No. 15-1373

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

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement contained in the petition for a writ of certiorari remains accurate.

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In answering the Court's call for a response to the petition for a writ of certiorari, the National Labor Relations Board provides no persuasive reason for denying plenary review of the court of appeals' deeply fractured ruling. The legal questions presented by the petition warrant resolution by this Court.

A. The Court of Appeals' Deference Ruling Conflicts with *New Process Steel* and Misapplies *City of Arlington*

1. The Board's deference-related reading of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), does not withstand careful scrutiny. Br. in Opp. 17–18. In the course of denying a conflict between *New*

Process Steel and the majority decisions below granting the Board judicial deference under the framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Board does not deny that it asked this Court to apply the *Chevron* framework in evaluating the Board's interpretation of 29 U.S.C. § 153(b) in *New Process Steel*. *See* Pet. 14–15. The Board also does not deny that the majority opinion and that of the dissent in *New Process Steel* showed no deference to the Board's interpretation of § 153(b). *See* Pet. 15–16.

Instead, in trying to explain why the Board's request for judicial deference went unheeded in *New Process Steel*, the Board appears to suggest that this Court resolved that case on something akin to *Chevron* step-one grounds and therefore had no need to discuss whether to apply deference. According to the Board, the *New Process Steel* majority "explained that the Board's interpretation [of § 153(b)] was precluded by the text and structure of the statute . . . ." Br. in Opp. 17. However, as both dissenters below recognized, *see* Pet. App. 36a (Sentelle, J., dissenting), 87a (Silberman, J., dissenting), the *New Process Steel* majority expressly acknowledged that there were "two different ways to interpret" the language of § 153(b) before the majority addressed the parties' competing arguments for why their respective interpretations were superior, 560 U.S. at 679. In the words of Judge Silberman, the *New Process Steel* majority then "simply picked the one it thought preferable . . . ." Pet. App. 87a. Such a legal analysis

is that of a court operating outside the *Chevron* framework, not within it. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–95 (2015) (conducting similar statutory analysis after expressly refusing to apply the *Chevron* framework).

2. The Board also fails to reconcile the majority decisions below with *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). Br. in Opp. 18–20. According to the Board, the majority decisions did not interpret *City of Arlington* as requiring application of the *Chevron* framework whenever a statute involves the agency's authority to act. *Id.* at 19. However, both of the majority opinions say just that, asserting: "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)." Pet. App. 7a, 52a.

Nor is the Board correct in arguing (Br. in Opp. 19–20) that the majority decisions below must be read as having correctly answered the *Chevron* step-zero question prior to applying the *Chevron* framework. While it is true that the majority observed that Congress has charged the Board with administering the National Labor Relations Act, *see* Pet. App. 72a, and that the purported interpretation of § 153(b) at issue here was issued by the Board via adjudication, *see* Pet. App. 52a, the majority below treated this case as if it were any other case involving the Board's interpretation of the Act's substantive provisions. The Board now defends that error by citing (Br. in

Opp. 20) inapposite decisions of this Court where the Board was granted deference under circumstances far different from this case. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397–401 (1996) (granting deference to Board's interpretation of Act's coverage exemption for "agricultural laborer[s]"); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786–87 (1990) (granting deference to Board order refusing to apply evidentiary presumption regarding lack of union support among striker replacements); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123–24 (1987) (granting deference to Board regulation providing that party making unfair-labor-practice charge was not entitled to Board review of a decision by the Board's General Counsel to sustain a regional director's informal settlement of the director's complaint resulting from the charge).

This Court's deference jurisprudence teaches that the *Chevron* framework does not apply just because (1) Congress has charged the agency with administering a particular statutory scheme and (2) the agency action in question is the product of rulemaking or adjudication. *See King*, 135 S. Ct. at 2488–89 (declining to apply *Chevron* framework to agency regulation even though agency was charged with administering statutory scheme at issue); *Gonzales v. Oregon*, 546 U.S. 243, 268–69 (2006) (same); *see also City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in judgment) (enumerating additional factors for determining *Chevron*'s applicability, including relevance of agen-

cy's substantive expertise to statutory question at issue); *id.* at 1881 (Roberts, C.J., dissenting) ("[T]he Court [in *Chevron*] did not ask simply whether Congress had delegated to the [agency] the authority to administer the Clean Air Act generally."). Therefore, the D.C. Circuit's misinterpretation of *City of Arlington* will affect all manner of challenges to agency action, not just those involving the Board. *See* Pet. 21–22.*

