreme Court decision which ultimately construed the same statute as *Laurel Baye*, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), neither the majority nor the dissent makes any reference to *Chevron*. Neither, apparently, did the government, since all references to the government argument in *New Process Steel* deal with interpretation of the statute *per se*, rather than an analysis of the NLRB's administrative conduct. For example, at 680, the Court states, "One interpretation, put forward by the Government, would read the clause to require only that a delegee group contain three members at the precise time the Board delegates its powers . . . ." In analyzing the government's position, the Court stated, "Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of § 3(b)'s provisions functionally void." *Id*. at 681. For what it's worth, the Seventh Circuit in the decision reviewed by the Supreme Court in *New Process Steel* also made no reference to *Chevron*. *See New Process Steel,*

L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009). That said, the fact that the *Laurel Baye* court did not discuss a government position that the government did not raise seems to me to be of little consequence.

Because *Laurel Baye* concluded that § 153(b)'s quorum requirement provision unambiguously requires the Board to have a quorum for a delegee to exercise its authority, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), does not apply. And, for the reasons discussed by Judge Silberman, we may not apply *Chevron* deference to the Board's interpretation of § 153(b). *See UC Health*, Slip op. at 5–6 (Silberman, J., dissenting). Even if *Chevron* deference applied, the Board's interpretation of § 153(b) is unreasonable under step two. *See id*. at 5.

I respectfully dissent.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

No. 01-CA-120161

SSC MYSTIC OPERATING COMPANY, LLC D/B/A
PENDLETON HEALTH & REHABILITATION CENTER

and

NEW ENGLAND HEALTH CARE EMPLOYEES UNION,
DISTRICT 1199, SEIU

March 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on January 6 and 14, 2014, respectively, by New England Health Care Employees Union, District 1199, SEIU (the Union), the General Counsel issued the complaint on January 17, 2014, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests to recognize and bargain following the Union's certification in Case 01-RC-098982. (Of-

ficial notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint.

On February 6, 2014, the General Counsel filed a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment. On February 7, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to the election in the underlying representation proceeding, including its assertion that the Board lacked a quorum on April 4, 2013, when the Regional Director conducted the representation election. The Respondent further asserts that this matter should be held in abeyance until the United States Supreme Court issues its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir.), cert. granted 133 S.Ct. 2861 (2013).[1]

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[1] The Respondent's arguments are without merit. As an initial matter, this case does not raise a quorum issue because the current Board, which includes five Board Members who were confirmed by the United States Senate, certified the Union. (continued)

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered

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Further, even if the Board lacked a quorum at the time the Regional Director conducted the election, that circumstance would not impair the Regional Director's authority to process the instant petition. The Board has delegated decisional authority in representation cases to Regional Directors, 26 Fed.Reg. 3911 (1961), pursuant to the 1959 amendment of Sec. 3(b) of the National Labor Relations Act expressly authorizing the delegation, Pub. L. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Sec. 3(d) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director). Pursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment.

Further, in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court expressed doubt about a contention that the lack of a Board quorum voids the previous delegations of authority to nonmembers, such as Regional Directors. Although the Supreme Court did not expressly rule on the question, it noted that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." 560 U.S. at 684 fn. 4. Further, since *New Process*, all of the courts of appeals that have considered this issue have upheld the principle that Board delegations of authority to nonmembers remain valid during a loss of quorum by the Board. See *Kreisberg v. Healthbridge Management, LLC*, 732 F.3d 131 (2d Cir. 2013); *Frankl v. HTH Corp*., 650 F.3d 1334, 1354 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012); *Osthus v. Whitesell Corp*., 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010).

and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business located at 44 Maritime Drive, Mystic, Connecticut, and has been engaged in the operation of a nursing home (the Mystic facility).

Annually, the Respondent, in conducting its operations described above, derives gross revenues in

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[2] The Respondent alleges as a special circumstance that its arguments are supported by the reasoning in *Hooks v. Kitsap Tenant Support Services*, 2013 WL 4094344 (W.D. Wash., August 13, 2013), a case that issued after the Respondent had filed exceptions to the hearing officer's report, and which it argues that no Board decision has fully analyzed. We find that the issuance of *Hooks v. Kitsap* does not constitute a special circumstance warranting reexamination of the representation proceeding, and we observe that the Board has previously rejected the court's reasoning in *Hooks v. Kitsap* and has found that the Acting General Counsel was validly selected. See *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 2 (2014).

excess of $100,000 and purchases and receives at its Mystic facility goods valued in excess of $5000 directly from points located outside the State of Connecticut.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, New England Health Care Employees Union, District 1199, SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on April 4, 2013, the Union was certified on December 3, 2013, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees working in the following classifications at Respondent's Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide, Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dieticians, Social Workers, MDS

> Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated December 10 and 17, 2013, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit, and, since about December 10, 2013, the Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about December 10, 2013, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the

Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, SSC Mystic Operating Company, LLC d/b/a Pendleton Health & Rehabilitation Center, Mystic, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with New England Health Care Employees Union, District 1199, SEIU, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understand-

ing is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees working in the following classifications at Respondent's Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide, Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dieticians, Social Workers, MDS Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mystic, Connecticut, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respond-

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2014

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with New England Health Care Employees Union, District 1199, SEIU, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time employees working in the following classifications at Respondent's Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide, Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dieticians, Social Workers, MDS Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional employees, guards, and supervisors as defined in the Act.

SSC MYSTIC OPERATING COMPANY, LLC D/B/A PENDLETON HEALTH & REHABILITATION CENTER

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14-1049, 14-1193

UC HEALTH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decided: September 18, 2015

Before: GRIFFITH, *Circuit Judge*, and EDWARDS and SILBERMAN, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Concurring opinion filed by *Senior Circuit Judge* EDWARDS.

Dissenting opinion filed by *Senior Circuit Judge* SILBERMAN.

GRIFFITH, *Circuit Judge*:

In *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Supreme Court determined that the National Labor Relations Board lacked authority to act during the time that three of its five members held office via appointments that violated the Recess Appointments Clause. This petition for review asks whether a Regional Director of the Board had authority to conduct a union election and certify its result during that same time. We conclude that the Regional Director

maintained his authority and therefore deny the petition for review.

I

A

Section 3(a) of the National Labor Relations Act (NLRA) calls for a National Labor Relations Board made up of five members who are appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). The Board has two main functions under the NLRA. Its quasi-judicial function involves deciding whether particular conduct violates the provisions of the Act that bar unfair labor practices. *Id.* §§ 158, 160. The Board also has the primary responsibility for directing and holding representation elections by which employees may choose to designate representatives for purposes of collective bargaining. *Id.* § 159(b), (c). Representation proceedings differ from unfair labor practice proceedings in that they may only be reviewed in a court of appeals when they are relevant to the court's review of an unfair labor practice proceeding. *See Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). The Act authorizes the Board to delegate to Regional Directors the authority to direct representation elections and certify the results. 29 U.S.C. § 153(b). The Board first delegated its authority over representation proceedings to the Regional Directors in 1961. *See* 26 Fed. Reg. 3911 (May 4, 1961). Regional Directors have been responsible for administering and certifying the results of representation elections in their particular regions ever since.

