No. 15-1373

In the Supreme Court of the United States

SSC MYSTIC OPERATING COMPANY, LLC,
DBA 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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board (Board) to delegate to its Regional Directors the Board's authority to conduct representation proceedings and to certify the results of such proceedings, subject to discretionary review by the Board. Under the statute and the Board's implementing regulations, Regional Directors' decisions are final only if the Board declines to review them or no party requests Board review. The question presented is:

Whether the court of appeals correctly deferred to the Board's reasonable interpretation that the authority of Regional Directors to exercise delegated authority, subject to plenary review by the Board, is not suspended when the Board loses a quorum.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 801 F.3d 302. The decision and order of the National Labor Relations Board (Pet. App. 37a-47a) is reported at 360 N.L.R.B. 68 (2014).

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2015. A petition for rehearing was denied on February 12, 2016 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on May 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> 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. The Board shall have an official seal which shall be judicially noticed.

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

STATEMENT

1. In enacting the National Labor Relations Act (NLRA or Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*), Congress sought through "the promotion of in-

dustrial peace to remove obstructions to the free flow of commerce." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939). To that end, the NLRA establishes mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress, as part of its design to fulfill the vital goals of the NLRA, "confide[d] primary interpretation and application of its rules [governing labor relations] to a specific and specially constituted tribunal"—the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953); see 29 U.S.C. 153, 154, 159, 160. Congress facilitated the Board's performance of those functions by statutorily providing the Board with both adjudicatory and rulemaking authority. 29 U.S.C 160(b)-(d) (setting forth Board's adjudicatory functions); 29 U.S.C. 156 (providing that Board has "authority * * * to make, amend, and rescind * * * such rules and regulations as may be necessary to carry out the provisions of this subchapter").

Section 3(a) of the NLRA, 29 U.S.C. 153(a), provides that "the Board shall consist of five * * * members, appointed by the President by and with the advice and consent of the Senate," and that each member shall serve a term of five years. Section 3(b) of the Act, 29 U.S.C. 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board." This Court held in *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 679-683 (2010), that

the Board may not exercise its authority when three or more Board positions are vacant at the same time.[1]

Section 3(b) of the Act, 29 U.S.C. 153(b), also authorizes the Board "to delegate to its regional directors its powers under" Section 9 of the NLRA, 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 of [the Act] and certify the results thereof."[2] Such a delegation is always subject to the statutory limitation that "the Board may review any action of a regional director delegated to him under" Section 3(b). 29 U.S.C. 153(b). Congress added that delegation authority to the NLRA in 1959 both to implement "the

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[1] Section 3(b) of the Act also authorizes the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise" and provides that "two members shall constitute a quorum of any group [so] designated." 29 U.S.C. 153(b). In *New Process Steel*, this Court considered whether the Board's delegation of its full powers to a three-member panel of the Board would enable a two-member quorum of that group to exercise the Board's full authority after the membership of the Board (and the delegee group) fell to two. The Court held that the delegee group ceases to exist at that point and therefore loses its authority to act on behalf of the Board. 560 U.S. at 684 n.4, 688.

[2] Section 9 of the NLRA, 29 U.S.C. 159, sets forth a general framework for determining whether a majority of employees in an appropriate bargaining unit wishes to select an exclusive representative for purposes of collective bargaining. The Board is authorized to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election, and to certify the results of the election. 29 U.S.C. 159(b) and (c).

considered judgment of Congress that the regional directors have an expertise concerning unit determinations" and to "speed up" the determination of matters covered by the delegation authorization. *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141-142 (1971).

Acting on that authority, in 1961 the Board delegated decisional authority in representation cases to its Regional Directors, see 26 Fed. Reg. 3911 (May 4, 1961), and thereafter promulgated rules implementing that delegation, *Magnesium Casting*, 401 U.S. at 138; see 29 C.F.R. 102.67.[3] That delegation has remained in effect for more than half a century.

On January 3, 2012, the membership of the Board fell to two members, leaving it without a quorum. Pet. App. 50a. On January 4, 2012, the President made three recess appointments to the Board, which this Court subsequently held were invalid under the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3. *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014). The Board regained a quorum in August 2013, when four

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[3] Prior to the 1961 delegation, the Board had authorized Regional Directors to conduct elections pursuant to voluntary agreement of the parties. See, *e.g.*, *River Raisin Paper Co.*, 70 N.L.R.B. 1348 (1946) (in election conducted pursuant to "Stipulation for Certification upon Consent Election Agreement," Regional Director conducted election and made rulings but parties retained rights to file exceptions with the Board); *Armour Leather Co.*, 39 N.L.R.B. 1193 (1942) (after election was held pursuant to "Stipulation for Certification upon Consent Election Agreement," Board issued final certification even in absence of objections to Regional Director's report); *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 326-327 (1946) (observing that, in accordance with the Board's rules and regulations, the election was conducted pursuant to an agreement of the parties that "[t]he determination of the regional director was to be final and binding upon any question").