The Board also glosses over the fact that its order expressly based its conclusion on two grounds demonstrating that the order is entitled to no judicial deference whatsoever: (1) a decision of this Court (*New Process Steel*) that expressly declined to decide the regional-director question and (2) circuit case law addressing the General Counsel's authority to act under a different statutory provision granting the General Counsel final authority to take certain actions independent of the Board. *See* Pet. 24. The Board's response to the petition never mentions the

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* The Board mistakenly contends that "no judge" in the court of appeals disagreed with the majority's application of *City of Arlington*. Br. in Opp. 21. Judge Silberman did so by openly questioning the majority's determination that the absence of language in § 153(b) addressing the regional-director question was a "statutory 'silence' under the *Chevron* doctrine, which the [Board] is authorized to fill." Pet. App. 85a. Judge Sentelle agreed with Judge Silberman's assessment. Pet. App. 36a. The Board's unanimity assertion also is belied by the fact that Judges Brown and Kavanaugh voted in favor of granting rehearing en banc. Pet. App. 94a.

second ground, leaving it out of its description of the order completely. *See* Br. in Opp. 7–8. As for the first ground, the Board now contends that the order simply "noted" that this Court used language in *New Process Steel* expressing doubt on the regional-director issue. Br. in Opp. 7–8. The face of the Board order demonstrates that the Board used that perceived doubt to justify its decision. *See* Pet. App. 39a n.1. Such "we probably can get away with it" reasoning is *not* the application of the Board's substantive expertise in labor relations.

B. The Court of Appeals' Decision Is Wrong

The Board takes issue with the fact that the petition did not burden the Court by arguing the merits of whether the Board's purported interpretation of § 153(b) is correct. *See* Br. in Opp. 13 (asserting that the petition "notably declines to argue that the Board's interpretation . . . is unreasonable on the merits"). Putting aside the fact that the role of such a petition is not to argue the merits, there especially was no need for the petition in this case to do so given that the petition described in detail the *two* dissenting opinions in the court of appeals below that found the Board's position to be unreasonable. *See* Pet. 11–13; *see also* Pet. App. 34a–36a (Sentelle, J., dissenting), 81a–92a (Silberman, J., dissenting).

Moreover, the Board's merits-focused response to the petition exposes critical flaws in the Board's purported interpretation of § 153(b). Taking a cue from the reasoning employed by the majority below, the Board now relies primarily on that portion of

§ 153(b) granting the Board authority to review decisions of regional directors. *See* Br. in Opp. i, 4, 9, 15, 16, 18. However, the Board order in question did not make any such argument. *See* Pet. App. 39a n.1. And the validity of the Board order must stand or fall based on the reasoning used in the order itself, not on the *post hoc* rationalizations of counsel. *See, e.g.*, *Encino Motorcars, LLC v. Novarro*, 136 S. Ct. 2117, 2127 (2016) ("It is not the role of the courts to speculate on reasons that might have supported an agency's decision. We may not supply a reasoned basis for the agency's action that the agency itself has not given.") (internal quotation marks, citation, and alteration omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

Be that as it may, the Board concedes that the review authority provided by § 153(b) is rendered ineffective when the Board lacks a quorum. *See* Br. in Opp. 17 ("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."). The Board also never addresses § 153(b)'s unambiguous language providing that "such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director." Therefore, the Board never addresses that portion of § 153(b) demonstrating that, if the President and/or the Sen-

ate refuse to keep the Board's membership above the minimum required by the agency's statutory charter, private parties are powerless to obtain a stay of actions taken by regional directors.

Finally, like the majority below, *see* Pet. App. 59a, the Board selectively quotes from the legislative history of the statutory amendment authorizing the Board to delegate certain of its powers to regional directors, *see* Br. in Opp. 13 (quoting Senator Goldwater's statement that language added by the conference committee would "expedite final disposition of cases by the Board," 105 Cong. Rec. 19,770 (1959)). As the petition explained (at 4–5), and as neither the majority below nor the Board's response to the petition address, the amendment's legislative history also demonstrates that Congress intended 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 regional directors are required to . . . act in all respects as the Board itself would act." 105 Cong. Rec. 19,770 (statement of Sen. Goldwater). The regional director in this case did not act as the Board itself could have acted given that the Board did not have a quorum at the time of the election.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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