In what turns out to be a critical distinction for the purposes of this challenge, the statute preserves

for the Board the power to review "any action of a regional director" taken pursuant to that delegation, should a party object. 29 U.S.C. § 153(b). Thus, though the Board may empower Regional Directors to oversee representation elections, the terms of the delegation authorized under the Act provide that no Regional Director's actions are ever final on their own; they only become final if the parties decide not to seek Board review or if the Board leaves those actions undisturbed. *Id*.

The Act separately permits the Board to delegate "any or all of the powers which it may itself exercise" to panels made up of three or more of its members. 29 U.S.C. § 153(b). When such a panel is created, the Act provides that two of its members make up a quorum of that group. *Id*. This provision allows the Board to process cases more quickly by spreading them across more panels. Moreover, it allows the Board to continue to function without requiring the attendance of all members. Should two of the five members' terms expire, the Board can continue to act despite the vacancies, while waiting for Congress to appoint new members. Nevertheless, the statute mandates that "three members of the Board shall, at all times, constitute a quorum of the Board." *Id*.

Between August 2010 and January 3, 2012, three of the Board's five members' terms expired and the Senate refused to confirm any of the President's nominees to fill the vacancies, leaving the Board without a quorum and therefore unable to act. Claiming authority under the Recess Appointments Clause, *see* U.S. Const. art. II, § 2, cl. 3, the President named three individuals to the Board during a three-day break between *pro forma* Senate sessions,

but the Supreme Court held those appointments unconstitutional in *Noel Canning*, 134 S. Ct. 2550. No Senate-confirmed appointees were sworn in until August 5, 2013. In the interim, Regional Directors continued to hold elections and certify the results, relying upon the Board's previous delegation of authority.

B

UC Health is a nonprofit corporation that operates a hospital and provides inpatient and outpatient medical care near the University of Cincinnati in Ohio. In March 2013, while the Board lacked a quorum, the UC Health Public Safety Union filed a petition with the Board seeking to represent a unit of security officers employed by the company. UC Health and the Union entered into a Stipulated Election Agreement that identified the appropriate bargaining unit and established that the Regional Director would supervise a secret-ballot election following the Board's regulations. Under those regulations, if either party files timely objections to the election, it is entitled to plenary review by the Board of any decision of the Regional Director addressing those objections. 29 C.F.R. § 102.67(c). If no objections are filed, the Regional Director "shall" certify the results. *Id*. § 102.69(b).

The Regional Director held the representation election on April 16, 2013, and the Union prevailed by a small margin. The Regional Director certified the results without objection from UC Health or the Union on April 24. Shortly thereafter, the Union requested that UC Health bargain, but the company refused. Citing that refusal to bargain, the Acting General Counsel charged UC Health with an unfair

labor practice. The company defended itself on the ground that the Regional Director had acted without authority because the Board lacked a quorum at the time of the election.

The Board granted summary judgment to the Acting General Counsel, finding that the company's argument was untimely because it had not been made during the representation proceedings. *See UC Health and UC Health Public Safety Union*, 360 N.L.R.B. No. 71 (2014). And even if not waived, the Board concluded that UC Health's argument was without merit because the Board had delegated authority over representational proceedings to the Regional Directors in 1961; "[p]ursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." *Id*. at *1 n.2. Therefore, the Board determined that the election was valid and UC Health had committed an unfair labor practice by refusing to bargain with the Union. *Id*. at *2-3. UC Health filed a petition for review in this court. We have jurisdiction under 29 U.S.C. § 160(e), (f). Absent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013).

II

The sole question before us is whether the Regional Director had authority to hold the representation election and certify its results when the Board lacked a quorum. We hold that he did.

A

The Board argues that we need not address whether the Regional Director had the necessary authority because UC Health has waived its challenge by failing to raise its objection to the Regional Director's authority at the representation proceeding. "[A]s a general proposition, the applicable case law emphasizes the need for parties seeking judicial review of agency action to raise their issues before the agency during the administrative process in order to preserve those issues for review." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148 (D.C. Cir. 2005). The NLRA states that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). And under the Board's practice, "any issues that may be presented during the representation proceeding must be offered there." *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008). Thus, the Board claims, UC Health's objection to the Regional Director's authority comes too late.

We have consistently held, however, that challenges to the composition of an agency can be raised on review even when they are not raised before the agency. *See Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2550 (2014); *Mitchell v. Christopher*, 996 F.2d 375, 378-79 (D.C. Cir. 1993) (recognizing an exception allowing parties to "raise[] for the first time on review . . . challenges that concern the very composition or 'constitution' of an agency"). Since this chal-

lenge directly involves the question of whether the Board's lack of a quorum stripped the Regional Directors of power, UC Health may make it and we may review it.

The Board also asserts that UC Health may not challenge the Regional Director's authority because the company voluntarily entered into the Stipulated Election Agreement with the Union, and therefore agreed to let the Regional Director supervise the election. According to the Board, the agreement is a contract binding on both parties: UC Health accepted the Regional Director's authority to oversee the election and, in exchange, received important procedural benefits, including a prompt election. Because UC Health explicitly agreed to the terms of the election, the Board insists that the company cannot challenge one of those terms now. We reject this argument. UC Health did not expressly give up the challenge it brings now when it executed the Agreement; it merely signed a form agreement providing that the Board's regulations would govern the election. Indeed, when UC Health entered the Stipulated Election Agreement, no one knew whether Congress might confirm the President's appointments and obviate the quorum issue by the time the representation election in this case took place. And for that matter, UC Health could not have known with any certainty that the Board had no quorum even without Senate approval for the President's appointments until the Supreme Court handed down its decision in *Noel Canning* fourteen months after the election. We will not hold UC Health responsible for failing to see the future. And as we have already said, "challenges that concern the very composition or 'constitution' of

an agency" can "be raised for the first time on review," even if the objecting party failed to make that objection at the appropriate time below. *Mitchell*, 996 F.2d at 378-79. Perhaps some objections to agency action could be abandoned by explicit acceptance of the agency's authority to act under the statute. But we need not decide that here because UC Health did not expressly abandon anything at all in the Stipulated Election Agreement, and we will not hold it responsible for failing to preserve expressly an argument the substance of which had not yet arisen. *See San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1187 n.7 (D.C. Cir. 2012).

B

UC Health's challenge to the Board's decision that the Regional Director had authority to conduct the election fails on the merits.

1

The Board interprets the relevant provision of the NLRA to permit Regional Directors to continue exercising their delegated authority while the Board lacks a quorum. We consider the validity of the Board's interpretation of the Act under "the familiar two-step *Chevron* test."[1] *Int'l Alliance of Theatrical &*

[1] The dissent contends that *Chevron* is inapplicable in this case because the Board opinion never relied on *Chevron* nor stated explicitly that the statute is ambiguous. Dissent at 5-6. But our precedent does not require such statements. In *Arizona v. Thompson*, 281 F.3d 248 (D.C. Cir. 2002), and other cases the dissent cites, we refused to defer to an agency when the agency itself made clear that it believed the interpretation on which it relied was compelled by Congress and did not represent its own view of an ambiguous statute. *See id*. at 254. Here, although the (continued)

Stage Emps. v. NLRB, 334 F.3d 27, 31 (D.C. Cir. 2003). At step one we ask "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress has addressed whether Regional Directors may continue to act in the absence of a Board quorum, "that is the end of the matter[,] for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is ambiguous, we move to *Chevron*'s second step and ask whether the Board's interpretation is "a permissible construction of the statute" to which we must defer. *Id.* at 843.