Senate-confirmed Board members joined Chairman Pearce on the Board. Pet. App. 51a.

2. In February 2013, the New England Health Care Employees Union, District 1199 (Union), filed a petition with the Board's Regional Director seeking certification as the bargaining representative of a unit of employees at petitioner's nursing home in Mystic, Connecticut. Pet. App. 2a. With the approval of the Regional Director for Region 1, see *id.* at 45a, petitioner and the Union entered into a "Stipulated Election Agreement." *Id.* at 2a. Under the terms of the agreement, the parties agreed on the appropriate bargaining unit and on the date on which the election would be held under the supervision of the Regional Director. *Ibid.* Reflecting applicable Board regulations, the agreement provided that either party was entitled to plenary review by the Board of the hearing officer's report addressing election objections, should any arise. *Ibid.*; see *id.* at 51a (discussing regulations then in effect governing such agreements).

In April 2013, the Regional Director conducted an election. Pet. App. 3a. The Union won the election when a majority of employees in the bargaining unit voted in favor of collectively bargaining with representation by the Union. *Ibid.* Petitioner filed objections to the election and, after holding a hearing, the hearing officer issued a report overruling the objections. *Id.* at 4a. Petitioner filed exceptions with the Board. *Id.* at 5a. In December 2013, a Board panel consisting of three Senate-confirmed members adopted the hearing officer's report, and issued a decision and certification of representative. *Id.* at 41a.

On December 10 and 17, 2013, the Union requested that petitioner collectively bargain with it as the unit

employees' exclusive representative. Pet. App. 42a. Petitioner refused. *Ibid.* Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued an unfair-labor-practice complaint alleging that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Pet. App. 37a. Petitioner's answer admitted its refusal to bargain, but claimed that it had no duty to do so, arguing in part that the Regional Director was not authorized to conduct the election because the Board lacked a quorum at the time. *Id.* at 38a.

The Board granted summary judgment to the General Counsel, concluding that petitioner's refusal to bargain on and after December 10, 2013 violated 29 U.S.C. 158(a)(1) and (5), and ordering petitioner to bargain with the Union. Pet. App. 38a-46a. The Board considered and rejected petitioner's challenge to the Regional Director's authority to conduct the election. *Id.* at 38a n.1. The Board explained that, "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," because the Board had in 1961 "delegated decisional authority in representation cases to Regional Directors, 26 Fed. Reg. 3911 (1961), pursuant to the 1959 amendment of Sec[tion] 3(b) of the [Act, U.S.C. 153(b)]." Pet. App. 39a n.1. Pursuant to the delegation, the Board explained, "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." *Ibid.* The Board also noted that in *New Process Steel*, 560 U.S. at 684 n.4, this Court expressed doubt that the loss of

a Board quorum voids previous delegations of authority to nonmembers, such as Regional Directors. *Ibid.*

3. The court of appeals enforced the Board's order. Pet. App. 1a-36a.

The court of appeals rejected petitioner's argument that the Regional Director was without authority to conduct the election because the Board lacked a quorum when the election was held. Pet. App. 7a-8a. The court held 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 7a (citing *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1870-1871 (2013)). The court relied on its simultaneous decision in *UC Health* v. *NLRB*, 803 F.3d 669 (D.C. Cir. 2015) (reprinted at Pet. App. 48a-92a), which addressed the same issue and held that the court "must defer to the Board's reasonable interpretation that the lack of a quorum at the Board does not prevent the Regional Directors from continuing to exercise delegated authority that is not final because it is subject to eventual review by the Board." Pet. App. 8a.[4]

In *UC Health*, the court of appeals "consider[ed] the validity of the Board's interpretation of [Section 3(b) of] the Act under 'the familiar two-step *Chevron* test.'" Pet. App. 55a (citing *International Alliance of Theatrical & Stage Emps.* v. *NLRB*, 334 F.3d 27, 31 (D.C. Cir. 2003)). At the first step of the *Chevron* analysis, the *UC Health* panel concluded that "the statute

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[4] The court of appeals also rejected petitioner's substantive challenge to the outcome of the election, Pet. App. 10a-21a, and its challenge to the conduct of the hearing, *id.* at 21a-23a. Petitioner does not contest those holdings in its petition for a writ of certiorari.

is silent on the issue of the Regional Director's power to act when the Board lacks a quorum." *Id.* at 56a-57a.

