No. 08-1457

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IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

This case presents the question of whether the National Labor Relations Board (the "NLRB" or the "Board"), the independent federal agency charged with enforcing the National Labor Relations Act ("NLRA"), has authority to decide cases with only two sitting Members, where 29 U.S.C. § 153(b) explicitly provides that "three members of the Board

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

shall, at all times, constitute a quorum of the Board." This question is of significant concern to the Chamber as many of its members are employers subject to the NLRA.

The United States Courts of Appeals for the First, Second, Seventh and District of Columbia Circuits are split on this issue, with the First, Second and Seventh Circuits upholding the validity of two-member Board decisions and the D.C. Circuit finding that the NLRA requires three or more Board Members in order for the NLRB to act. The divide in the circuits calls into question the fundamental authority of the NLRB to act and the validity of the hundreds of decisions made by the Board since January 1, 2008, as well as any decisions it makes until a third Member is confirmed by the Senate. The authority of the NLRB is of the utmost importance to the businesses represented by the Chamber. The Chamber has a vital interest in ensuring that the United States labor law framework under which its members operate is rational, fair, and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the statute.

SUMMARY OF ARGUMENT

The fundamental authority of the NLRB, the agency in charge of administering the NLRA, remains compromised until the issue of the authority of a two-member Board to carry out all of the duties and responsibilities of the NLRB is resolved. The split among the circuits regarding the power of a two-member Board raises primary questions about the validity of several hundred decisions issued by

the two-member NLRB since January 1, 2008. A clear statement regarding the authority of the Board is necessary for the stability of labor relations throughout the United States. Barring intervention from this Court, the divide among the circuits will only proliferate, since additional cases presenting this precise issue are pending before courts in multiple circuits. Moreover, given the present political composition of the United States Senate, it is highly likely that at other times in the near future, the Board again may find itself with only two Members facing a question regarding their power to act. Accordingly, the likelihood is that this important question regarding the NLRB's authority to act will reoccur if it is not resolved.

As the largest representative of employers in the United States, the Chamber has a fundamental interest in ensuring the proper functioning of, and proper functioning by, the NLRB. The decision below misinterpreted section 3(b) of the NLRA by, *inter alia*, ignoring its explicit requirement that the Board must have three Members "at all times."

In view of the foregoing, the Court should grant the Petition for a Writ of Certiorari to the Seventh Circuit filed by New Process Steel.

ARGUMENT

I. ALLOWING THE SPLIT AMONG THE COURTS OF APPEALS TO REMAIN THREATENS THE STABILITY OF LABOR RELATIONS IN THE UNITED STATES

A. The Board's December 2007 Delegation of Power

The NLRB consists of five Members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Section 3(b) of the NLRA provides that:

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

On December 20, 2007, the Board, which then consisted of only four Members, two of whom had terms set to expire December 31, 2007, delegated its powers to three of its Members effective December 28, 2007. The Board intended the delegation of powers to permit the remaining two Members to issue decisions and orders as a quorum of the three-member group. Indeed, since January 1, 2008, the Board has issued hundreds of decisions as a two-member panel or group. Although President George W. Bush

attempted to fill the vacant NLRB seats in 2008, his efforts were thwarted by the Senate.

B. Consistency With Regard to the Issue of Whether a Two-Member Board Can Issue Decisions is Essential

The authority of the NLRB to issue decisions and orders is of primary importance to the administration of the NLRA. The Courts of Appeals are divided on whether the two-member NLRB resulting from the Board's December 2007 delegation of power has the power to act. As a result, employers in the First, Second and Seventh Circuits cannot be sure whether an order of the NLRB will be enforceable. If the employer challenges the Board's authority to issue a decision in the D.C. Circuit, the Board's order shall be voided in light of the Court's holding in *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009). If the Board or another interested party asks the First, Second or Seventh Circuits to enforce an order, however, regarding the authority of the Board to act, the order shall be binding. *See Snell Island SNF LLC v. NLRB*, Nos. 08-3822-ag(L), 08-4336-ag(XAP), 2009 U.S. App. LEXIS 13008 (2d Cir. June 17, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009); *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009). Where competing petitions for review of an agency decision are filed in multiple circuits within ten days of a Board decision, the enforceability of the Board's decision and the authority of a two-member Board to act shall be determined randomly in accordance with 28 U.S.C. § 2112(a)(3). Moreover, the divide among the circuits will only proliferate, as cases involving this very issue presently are pend-

ing before courts in several circuits. Without the intervention of this Court, the enforceability of each decision made by the NLRB until the Senate confirms one of President Obama's nominees may be in doubt.