At the first step of *Chevron*, we conclude that the statute is silent on the issue of the Regional Direc-

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Board's explanation of its interpretation of the statute is brief, it contains nothing suggesting that it viewed its interpretation as reflecting Congress's unambiguously expressed intent. Instead, the Board's reasoning rested on its interpretation of the extent of its prior delegation of authority to the Regional Director, backed by its reading of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), and other case law. Of course, "[l]ike other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers." *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001) (internal quotation marks and citations omitted). And we note that even if we agreed with the dissent that the Board did not exercise its own judgment here, we would not in any case rule for UC Health; because we conclude that the statute is ambiguous, "[t]he law of this circuit [would] require[] . . . that we withhold *Chevron* deference and remand to the agency so that it can fill in the gap." *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004).

tor's power to act when the Board lacks a quorum. The relevant text of the statute provides:

> 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. The Board is also authorized to delegate to its regional directors its powers . . . to direct an election or take a secret ballot . . . and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. 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 . . . .

29 U.S.C. § 153(b). In its adjudication of the unfair labor practice charge against UC Health, the Board explained that it interpreted the NLRA to permit the delegation of authority to the Regional Director and concluded that "[p]ursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." *UC Health*, 360 N.L.R.B. No. 71 at *1 n.2.

UC Health argues that the structure of the statute forbids this interpretation. In its view, the three-member quorum requirement applies to the activities of not just the Board but also of the Regional Directors. UC Health points out that the statute implements the quorum requirement in the sentence

immediately succeeding the sentence that authorizes the Board to delegate authority to the Regional Directors. This ordering, UC Health argues, expressly limits actors wielding delegated Board authority precisely as the Board itself is limited: Neither may act unless the Board has a quorum.

We are not convinced that the statutory text and structure unambiguously require this interpretation. The plain language of the Act applies the quorum requirement to the Board's authority to act, not the Regional Directors' ability to wield delegated authority. To the contrary, the structure of the statute supports the Board's interpretation just as well as it might support UC Health's construction. The first sentence of the provision empowers the Board to delegate its final, plenary authority to panels of its own members. The second sentence authorizes the Board to delegate to the Regional Directors the authority to oversee elections, provided that the Regional Directors' decisions always remain subject to Board review if the parties dispute them. And the third sentence specifies that the Board can only exercise its plenary, final authority—whether to adjudicate unfair labor practice charges or to review the decisions of Regional Directors in representation elections, whether wielded by the Board as a whole or by three-member delegee panels—if the Board has at least three validly appointed members. Thus, though the statute cabins the Board's own ability to function without a quorum, it says nothing about what effect the loss of a quorum has on pre-existing delegations of authority to the Regional Directors.

Because the statute is ambiguous on this point, we owe deference to the Board's interpretation, *City of Arlington*, 133 S. Ct. at 1870-71, if it is reasonable and consistent with the statute's purpose, *see Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000).

We think the Board's interpretation easily meets this requirement. The Board explained that the NLRA "expressly authorize[s] the delegation" of power to the Regional Director, that the Board acted under that authority and "delegated decisional authority in representation cases to Regional Directors," and that "[p]ursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." *UC Health*, 360 N.L.R.B. No. 71 at *1 n.2. This is a sensible interpretation that is in no way contrary to the text, structure, or purpose of the statute. Though the dissent suggests we have failed to examine the language or structure of the statute, Dissent at 5, we have already explained in our step-one analysis that the Board's interpretation gives effect to each part of the statutory provision. Moreover, allowing the Regional Director to continue to operate regardless of the Board's quorum is fully in line with the policy behind Congress's decision to allow for the delegation in the first place. Congress explained that the amendment to the NLRA that permitted the Board to delegate authority to the Regional Directors was "designed to expedite final disposition of cases by the Board." *See* 105 Cong. Rec. 19,770 (1959) (statement of Sen. Barry Goldwater).

Permitting Regional Directors to continue overseeing elections and certifying the results while waiting for new Board members to be confirmed allows representation elections to proceed and tees up potential objections for the Board, which can then exercise the power the NLRA preserves for it to review the Regional Director's decisions once a quorum is restored. And at least those unions and companies that have no objections to the conduct or result of an election can agree to accept its outcome without any Board intervention at all. The Board's interpretation thus avoids unnecessarily halting representation elections any time a quorum lapses due to gridlock elsewhere.

The Board's interpretation of the statute reads every clause of the statutory provision harmoniously, and, as a policy matter, it ensures adequate protection for the rights of employers and unions alike. It is eminently reasonable. Therefore we defer to the Board's interpretation under *Chevron* step two and uphold the Regional Director's authority to direct and certify the union election even while the Board itself had no quorum.

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UC Health argues, however, that the Board's interpretation of the statute is foreclosed by our decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). We conclude that UC Health is wrong. *Laurel Baye* has no direct application here because it addressed different statutory questions involving different and highly distinguishable statutory language and altogether different facts. Neither the holding nor the reasoning of that case forbids the Board's interpretation of its authority here, to which we owe deference.

Laurel Baye addressed the lawfulness of the Board's effort to evade the quorum requirement imposed on its own activities, not the status of authority previously delegated to the Regional Directors once the Board loses a quorum. In *Laurel Baye*, we considered the consequence of events beginning in December 2007, when the Board had four members, two of whom had terms that expired at the end of the month. With their departures, the Board would no longer satisfy the three-member quorum requirement the NLRA imposes "at all times," *see* 29 U.S.C. § 153(b). In an effort to overcome this impediment, the four-member Board delegated its plenary, final authority to a panel of three members made up of the two members whose terms continued into 2008 and one of the members whose term would soon expire. When the outgoing members finished their service at the end of 2007, the Board had a total of only two members and no longer met the overall three-member quorum requirement. By the same token, the panel to which the Board had delegated its authority was composed only of the two remaining members of the Board. The Board reasoned that because the NLRA imposes a separate, lower quorum requirement for three-member panels, those two remaining members made up a quorum of the delegee panel. Thus, even though the Board itself was paralyzed for want of a quorum, the Board believed that those two remaining members could still act in the name of the three-member panel to which they belonged and could wield the plenary, final authority the Board had delegated to that panel before the Board's total membership fell below the "at all times"

three-member quorum requirement of 29 U.S.C. § 153(b).

In *Laurel Baye*, we rejected this tactic, concluding that the plain language of the statute had a single, "unambiguous" reading that foreclosed the Board's interpretation.[2] 564 F.3d at 473. We held that the Board could never adjudicate unfair labor practice charges with fewer than three active members because the NLRA provides that the Board must satisfy the three-member quorum requirement "*at all times*." *Id*. at 472 (quoting 29 U.S.C. § 153(b)) (emphasis in *Laurel Baye*). "The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members." *Id*. And when the Board has delegated its authority to a panel of three that meets its own two-member quorum requirement, that panel has authority to act on behalf of the Board only so long as the Board has authority to act as well—that is, when the Board has at least three members. "[T]he Board cannot by delegating its authority cir-

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[2] Though we did not indicate in so many words that this conclusion constituted a *Chevron* step-one holding, we did without question identify an "unambiguous" reading of the statute regarding the Board's authority to evade the quorum requirement on its own activities that foreclosed any inconsistent Board interpretations. *Laurel Baye*, 564 F.3d at 473; *see also id*. (explaining that the statutory text "clearly require[d]" one result); *id*. ("Congress provided unequivocally" that the Board's interpretation was foreclosed); *id*. at 475 (explaining that the delegated authority of a Board panel was "necessarily limited" by the NLRA's quorum requirement); *id*. at 476 (noting that "[a]ny change to the statutory structure must come from the Congress, not the courts").

cumvent the statutory Board quorum requirement, because this requirement must always be satisfied." *Id*. at 473. "The delegee group's delegated power to act [therefore] ceases when the Board's membership dips below the Board quorum of three members." *Id*. at 475. The Board's approach—allowing a delegee panel of two members to wield plenary Board authority even if those two members comprised the entire active Board membership—would "allow the Board to reduce its operative quorum to two without further congressional authorization." *Id*. Thus we found that under the plain meaning of the statute a three-member delegee panel acting "*on behalf* of the Board" may only do so when the Board satisfies its quorum requirement. *Id*. (emphasis added).