Turning to the second step of the *Chevron* analysis, the panel began by noting that, 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.'" Pet. App. 57a (brackets in original) (quoting *UC Health*, 360 N.L.R.B. 71, at 1 n.2 (2014)). The court then concluded that the text of Section 3(b) is ambiguous on the relevant point and that the Board's interpretation of the statute "is reasonable and consistent with the statute's purpose." *Id.* at 59a; see *id.* at 57a-60a.

In reaching that conclusion, the *UC Health* panel rejected petitioner's argument that the structure of Section 3(b) forecloses the Board's interpretation because Section 3(b) requires that the full Board have a quorum of three members in order to act. Pet. App. 57a-58a. The court explained that "[t]he 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." *Id.* at 58a. The court explained that, although Section 3(b) authorizes the Board to delegate to a three-member panel the Board's "final, plenary authority," that Section permits only a more limited delegation to Regional Directors of the authority to oversee elections, the results of which are always subject to the Board's review if disputed by the parties. *Ibid.* The quorum

provision, the court explained, applies to the Board's ability to "exercise its plenary, final authority," but "says nothing about what effect the loss of a quorum has on pre-existing delegations of authority to Regional Directors" of lesser and non-final authority. *Ibid.*

The panel further concluded that the Board's interpretation of Section 3(b) is "sensible" and "in no way contrary to the text, structure, or purpose of the statute." Pet. App. 59a. The court explained that "[t]he 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." *Id.* at 60a; see *id.* at 71a ("[W]e 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."). Finding the Board's interpretation of Section 3(b) to be "eminently reasonable," the *UC Health* panel "defer[red] to the Board's interpretation under *Chevron* step two and uph[e]ld the Regional Director's authority to direct and certify the union election even while the Board itself had no quorum." *Id.* at 60a.

Judge Silberman dissented from the decision in *UC Health*. Pet. App. 81a-92a. In his view, the Board's interpretation was not entitled to *Chevron* deference, both because the Board did not "purport[] to interpret an ambiguity in the statute," and because he viewed

this Court's decision in *New Process Steel* as rejecting *Chevron's* applicability to Section 3(b) of the Act. *Id.* at 86a-87a. Dissenting in this case, Judge Sentelle expressed the view that "the Board's interpretation of § 153(b) is unreasonable under step two" of the *Chevron* analysis. *Id.* at 36a.[5]

The court of appeals denied a timely petition for rehearing en banc. Pet. App. 93a-94a. Judges Brown and Kavanaugh voted to grant the petition. *Id.* at 94a.

ARGUMENT

Petitioner challenges the court of appeals' application of *Chevron* deference to the Board's conclusion that Section 3(b) of the NLRA does not disable the Board's Regional Directors from continuing to exercise their delegated (non-final) authority to decide representation cases any time the full Board lacks a quorum of at least three members. Review of the court of appeals' decision is not warranted because it is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals relied on its decision in *UC Health* v. *NLRB*, 803 F.3d 669 (D.C. Cir. 2015), which

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[5] In his dissent in *UC Health*, Judge Silberman also expressed his view that the issue before the panel was controlled by the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (2009) (*Laurel Baye*), cert. denied, 130 S. Ct. 3498 (2010), which considered the same question presented in *New Process Steel*. Pet. App. 81a-85a. Judge Edwards filed a concurring opinion responding to that argument. *Id.* at 73a-80a. In the instant case, dissenting Judge Sentelle agreed with Judge Silberman that the question presented was controlled in the D.C. Circuit by the decision in *Laurel Baye*. *Id.* at 34a-36a. Judge Srinivasan filed a concurring opinion in this case, explaining his view that the *Laurel Baye* decision did not preclude deferring to the Board's interpretation of Section 3(b) in this case. *Id.* at 24a-33a.

correctly concluded that the Board's interpretation of Section 3(b) of the NLRA, 29 U.S.C. 159(b), is reasonable and is entitled to deference. The Board had explained in its decision and order in *UC Health* that the lack of a quorum in the full Board did not affect the certification of the Union as bargaining representative because "the Regional Director, not the Board, certified the Union," and because the Board had validly delegated to Regional Directors "decisional authority in representation cases." *UC Health*, 360 N.L.R.B. 71, at 1 n.2 (2014).