The issue of the authority of a two-member Board also should be resolved by the Court at this time in view of the fact that it is likely to arise again. Given the increase in political partisanship, and the closely drawn numbers in the United States Senate, it is highly likely that a question regarding the power and authority of a two-member NLRB will continue to recur.

II. THE SEVENTH CIRCUIT DECISION MISINTERPRETS SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT

In upholding the validity of two-member Board decisions, the Seventh Circuit held that the "plain meaning" of section 3(b) supported the Board's December 2007 delegation of power. In reaching this conclusion, the court relied upon the language of section 3(b) regarding the quorum of a group, and upon the First Circuit's decision in *Northeastern Land Services v. National Labor Relations Board*, which similarly found that "the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)." *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 846 (7th Cir. 2009) (quoting *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009)). Neither the Seventh Circuit below, or the First Circuit in *Northeastern Land Services*, however, discussed or reconciled the competing language in section 3(b)

that requires a three-member quorum of the full Board.

The decision below, and the First Circuit decision, simply ignore the plain and unambiguous language of section 3(b), which states that "three members of the Board shall, *at all times*, constitute a quorum", and thereby fail to give proper effect to section 3(b)'s separate quorum requirements. (emphasis supplied.) Indeed, in pursuit of a rationale that would allow the Board to continue to function with only two Members, the First and Seventh Circuits' decisions essentially re-write section 3(b) to provide a two-member quorum requirement for the Board. In contrast, the D.C. Circuit, on the very same day that the Seventh Circuit issued its decision, correctly held that section 3(b) provides that the NLRB may not function with less than three sitting Members.

In *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009), the D.C. Circuit interpreted section 3(b) as permitting the Board to act with two Members *only if* the Board maintains a quorum of three sitting Members at all times. Noting that section 3(b) unambiguously states that "three members of the Board shall, at all times, constitute a quorum", the Court observed that nothing that follows this statement qualifies the "Board quorum" requirement of three sitting Members. *Id.* at 472-73. The additional provision of section 3(b) that allows two Members of the Board to act on behalf of a "three-member group" to whom the Board has delegated authority does not permit a two-member quorum of a group to supplant a three-member quorum of the Board. *Id.* In this regard, the Court stated that:

> [i]t therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times.

Id. at 473.

The D.C. Circuit correctly recognized that in the Taft-Hartley Act's 1947 amendments to the NLRA expanding the Board from three to five Members, Congress wanted to ensure in the NLRA that the Board was authorized to hear cases in three-member panels or groups, but that at all times, a quorum *of the Board* shall nevertheless be three Members. *Id.* at 470, 475. The two-member quorum of the group or panel is intended to *subserve* the Board's general three-member quorum requirement, *not supersede* it. As the D.C. Circuit recognized, it is a fundamental principle of agency law that when the delegating authority's power lapses, the delegation itself lapses. *Id.* at 473; *see also* 29 U.S.C. § 153(b) (". . . any or all of the powers which it may itself exercise . . .").

The Second Circuit took a somewhat different approach than the Seventh Circuit by applying a *Chevron* analysis. In *Snell Island SNF LLC v. National Labor Relations Board*, Nos. 08-3822-ag(L), 08-4336-ag(XAP), 2009 U.S. App. LEXIS 13008 (2d Cir. June 17, 2009), the Court applied the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

837 (1984), for reviewing an administrative agency's attempt to give meaning to the statute it administers. *Snell*, 2009 U.S. App. LEXIS 13008, at *27-41. After finding that the Congressional intent of the three-member Board quorum requirement in section 3(b) is unclear, the Second Circuit applied the second step of the *Chevron* analysis, which it believed required it to defer to the Board's interpretation of its own power to act with two Members under the NLRA. *Id.* at *38-41. This Court need not decide whether a *Chevron* analysis is appropriate where the agency is passing on its own power or authority to act, however, because the statute herein is clear on its face that a quorum of the Board at all times must be comprised of three Members.[2]

While, in the words of the Second Circuit, the NLRB should be commended "for its conscientious efforts to stay 'open for business' in the face of vacancies that it did not create and for which it lacked the authority to fill", *Snell*, 2009 U.S. App. LEXIS 13008, at *40, the Chamber agrees with the D.C. Circuit, which noted, "we may not convolute a statutory scheme to avoid an inconvenient result." *Laurel Baye*, 564 F.3d at 476.

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[2] Moreover, even if the statute were not plain on its face, the NLRB's construction of the statute raises serious separation-of-powers concerns by permitting an independent regulatory agency to supplant the necessity of the President and the Senate to carry out their Article II responsibilities to nominate and confirm officials to constitute the requisite quorum. As such, the constitutional avoidance canon would require the construction advocated by the Petitioner. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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