Separately, we noted that our conclusion was bolstered by analogy to common-law agency principles. According to the Restatement (Third) of Agency, we explained, "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended" and "is also deemed to cease upon the resignation or termination of the delegating authority." *Laurel Baye*, 564 F.3d at 473. "The statute confers no authority" on a delegee panel, but only "permits" the Board to create such a committee. *Id*. "The only authority by which the committee can act is that of the Board," and "[i]f the Board has no authority, it follows that the committee" cannot exercise final authority in the place of the Board, either. *Id*.

The Supreme Court took up the same question regarding the Board's authority to act without a quorum in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), and reached a similar conclusion based

on different reasoning. The Supreme Court's interpretation of the plain terms of the statute led it to conclude that the Board's powers must "be vested at all times in a group of at least three members." *Id.* at 680.[3]

The Court specifically declined to consider the discussion of agency law in *Laurel Baye*, explaining that "failure to meet a quorum requirement [does not] necessarily establish that an entity's power is suspended so that it can be exercised by no delegee. . . . [The] conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt

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[3] The dissent suggests that we may never apply *Chevron* deference to interpretations of section 3(b) because the Court did not rely on *Chevron* at all in *New Process Steel*. Dissent at 6. There are a number of cogent explanations that might explain why the Court did not do so. Perhaps the Court simply concluded that the Board was due no deference under any standard because the text of the statute decided the question. Perhaps the Court viewed the Board's entitlement to *Chevron* deference as forfeited because the Board had neglected to request deference at the court of appeals. Perhaps the Court believed that the Board was not entitled to deference because it relied on an OLC memorandum rather than interpreting the statute itself. But the dissent offers no reason at all justifying its contrary conclusion that *New Process Steel* prohibits the application of *Chevron* to this precise section in any future case. We will not take the extraordinary step of removing a provision from an agency's interpretive reach without any basis for such a holding. Of course, even if *New Process Steel* did somehow foreclose *Chevron* deference, that unusual result would apply only to the issue presented in that case: the authority of Board delegee panels, not the authority of the Regional Directors. And even if *New Process Steel* did somehow apply to the issue before us, we would nonetheless be left with ambiguous statutory text.

on the prior delegations of authority to nongroup members, such as the regional directors . . . ." *Id*. at 684 n.4. Such prior delegations to nongroup members involved a separate question that the Court expressly did not address.

Laurel Baye does not control this case because it confronted an entirely different situation based on different statutory language and policy considerations, and neither could have nor did reach the question we face here. Therefore nothing in that opinion alters our conclusion that we owe deference to the Board's reasonable interpretation of the statute. As noted above, in *New Process Steel* the Supreme Court highlighted the distinction between the two types of authority the Board may delegate to different actors. The Board may delegate its plenary, final authority to decide cases to a subgroup of its own members. It may also delegate nonfinal authority to supervise elections, subject to review and approval by the Board itself, to "nongroup" actors like the Regional Directors. *New Process Steel*, 560 U.S. at 684 n.4. This distinction between forms of delegated authority is crucial. *Laurel Baye* considered only whether plenary, final authority delegated to panels of the Board's own members could survive when the Board had no quorum; we concluded that the delegation in question could not survive because it was precluded by the plain meaning of the statutory provision in question. Here, we must consider a different question, arising from a different clause of the statute, involving different analytical considerations: whether the statute vitiates nonfinal authority already delegated to individuals outside the Board's membership when the Board loses its quorum. As the

Supreme Court expressly acknowledged, the two questions are distinct, and the answer to one has no necessary logical relationship to the answer to the other.

UC Health insists, however, that the agency discussion in *Laurel Baye* prohibits the Board from interpreting the statute to authorize Regional Directors to continue acting when the Board has no quorum. We disagree. In *Laurel Baye*, we analyzed the plain language of the statute and found that it prohibited the Board from employing the delegation at issue there without giving any deference to the Board at all. The discussion of agency principles in that case confirmed our interpretation of the statute's plain meaning. Here, because the text is ambiguous, we must defer to the Board's reasonable interpretation. For that reason, *Laurel Baye*'s agency analysis could only possibly be relevant here if it rendered the Board's interpretation unreasonable with the same clarity that the plain language of the statute, reinforced by the principles of agency law, foreclosed the Board's effort in *Laurel Baye* to delegate its plenary, final authority even when it had no quorum. But there is a fundamental difference in the nature of the authority delegated in these two cases. Therefore we conclude that *Laurel Baye*'s agency discussion is simply off the mark in this case. A delegee panel, wielding the Board's plenary, final authority, speaks on the Board's behalf and in its place. The Regional Directors never similarly occupy the Board's role as a final decisionmaker. Indeed, the statute and the Board's own regulations expressly reserve for the Board the power to review and reverse any determination a Regional Director makes.

29 U.S.C. § 153(b); 29 C.F.R. § 102.67(c).[4] Therefore the statute makes clear that the delegation at issue here does not implicate any of the concerns that motivated us to draw on agency law in *Laurel Baye*. Because the relationship between the Board and the Regional Directors is so different from the relationship between the Board and its delegee panels, we do not see how the agency analysis in *Laurel Baye* sheds any light at all on the authority the statute permits the Board to delegate to the Regional Directors or when that authority expires.[5]

The important distinction between the final authority delegated in *Laurel Baye* and the nonfinal authority delegated here is all the more clear in light of the materials on which we relied in our agency analysis in *Laurel Baye*. All the sources we cited dealt with an agent who had authority to speak finally on the principal's behalf with permanent legal

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[4] The dissent claims that the right to appeal a Regional Director's decision is lost if the Board lacks a quorum. Dissent at 2 & n.1. This is incorrect. Even if the Board has no quorum when a party appeals a Regional Director's decision, nothing in the regulation precludes the Board from taking up the objection once it regains a quorum. *See* 29 C.F.R. § 102.67(c). The dissent suggests that bad consequences might arise while appeals of Regional Director determinations remain pending. This claim finds no support in the record. In any event, considerations such as these shed no light on the proper reading of the statute.