In considering the contention that the Regional Directors lacked authority to act in the absence of a Board quorum, the court of appeals in *UC Health* first noted that the text of Section 3(b) "is silent on the issue of the Regional Directors' power to act when the Board lacks a quorum." Pet. App. 56a-57a. The court then correctly rejected petitioner's argument that "the structure of [Section 3(b)] forbids [the Board's] interpretation." *Id.* at 57a. After examining the requirements of Section 3(b), the court explained that, although "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." *Id.* at 58a. The statute, the court concluded, "supports the Board's interpretation just as well as it might support [petitioner's] construction." *Ibid.*

The court of appeals went on to conclude, again correctly, that the Board's interpretation "easily meets th[e] requirement" that it be "reasonable and consistent with the statute's purpose" in order to merit *Chevron* deference. Pet. App. 59a (citing *Independent Ins. Agents of Am.* v. *Hawke*, 211 F.3d 638, 643 (D.C.

Cir. 2000)). The court explained that the Board's interpretation "gives effect to each part of" Section 3(b) and 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," *ibid.*, *i.e.*, "to expedite final disposition of cases by the Board," *ibid.* (quoting 105 Cong. Rec. 19,770 (1959) (statement of Sen. Goldwater)). The court further explained that "[p]ermitting 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 Directors' decisions once a quorum is restored." *Id.* at 60a. Because the Board's interpretation of Section 3(b) is reasonable, the court in *UC Health* "defer[red] to the Board's interpretation under *Chevron* step two and uph[e]ld the Regional Director's authority to direct and certify the union election even while the Board itself had no quorum." *Ibid.*

The panel in the instant case, relying on the decision in *UC Health*, similarly rejected petitioner's argument that the Regional Directors' authority to certify election results was suspended when the full Board lost a quorum. Pet. App. 8a. In urging this Court to review that decision (Pet. 14-24), petitioner notably declines to argue that the Board's interpretation of Section 3(b) is unreasonable on the merits. Instead, petitioner argues that the court of appeals' decision to apply *Chevron* deference at all conflicts with decisions of this Court. For the reasons set forth below, that is not correct.

2. Petitioner errs in arguing (Pet. 14-16, 20-24) that review is warranted because the court of appeals' application of *Chevron* deference in this case and in *UC Health* conflicts with this Court's decisions in *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674 (2010), and in *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013).

a. Petitioner argues (Pet. 14-16) that the court of appeals' decisions conflict with this Court's decision in *New Process Steel* because, although the *New Process Steel* decision did not mention *Chevron*, the decision must be construed as refusing to defer to the Board's interpretation of a different provision of Section 3(b). No such conflict exists.

i. In *New Process Steel*, this Court considered whether the Board's delegation of all of its authority to a group of three members (which is authorized by Section 3(b)) remained valid after the membership of the Board (and therefore of the delegee group) fell to two members. 560 U.S. at 676-678. The government argued in part that the remaining members of the delegee group retained authority to exercise the Board's plenary authority because Section 3(b) provides that two members constitute a quorum of a three-member delegee group. See *id.* at 683; 29 U.S.C. 153(b). The Court rejected that argument as "structurally implausible" because "it would render two of § 3(b)'s provisions functionally void." 560 U.S. at 681. The Court instead concluded that the provision in Section 3(b) governing the quorum of a delegee group had no role to play when the Board's membership fell to two because the three-member delegee group "ceases to exist once there are no longer three Board members to constitute the group." *Id.* at 684 n.4. The Court explained that "Congress' decision to require that the

Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances." *Id.* at 688.

The court of appeals' decision in this case does not conflict with the holding of *New Process Steel*. Indeed, the Court in *New Process Steel* explicitly declined to address whether the longstanding delegation to Regional Directors remained valid when the Board lost a quorum. Thus, this Court noted that the "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." 560 U.S. at 684 n.4. And the Court went on to make clear 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." *Ibid.* The latter, the Court noted, implicated a "separate question." *Ibid.* It is that separate question that the court of appeals addressed in *UC Health* and in this case. And the court of appeals' answer to that question is consistent with the decision in *New Process Steel*.