[5] The dissent apparently takes issue with the fact that the Board did not highlight this distinction in its brief. Dissent at 4. But of course "[p]arties cannot waive the correct interpretation of the law by failing to invoke it." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 n.2 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (citing *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (*per curiam*)).

effect. *See, e.g.*, Restatement (Third) of Agency § 3.07(4) (2006) (explaining that an agent's actual authority to affect its principal's legal relations expires when the principal's power to act is suspended); 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 504 (2008) (same, with respect to the resignation or termination of the delegating authority); *Id*. § 421 ("If there are fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."); *Emerson v. Fisher*, 246 F. 642, 648 (1st Cir. 1918) (holding that a corporate treasurer's delegee lacks authority to disburse corporate funds after the treasurer himself resigns). In every case the cited rule prohibits an agent from taking some final action on behalf of its principal at a time when the principal could not act itself. And indeed, the ability to stand in the principal's place is fundamental to the existence of an agency relationship at all. *See* Restatement (Third) of Agency § 1.01 cmt. c ("[T]he concept of agency posits a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person."). For example, in *Emerson*, an assistant corporate treasurer continued to sign checks drawn on corporate funds in the treasurer's name after the treasurer had resigned. 246 F. at 648. The First Circuit found that the assistant treasurer could not take final actions in the place of the treasurer when no individual held that office; wielding the principal's authority and signing checks in his stead was forbidden without a treasurer in place whose authority the assistant could exercise by proxy.

The outcome in *Emerson* and the issues identified in the other authorities we cited in *Laurel Baye* were unmistakably relevant to the issue we confronted in that case. There, the Board had allowed a delegee panel to exercise the Board's plenary, final authority when the Board itself could not act at all. The panel's judgment was as final for the parties as the full Board's determination would have been. Allowing an agent to act in those circumstances was at odds with basic principles of agency law. But those principles have no bearing here. No decision of the Regional Directors is ever final under its own power. Only the acquiescence of the parties or the Board's ratification can give binding force to a Regional Director's determination. Therefore the Regional Directors are not acting "*on behalf* of the Board" in the way that doomed the Board's tactic in *Laurel Baye*. 564 F.3d at 475 (emphasis added). And the agency analysis we expounded in that case is not relevant here for the same reason.

In other words, a Regional Director never has the last say on anything unless a party fails to object. In that event, it is the parties' choice to leave the Regional Director's decisions unchallenged that effectively makes the election final. Otherwise, a Regional Director's decision becomes final only when approved by the Board. Of course, Board review is discretionary even when a party files an objection to a Regional Director's decision. Nonetheless any objection will always be considered by the Board, and it is the Board's action—declining to grant review or granting review and upholding or reversing the Regional Director's decision—that finally commits the Board's imprimatur. Obviously the Board could not consider

any objection to a Regional Director's determination when it did not satisfy the NLRA's three-member quorum requirement. But when the Board acts with a quorum to review and approve a Regional Director's decision, the Board, not the Regional Director, has decided the issue. Unlike in *Laurel Baye*, this delegation does not allow some other actor to stand in the Board's place and wield its authority when it is otherwise statutorily immobilized. Therefore the agency principles that bolstered our statutory conclusion in *Laurel Baye* are as irrelevant in this case as is our discussion there of a different clause of the statute.[6]

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[6] The dissent suggests that, by declining to consider or adopt the agency analysis in *Laurel Baye*, the Court in *New Process Steel* understood *Laurel Baye* to have implicitly decided the issue this case presents. Dissent at 3. It is far from clear whether it would make any difference if the Court actually expressed a view, in dicta, of the implicit scope of one of our decisions. Even so, we disagree that the Court expressed any such opinion. The Court acknowledged, as have we, that *Laurel Baye* relied on statutory and agency grounds to foreclose the Board's agents from acting when the Board could not act. But the Court did not explain its view of how far *Laurel Baye*'s reasoning necessarily extended any more than *Laurel Baye* itself offered such an explanation. And after all, *New Process Steel*, like *Laurel Baye*, decided a different question from the issue before us here. Whether the agency analysis in *Laurel Baye* necessarily also applies to "nongroup" actors like the Regional Directors was, the Court explained, "a separate question." *New Process Steel*, 560 U.S. at 684 n.4.

Nor do we think the dissent is correct that other circuits' pronouncements militate in favor of extending *Laurel Baye* to reach delegations to the Regional Directors—an issue not raised in that case. Dissent at 3 & n.3. It is true that several other courts since *New Process Steel* have declined to apply the broadest possible reading of our agency analysis in *Laurel Baye*

(continued)

Indeed, we are all the more persuaded that the Board's interpretation of the statute is reasonable in light of the structural distinction between the final character of its authority to adjudicate unfair labor practice cases and the nonfinal authority to oversee representation elections it may delegate to the Regional Directors. Because any contested decision a Regional Director makes is not final until the Board acts, it is immaterial whether the Board had a quorum at the time the Regional Director conducted the election. To the contrary, when the Regional Directors exercise their delegated authority to oversee elections, they further the policy of the statute by increasing the efficiency with which representation elections are held—irrespective of the Board's status at that time.

For all these reasons, there is nothing in *Laurel Baye* or its broad discussion of principles of agency

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to the distinct question of whether the Board's General Counsel may continue to exercise authority when the Board has no quorum. But the noteworthy point is that these circuits all agree with our fundamental conclusion: The broad, general expressions of common law agency principles stated in the different context of *Laurel Baye* are not persuasive in the context of non-Board delegees. We have explained why the fundamental differences between the authority delegated in *Laurel Baye* and the authority delegated to the Regional Directors here render *Laurel Baye* irrelevant. *See* Restatement (Third) of Agency § 1.01 cmt. c ("[T]he concept of agency posits a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person."). Neither *New Process Steel* nor the circuit cases cited in the dissent erase that structural distinction. In fact, they are all best read to support it.

law that controls the Board's interpretation of its authority in this case. As shown above, the Board's interpretation of its authority was reasonable, and we are bound to defer to the Board's reasonable interpretation of the statute it is charged to administer. *See City of Arlington*, 133 S. Ct. at 1870-71.

III

For the foregoing reasons, we deny UC Health's petition for review and grant the NLRB's cross-application for enforcement of its order.

EDWARDS, *Senior Circuit Judge*, concurring: The dissent is mistaken in suggesting that if the rationale or logic supporting a decision in one case is stated broadly enough to cover future cases not at issue, the latter cases are necessarily controlled by the earlier case. Were this the law, appellate decisionmaking would be a mischievous enterprise.

* * * *

It is well understood that "[t]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). *Stare decisis* – to stand by things decided – embraces the principle that each judicial decision is a statement of law (or precedent) that may have binding force in future cases. "*Stare decisis* . . . 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). "For judges, the most basic principle of jurisprudence is that we must act alike in all cases of like nature" because "[i]nconsistency is the antithesis of the rule of law." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (internal quotation marks omitted).

A judicial decision is viewed as "precedent" when it controls the disposition of a pending case. Whenever a court faces a situation in which a prior judicial decision has some similarity to a pending case, the judges must initially determine the rule established by the decision in the first case, limited by the context in which the judgment was reached. Then the

judges must determine whether the rule of the prior case controls the disposition of the pending case. It is easy to subscribe to the goal of *stare decisis*. It is not always easy, however, to determine when a prior case qualifies as controlling precedent. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012) (discussing applications of *stare decisis*); Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPPERDINE L. REV. 605 (1990) (same). Nonetheless, there are several important principles that the courts routinely follow in determining the applicability of precedent to the cases before them.

First, "an issue of law must have been heard and decided" in the same or a higher court for a decision to have precedential value with respect to that issue. *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (quoting *EEOC v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986)). Second, "if an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed" with respect to that issue. *Id*. Third, a judicial decision "attaches a specific legal consequence to a detailed set of facts." *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979). The decision "is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts." *Id*.; *see also United States v. Holyfield*, 703 F.3d 1173, 1177 & n.7 (10th Cir. 2013) (citing *Allegheny*'s definition of precedent approvingly). Fourth, as Chief Justice Marshall explained in his seminal opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821):

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id. at 399–400.

This last precept – that the force of a general expression enunciated in a prior decision must be limited by reference to its specific context – is so firmly embedded in *stare decisis* jurisprudence that the Supreme Court has called it a "canon of unquestionable vitality." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Indeed, the Court has said that it is the "*duty*" of judges "to restrict general expressions in opinions in earlier cases to their specific context." *Int'l Bhd. of Teamsters Local 309 v. Hanke*, 339 U.S. 470, 480 n.6 (1950) (plurality opinion) (emphasis added). *See also, e.g.*, *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) ("Chief Justice Marshall warned against basing decisions on bare general principles enunciated in other cases. . . . The simple words of the opinions [cited by appellant] are not as important as the contexts in which those cases were decided.").

The obvious point is that the precedential value of a decision is defined by the context of the case from which it arose. If, in light of that context, the decided case is materially or meaningfully different from a superficially similar later case, the holding of the earlier case cannot control the latter.

Determining the proper scope of the rule of a prior decision can be controversial. In his illuminating article on "Stare Decisis and the Rule of Law," Professor Waldron points out that "[l]egal realists and critics are fond of" accusing judicial panels of formulating the rule of prior decisions as they see fit "in order to suit [their] own view[s] about how the case in front of [them] should be decided." Waldron, *supra*, at 26. He urges that, to avoid this pitfall in decisionmaking, judicial panels should be ever mindful that the rule of law commands them to view precedent "in a responsible spirit of deference." *Id*. I agree.

However, as Professor Waldron notes, the ascertainment of the rule of a prior case and the determination whether the prior case constitutes a binding precedent that controls the disposition of a pending case are nuanced enterprises.

> One case may seem superficially similar to another, but the judge[s on the second panel] may be convinced that there are differences that preclude simply subjecting a subsequent case to the same rule that decided the precedent case. . . . For example, a given statutory provision may apply properly to one case but not another, even though the second is superficially similar to the first; therefore, we "distinguish" the second case. And similarly, the rule that [the first panel] figured out as a basis for [its] decision in the precedent

> case may not apply to a subsequent case despite superficial similarities. There may be things about the second case that pose a distinct legal problem, which require a new and distinct law-like solution to be figured out by [the second panel] in the form of a rule . . . . To distinguish a case, then, is not just to "come up with" some difference. It is to show that the logic of what [the first panel] figured out does not, despite appearances, apply. It means pointing to some additional problematic feature of the subsequent case that requires additional figuring.

Id. at 25–26. Courts routinely follow these principles of precedent application. Looking to the context of the putative controlling decision – the facts, the statutory or constitutional provisions at issue, the arguments made by the parties and decided or reserved by the court, and the rationale underlying the decision – they determine whether the holding of an existing case controls the outcome of a pending case. *See, e.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602, 626–28 (1935) (distinguishing the pending case from the cited precedent because the situations were "so essentially unlike" each other); *United States v. Thomas*, 361 F.3d 653, 662–63 (D.C. Cir. 2004) (applying precedent selectively to two defendants' cases based on factual similarities and dissimilarities to the prior case), *reinstated following vacatur sub nom. United States v. Cook*, 161 Fed. App'x 7 (D.C. Cir. 2005).

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Here, the considerations guiding the application of precedent make clear that, although *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d

469 (D.C. Cir. 2009), is "superficially similar" in some respects to the case presently before the court, it does not control the resolution of the legal question presented in this case. First, as Judge Griffith's opinion explains, the facts of *Laurel Baye* are very different from the facts of this case. And facts matter in determining the precedential value of a prior case. *See, e.g.*, *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) ("[W]ords of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading."). Second, just as significantly, *Laurel Baye* did not involve the statutory and regulatory provisions that are principally at issue in this case. Finally, and most importantly, *Laurel Baye* did not in any way address the question of the deference due the Board's construction of either the particular provisions of the statute at issue here or any other provisions of the Act. This appears to be because the Board never offered an interpretation of the Act for which deference was sought.

We face a very different situation in this case than the situation faced by the court in *Laurel Baye*. Here, the Board *has* offered a reasonable interpretation of statutory language in the Act – statutory language different from the statutory provisions at issue in *Laurel Baye*. And as Judge Griffith explains, the Board's interpretation is one to which we must defer pursuant to the firmly established principles enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Alternatively, as Judge Srinivasan contends, *see SSC Mystic Operating Co. v. NLRB*, No. 14-1045 (D.C. Cir. September __, 2015)

(Srinivasan, J., concurring), we must defer to the Board because a court's prior judicial construction of a statute does not trump an agency construction that is otherwise entitled to deference under *Chevron* unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Under either view, *Laurel Baye* is not binding precedent here because the relevant terms of the statute at issue in this case are unquestionably ambiguous.

In sum, the decision in *Laurel Baye* does not control the judgment in this case. This case poses what Professor Waldron would call a "distinct legal problem" that was neither raised by the parties nor addressed by the court in *Laurel Baye*. Consequently, "[a]ny observations [from that opinion] which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation." *Wright v. United States*, 302 U.S. 583, 593 (1938); *see also Whitacre v. Davey*, 890 F.2d 1168, 1172 (D.C. Cir. 1989) ("We cannot count as controlling a decision that never touched upon the issue we confront" when that point "was simply not considered" in the prior case). The general expressions from *Laurel Baye* to which the dissent refers cannot be confused with binding precedent. To rely on these general expressions, taken from a case whose context is materially different from the case before us, flies in the face of the core principles of *stare decisis*. *See Weyerhauser v. Hoyt*, 219 U.S. 380, 394 (1911) ("[G]eneral language" used in a prior opinion should not be "separated from its context and disassociated

from the issues which the case involved" and then given controlling weight.).

The dissent suggests that we have betrayed "the most important characteristic of a collegial appellate court" by failing to give "careful attention [and] respect" to the law of the circuit. It is hard to take this claim seriously because it is premised on misguided notions of *stare decisis*. I therefore view the dissent's unfortunate statement as nothing more than a poignant example of hyperbole.

SILBERMAN, *Senior Circuit Judge*, dissenting: The merits of this case are not particularly important. I doubt whether we will see many situations in which an NLRB regional director certified an election during a period in which the NLRB lost its quorum, and that certification is subsequently challenged in an unfair labor practice proceeding. But, the case is nevertheless of great significance because the most important characteristic of a collegial appellate court is careful attention, respect, and adherence to precedent. I am afraid the majority opinion is a glaring example of a contrary approach.

I have previously authored an opinion in which I was faced with conflicting lines of authority because of my colleagues' failure to follow prior precedent, *see Vietnam Veterans of America v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010) (Silberman, J.), which I regarded then, and do now, as most unfortunate. Of course, every case with which we are presented has some factual difference, but not every case is legally distinguishable from every other. In deciding whether a new case is covered by previous precedent, it is the logic of the previous case's holding that is determinative. Petitioner's brief elegantly argued, succinctly, that we were bound by our prior decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). I think petitioner is exactly correct and that should be the end of the matter.