Unlike the situation in *New Process Steel*, in which the Board delegated *all* of its powers to a three-member group that almost immediately lost one member, the delegation at issue here is much more limited. Section 3(b) authorizes the Board to delegate only certain functions to Regional Directors—and the Board always retains the authority to "review any action of a regional director" taken pursuant to a delegation. 29 U.S.C. 153(b). The court of appeals recognized that

limitation on the delegation authority to be a "critical distinction" between the Board's authority to delegate to a three-member group and its authority to delegate to Regional Directors. Pet. App. 49a. Section 3(b)'s provision for the Board to retain authority to review any action of a Regional Director taken pursuant to a delegation, the court explained, means 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.* at 50a. Unlike the Board's interpretation of the delegation to a three-member group of the Board itself that was at issue in *New Process Steel*, therefore, the Board's interpretation of the continuing validity of its decades-long delegation to Regional Directors "does not authorize 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.

Another critical distinction between the Board's delegation to Regional Directors and the delegation at issue in *New Process Steel* is that the delegee at issue in this case (*i.e.*, the Regional Director for Region 1, see Pet. App. 44a) does not "cease[] to exist once there are no longer three Board members." *New Process Steel*, 560 U.S. at 684 n.4; see *id.* at 688 ("We thus hold that the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board."). The crux of the decision in *New Process Steel* was that the Board's delegation to a three member group could not survive when the membership of the Board fell to two because the delegee group itself ceased to exist when it no longer had three members. That is not true of

the delegation at issue here. Regardless of how many members the Board has at any one time, a Regional Director continues to exist as a Regional Director as long as that position is filled. Of course, if any party requests review by the Board of a Regional Director's exercise of delegated authority, that review must wait until the Board has at least three members.

ii. Petitioner's primary submission (Pet. 14-16) is that the court of appeals' decision to defer to the Board's interpretation of Section 3(b)'s provision for delegation of certain authority to Regional Directors conflicts with the decision in *New Process Steel*—not because the statutory interpretation at issue here conflicts with that articulated in *New Process Steel*, but because petitioner believes that the court of appeals' decision to defer to the Board conflicts with this Court's approach to deference in *New Process Steel*. Petitioner argues that the decision in *New Process Steel* implicitly held that *Chevron* deference is not appropriate for the Board's interpretation of any provisions in Section 3(b). That contention fails.

As petitioner acknowledges (Pet. 16), the decision in *New Process Steel* mentions neither deference nor *Chevron*. Petitioner nevertheless argues that the Court "implicitly but necessarily concluded that, for whatever reason, *Chevron* deference was inappropriate in construing" any interpretation of any part of Section 3(b). *Ibid.* (quoting Pet. App. 87a (Silberman, J, dissenting)). But the words this Court actually did include in its decision refute petitioner's contention. The Court explained that the Board's interpretation of the relevant provisions in Section 3(b) was precluded by the text and structure of the statute because the Board's interpretation would "render two of § 3(b)'s

provisions functionally void" and was therefore "structurally implausible." *New Process Steel*, 560 U.S. at 681. The contrary reading (ultimately adopted by the Court) was thus "the only way to harmonize and give meaningful effect to all of the provisions of § 3(b)." *Id.* at 680. Having thus concluded that the government's construction of Section 3(b) was unreasonable, the Court had no need to separately explain why that interpretation was not entitled to *Chevron* deference.

This case includes different provisions of Section 3(b) and, as noted above, the court of appeals relied on "critical distinction[s]," Pet. App. 49a, between the provisions at issue in *New Process Steel* and that at issue here. The provisions at issue in *New Process Steel* authorized delegation of *all* of the Board's powers to a three-member group of Board members that ceased to exist almost immediately. In contrast, the provision at issue here authorizes the Board to delegate some of its powers to a delegee that continues to exist regardless of the number of members on the Board—and, significantly, the statute requires the Board to retain at all times the authority to review any decision made pursuant to that delegation. Because nothing in the text or structure of Section 3(b) precludes the Board's interpretation, any deference implications one might find in the *New Process Steel* decision are not applicable here. Indeed, this Court explicitly stated in *New Process Steel* that its decision there "does not cast doubt" on the continuing validity of the delegation at issue in this case of nonfinal authority to supervise elections. 560 U.S. at 684 n.4.

b. Petitioner further errs in contending (Pet. 20-22) that the court of appeals "adopted an expansive—and incorrect—interpretation of this Court's decision

in *City of Arlington*." Petitioner argues (Pet. 20-21) that the court of appeals interpreted *City of Arlington* to require application of *Chevron* deference whenever a statute involves the agency's authority to act regardless of whether Congress has authorized the agency to determine that question. But that contention finds no support in the court of appeals' decision in this case or in *UC Health*.