I.

The majority concludes that section 3(b) of the National Labor Relations Act, authorizing the Board to delegate to regional directors – civil servants, not political appointees – power to certify the results of an election, means that that power remains indefi-

nitely in the regional director, even if the Board itself disappears (perhaps, because of a failure of the Senate to confirm any appointee). This power supposedly resides permanently in the regional director, even though the statute specifically provides that any interested party can appeal a regional director's determination to the Board. And if the Board loses its quorum, or goes out of existence, that appeal right is lost.[1]

But even if a Board were to read its regulation to permit an appeal of a regional director's decision out of time – perhaps years later when a Board regained a quorum – the majority ignores the impact of a regional director's certification in the interim. An employer who refuses to recognize that certification may pay a price in labor relations. And the regional director's decision with respect to issues such as objectional conduct may deviate from Board policy.

As I discuss below, I think this construction would be a stretch, even if we were considering section 3(b) *de novo*, but we are not. We are bound by our prior opinion in *Laurel Baye*. In that case, we considered whether a Board delegation of all of its power to a subgroup of only three survived the drop in membership of the subgroup (and the Board) to only two. Although the statutory language is convoluted, we relied on two factors to conclude that the Board's powers had lapsed. We focused first on the most persuasive language – "[t]he quorum provision

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[1] A party must seek Board review within 14 days of the regional director's issuance of a final disposition. 29 C.F.R. § 102.67(c) (as amended Dec. 15, 2014). The majority's reading of the regulation appears incorrect.

clearly requires that a quorum of the Board is, 'at all times,' three members," *id*. at 473 (citing 29 U.S.C. § 153(b)) – but we also relied on general agency principles reasoning broadly that an agent – in that case, the two member Board panel – lost its authority when the Board – the principal – lost its quorum. We never mentioned *Chevron*, implicitly concluding that the combination of the two factors ineluctably pointed to only one interpretation. As Judge Sentelle writes in the companion case, "*Laurel Baye* concluded that § 153(b)'s quorum requirement provision unambiguously requires the Board to have a quorum for a delegee to exercise its authority." *SSC Mystic Operating Co.*, Slip op. at 2 (Sentelle, J., dissenting). The Supreme Court, reviewing the same issue in *New Process Steel v. NLRB*, came to the same conclusion, that the Board had lost its authority, but it relied primarily on different language in the section.[2] 560 U.S. 674, 679-83 (2010). It explicitly did not adopt the general agency principles so important to our reasoning, recognizing that to do so would decide the very issue now before us – whether a regional director's authority survives the loss of Board membership. *Id*. at 684 n.4. The Supreme Court wanted that issue to remain open in its court, but – and this is the crucial point – the Court implicitly recognized that it did *not* remain open in our court. Moreover, even though our sister circuits declined to adopt *Laurel Baye*, they have uniformly read it as did the Supreme Court: as having decided the validity of

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[2] Although the Supreme Court's footnote four is at least clear in not adopting *Laurel Baye*'s agency rationale, its reasoning explaining why it does not is impenetrable.

board delegations to nonmembers in the absence of a quorum.[3] Our agency reasoning was not, as the majority puts it, "separate," it was integral to *Laurel Baye*'s statutory interpretation, and therefore applies equally to our case. Indeed, it is *a fortiori* because we are dealing with a delegation, not to a subgroup of Board members, but rather to a much lesser-ranked official, a regional director.

Notwithstanding the Supreme Court's interpretation of *Laurel Baye*, the majority would distinguish that case on the theory that a delegation to an agent with lesser authority (a regional director) somehow survives the disappearance of the principal, even though a more senior agent's authority would not. It should be noted, the majority does not cite any case so holding. To give the government its due, the Board

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[3] *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 852-54 (5th Cir. 2010) ("[*Laurel Baye*] held that when the Board's membership drops to two, it loses its quorum and '[i]n the context of a board-like entity, a delegee's authority therefore ceases the moment the vacancies or disqualifications on the board reduce the board's membership below a quorum.'"). These circuit cases deal with the General Counsel of the Board's authority to continue to seek 10(j) injunctions when the Board loses its quorum. Board delegations of duties to the General Counsel are governed by a separate statutory provision. *See* 29 U.S.C. § 153(d). The General Counsel – a Presidential appointee – has unreviewable discretion to seek a complaint whether or not the Board is in existence. Therefore it is reasonable to conclude that the Board's permanent delegation to the General Counsel to seek an injunction is simply an addition to his or her authority to file a complaint.

never makes this cockamamie argument (I thought we avoided relying on arguments not presented by parties because to do so suggests we are result-oriented). In any event, I do not understand why the regional director's authority is described as "non-final" when the very issue in this case is whether the regional director's certification of an election is final.

II.

As I noted above, I think that if we were not bound by *Laurel Baye*, I would still regard the Board's contention that the regional director's authority to certify an election extends indefinitely, even if the Board went out of existence for years, as an impermissible construction of the statute.

The majority acknowledges the statute does not address the question whether the regional director's power lapses when the Board loses its quorum or ceases to exist, but contends that that is a statutory "silence" under the *Chevron* doctrine, which the NLRB is authorized to fill. And it asserts that the Board's interpretation is reasonable under *Chevron*'s second step. Actually, if *Chevron* applied, I think such an interpretation would be flatly unreasonable. We must bear in mind that even if we are following *Chevron*'s second step, we are construing a Congressional act – the second step is not open sesame for the Agency. After all, the rest of that statutory section deals specifically, although in a rather convoluted fashion, with the circumstances in which the Board loses authority because of a lack of a quorum. It is quite incredible that Congress would nevertheless have implicitly bestowed on regional directors permanent authority *ad infinitum*, even in the total absence of a supervising Board. It should be noted

that neither the majority opinion nor Judge Edwards's and Judge Srinivasan's concurrences grapple with the statutory structure or language to reach their conclusion that the interpretation they adopt is actually "reasonable."

Be that as it may, we cannot affirm the Board based on *Chevron* deference in this case. The Board never purported to interpret an ambiguity in the statute. Instead, it boldly asserted that, pursuant to the statute, "NLRB Regional Directors remain vested with the authority to conduct elections and certify their results regardless of the Board's composition at any given moment." *UC Health & UC Health Pub. Safety Union*, 360 N.L.R.B. No. 71, *1 n.2 (Mar. 31, 2014). We have held repeatedly that "[d]eference to an agency's statutory interpretation is only appropriate when the agency has exercised its own judgment, not when it believes that interpretation is compelled by Congress." *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal citations and emphasis omitted). *See also Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006); *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000). The majority argues that the Board never explicitly stated that the statute compelled the construction, but what else can the Board have intended when it flatly states what the statute meant.[4]

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[4] If the majority was correct in concluding that *Chevron* applied, it certainly should remand and allow the agency to exercise its judgment. *See PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004).