In *City of Arlington*, this Court confirmed the longstanding rule that courts must apply *Chevron* deference to an agency's reasonable interpretation of a statutory ambiguity when Congress has authorized the agency to administer the statute through adjudication or rulemaking. 133 S. Ct. at 1868-1875. And the Court held that that rule applies whether an agency is interpreting the scope of its authority to act or is interpreting the manner in which it is to act. *Id.* at 1868-1871. The court of appeals applied those holdings in a straightforward manner in *UC Health* and in relying on *UC Health* in the instant case.

Before applying *Chevron*, the court of appeals in *UC Health* explained that the NLRB is "charged to administer" the NLRA, Pet. App. 72a; see *id.* at 56a n.1; that Congress has authorized the Board to adjudicate claims of unfair labor practices, *id.* at 49a[6]; that the statutory interpretation at issue was articulated in the exercise of the Board's adjudicatory function, *id.* at 52a, 59a; and that the statutory text at issue is ambiguous, *id.* at 56a-58a. As the court of appeals explained, when those conditions are present, "a court is obliged to defer to an agency's reasonable interpreta-

[6] In Section 10 of the NLRA, Congress granted broad authority to the Board to adjudicate claims of unfair labor practices. 29 U.S.C. 160.

tion of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine." *Id.* at 7a (citing *City of Arlington*, 133 S. Ct. at 1870-1871); see also *City of Arlington*, 133 S. Ct. at 1874. Indeed, this Court has long recognized that Congress granted to the NLRB adjudicatory and rulemaking authority in administering the NLRA, see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990), and has accordingly applied *Chevron* deference to the Board's reasonable interpretations of ambiguous text in the NLRA, see *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-399 (1996); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-124 (1987). Because nothing in *City of Arlington* suggests that the court of appeals in this case was required to make any additional determinations before applying *Chevron* deference, petitioner's claim of a conflict is unavailing.[7]

3. Finally, review is not warranted because no decision from any other court of appeals conflicts with the decisions below. As petitioner notes (Pet. 22), the Fourth Circuit—the only other court of appeals to address the authority of Regional Directors to exer-

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[7] Petitioner's reliance (Pet. 22) on *King* v. *Burwell*, 135 S. Ct. 2480 (2015), is also misplaced. This Court explained in *King* that *Chevron* deference might not be appropriate "[i]n extraordinary cases" where there is reason to question whether Congress intended a particular agency to have authority to interpret a particular statutory provision. *Id.* at 2488. In *King*, the Court determined that Congress did not intend to authorize the IRS to undertake the statutory interpretation at issue because the IRS "has no expertise in crafting health insurance policy of th[e] sort" at issue in that case. *Id.* at 2489. In contrast, the Board is the only agency with expertise in administering the NLRA—which is why Congress expressly endowed the Board with adjudicatory and rulemaking power. 29 U.S.C. 156, 160.

cise delegated authority after the Board loses a quorum —reached the same result as the D.C. Circuit. *NLRB* v. *Bluefield Hosp. Co.*, 821 F.3d 534, 541-542 (4th Cir. 2016) (applying *Chevron* deference to Board's interpretation of Section 3(b)).[8] And even within the divided opinions issued by the D.C. Circuit in *UC Health* and in this case, no judge disagreed with the *UC Health* majority's explanation 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." Pet. App. 7a, 52a (citing *City of Arlington*, 133 S. Ct. at 1870-1871). Thus, petitioner's contention (Pet. 17) that courts of appeals are in need of "guidance on how to analyze the threshold question whether agency action must be reviewed under the *Chevron* framework" lacks merit.

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[8] *Bluefield Hospital* involved an election conducted pursuant to a different type of agreement—a consent election agreement, in which the parties voluntarily agreed to treat the Regional Director's decision as final and unreviewable for purposes of the representation proceeding, while remaining subject to collateral Board review on specified grounds in any subsequent related unfair labor practice proceeding. See *Hospital of Barstow, Inc.*, 364 N.L.R.B. 52 (July 15, 2016), slip op. at 4, petition for review, No. 16-1243 (D.C. Cir. filed July 18 2016). The instant case does not implicate the authority of Regional Directors to act pursuant to such an agreement in the absence of a Board quorum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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