Moreover, the Supreme Court has rejected *Chevron*'s applicability to section 3(b). Even though the language the Supreme Court relied on, as I noted, is rather convoluted, the Supreme Court's opinion in *New Process Steel* never mentioned *Chevron* – despite the government's reliance on *Chevron* deference in its Supreme Court brief. Although the Court's opinion frankly acknowledged two possible interpretations of what it called section 3(b)'s delegation clause, it simply picked the one it thought preferable – leading to the same result we chose in *Laurel Baye*. *See New Process Steel*, 560 U.S. at 679-83. It is, therefore, decisive, for our purposes, that the Court implicitly but necessarily concluded that, for whatever reason, *Chevron* deference was inappropriate in construing section 3(b). *See SSC Mystic Operating Co.*, Slip op. at 2–3 (Sentelle, J., dissenting). In that regard, the other circuits, construing the companion language dealing with the General Counsel's delegated authority to seek 10(j) injunctions, have followed the Supreme Court's lead and have ignored *Chevron*.[5]

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Judge Srinivasan's concurrence in the companion case disagrees with the majority's conclusion that the panel's decision in *Laurel Baye* was based on an unambiguous reading of the plain language, and chooses to read *Laurel Baye* as only adopting the

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[5] With the exception of one concurring Eighth Circuit Judge. *See Osthus*, 639 F.3d at 845-48 (Colloton, J. concurring).

"best" reading of an ambiguous statute.[6] By so doing, Judge Srinivasan essentially accuses the *Laurel Baye* panel of disregarding governing law applying to judicial review of agency statutory interpretations in formal adjudication. That governing law, *Chevron* – with certain specific exceptions, such as avoidance of serious constitutional issues[7] – for over thirty years has banned courts of appeal from doing exactly what Judge Srinivasan accuses the *Laurel Baye* panel of doing; rejecting an agency statutory interpretation of supposedly ambiguous language in favor of what a reviewing court believes is a better or best reading.

Judge Srinivasan relies on *Brand X* as support for his analysis – suggesting that it allows a court reviewing agency interpretation of ambiguous language to choose the better interpretation. But that is a flagrant misreading of the case. *Brand X* applies in situations quite apart from *Laurel Baye*. The first is the question of how do reviewing courts deal with a pre-*Chevron* judicial decision if the agency subsequently disagrees. The Supreme Court explained that if a prior judicial decision announced the only

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[6] Judge Srinivasan ignores the fact that the Supreme Court's decision – both the majority and the dissent as Judge Sentelle points out, *see SSC Mystic Operating Co.*, Slip op. at 2 (Sentelle, J., dissenting) – ignored *Chevron*, or its doctrine, in deciding *New Process Steel* – which certainly indicates, as I have argued above, that *Chevron* is not to be used in interpreting section 3(b), as Judge Srinivasan does. Granted, the Supreme Court in *New Process Steel* did ignore *Chevron* without explanation, but it is not subject to the same restraints which bind lower federal courts.

[7] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988).

acceptable interpretation of a statute that opinion governed, but if the earlier judicial opinion – properly read – only relied on a better interpretation, the agency was free to adopt a different reasonable construction. The second situation involves a judicial affirmance of a prior agency interpretation. Again, the agency can change its interpretation to another reasonable one if the prior judicial opinion was limited to accepting the agency interpretation as reasonable. The third situation, as occurred in *Brand X* itself, is when an agency departs from a prior judicial decision that had reviewed the interpretation of an entity not entitled to *Chevron* deference.[8] Because the previous court needn't have deferred under *Chevron*, it may have opted for the "best," but not the only permissible, interpretation. The agency may thus later adopt another reasonable construction. None of those situations apply here. *Brand X* hardly suggested that in the future courts may reject a federal agency statutory interpretation as not the "best one," which would be inconsistent with *Chevron*.

Judge Srinivasan suggests, although he does not quite assert, that significance should be placed on the fact that the NLRB did not seek *Chevron* deference in *Laurel Baye*. But that is often true when an agency believes its interpretation is compelled by the

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[8] *Brand X* reviewed an agency interpretation that departed from a previous judicial construction in *AT&T Corporation v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *AT&T* itself *did not* apply *Chevron* in its analysis – and opted for the best, not the only, interpretation – because it was reviewing the construction of a local, municipal franchising board (an entity to which *Chevron* deference was not owed).

statute. Indeed, in *Laurel Baye*, as in many other cases, the agency flatly asserted that its reading resulted from the plain language of the statute, rather than an exercise in discretion. That is not a hypothesis, as Judge Srinivasan suggests; it is the obvious reading of the Board's decision. And as Judge Sentelle points out, because the statute was thought by the panel to be unambiguous, *Chevron* was irrelevant. The important principle of administrative law is that federal courts of appeals for almost 30 years have followed *Chevron*'s command (with certain recognized exceptions) that agency interpretations of ambiguous language in a formal adjudication, *see United States v. Mead Corp.*, 533 U.S. 218 (2001), are entitled to deference and affirmance if reasonable. That is so – and there are no deviations in our cases – notwithstanding whether *Chevron*'s familiar two-step analysis is explicitly "walk[ed] through," *see SSC Mystic Operating Co.*, Slip op. at 3 (Srinivasan, J., concurring). If we think, notwithstanding the agency's claims, that a statute is actually ambiguous, we are not free to disregard *Chevron* and opt for our own "best" reading, as Judge Srinivasan seems to suggest we can. We must instead remand to an agency for its subsequent resolution of the ambiguity. *See PDK Labs. Inc. v. U.S. DEA*, 362 F. 3d 786, 798 (D.C. Cir. 2004). *Chevron* is as much a principle of judicial review of agency action as is *Chenery*[9] or *Vermont Yankee*.[10]

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[9] *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

[10] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

Judge Srinivasan searches for another reason *Chevron* may not have been applied. He suggests that the *Laurel Baye* panel may have secretly denied deference based on an argument made by the company in *Laurel Baye* – that *Chevron* deference was inappropriate because the issue went to the Board's jurisdiction. To be sure, this was a question which once troubled panels of this court. *See New York Shipping Ass'n, Inc. v. Federal Maritime Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988); *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 699 (D.C. Cir. 1988); *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). But since 1990 we have consistently rejected that concept as an exception to *Chevron*.[11] *See Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Circ. 2009); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (D.C. Cir. 2003); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000); *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994); *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990). The cases cited by Judge Srinivasan, with all due respect for the University of Illinois Law Review, do not stand for the contrary proposition; they don't even mention agency "jurisdiction." It is flatly incon-

[11] Of course, the Supreme Court subsequently put the issue to rest in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

ceivable that any panel would accept Judge Srinivasan's hypothetical reasoning sub silentio.[12]

In sum, since *Laurel Baye* failed to accept the agency's interpretation, it *must* have been because it determined that the language was susceptible of only one meaning. It is the only explanation of *Laurel Baye* consistent with both Supreme Court commands and our own precedent.

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Three of my colleagues have explored reasons not to follow *Laurel Baye*. I think they are all unpersuasive; *Laurel Baye* is binding precedent.

Regretfully I dissent.

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[12] It is worth noting that the *Laurel Baye* panel members Judges Williams, Sentelle, and Tatel had, collectively, nearly 60 years of experience reviewing agency statutory interpretations.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2015

No. 14-1045
Consolidated with 14-1089
NLRB-01CA120161

SSC MYSTIC OPERATING COMPANY, LLC,
DOING BUSINESS AS PENDLETON HEALTH AND
REHABILITATION CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Filed on: February 12, 2016

Before: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown*, Griffith, Kavanaugh*, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

Petitioner's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Circuit Judges Brown and Kavanaugh would grant the petition.