

09-377 SEP 29 2009

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**In the Supreme Court of the United States**

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

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

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The Solicitor General, on behalf of the National Labor Relations Board, 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-15a) is reported at 564 F.3d 469. The decision and order of the National Labor Relations Board (App., *infra*, 22a-44a) are reported at 352 N.L.R.B. 179.

### JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. A petition for rehearing was denied on July 1, 2009 (App., *infra*, 18a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

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

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

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

### STATEMENT

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

Congress “confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal,” the National Labor Relations Board (NLRB or Board). *Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 489-490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: “A vacancy in the Board

shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.” Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 451.<sup>1</sup>

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

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

<sup>2</sup> See *NLRB Thirteenth Annual Report* 8-9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Report Labor-*

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

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. On December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board’s powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.<sup>3</sup> App., *infra*, 4a. After the

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*Management Relations* Pt. 3, at 9 (Comm. Print 1948); 1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov’t Operations, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman’s statement).

<sup>3</sup> Also on that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f), and (j) of the NLRA, 29 U.S.C. 160(e), (f), and (j). See Minute of Board Action (Dec. 20, 2007); NLRB Press Release, *Labor Board Temporarily Delegates Litigation Auth-*

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

3. Respondent Laurel Baye Healthcare of Lake Lanier operates a nursing care facility for geriatric and disabled residents in Buford, Georgia. *Laurel Baye Healthcare of Lake Lanier, LLC v. NLRB*, 209 Fed. Appx. 345, 347 (4th Cir. 2006). In November 2004, employees of respondent elected to be represented as a collective bargaining unit by the United Food and Commercial Workers International Union, Local No. 1996 (Union). Although the Board certified the Union as the employees' bargaining representative in June 2005, respondent subsequently refused to recognize and bargain with the Union. *Ibid.* In response, based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, and the Board issued an order requiring respondent to recognize and bargain with the Union. *Laurel Baye Healthcare of*

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*ority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007).

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

<sup>5</sup> On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See BNA, 83 *Daily Labor Rep.* AA-1, at 1. The published decisions are reported in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (81 decisions as of September 28, 2009).

*Lake Lanier, LLC*, 346 N.L.R.B. 159 (2005). The United States Court of Appeals for the Fourth Circuit later denied respondent's petition for review and granted the Board's cross-application for enforcement. *Laurel Baye, supra*, 209 Fed. Appx. 345.

In January 2006, the Board's Regional Director issued a consolidated complaint against respondent alleging that respondent violated its duty under Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5), to bargain with the Union between the time of the Union's November 2004 election and its June 2005 certification as bargaining representative. App., *infra*, 29a, 31a-32a. The complaint alleged that respondent made unilateral changes to the terms and conditions of employment for its bargaining unit employees by implementing changes in its attendance policy; dress code; health insurance carriers, premiums, and benefits; and vacation and sick leave pay benefits. *Id.* at 31a-32a. After holding a hearing, an administrative law judge (ALJ) issued a decision finding that respondent had committed the alleged unfair labor practices. *Id.* at 29a-44a. In an order dated February 29, 2008, the Board—comprised of the two sitting members acting as a quorum of the three-member group to which the Board had delegated its full authority—adopted the ALJ's findings and conclusions, and ordered respondent to bargain with the Union, rescind the unilateral changes upon request by the Union, and make the employees whole for any losses resulting from those unilateral changes. *Id.* at 22a-26a.

4. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-applied for enforcement of its order. App., *infra*, 1a. Respondent did not contest the substance of the Board's

unfair labor practice findings, instead challenging the authority of the two sitting Board members to issue the decision. *Id.* at 1a-2a.

The court of appeals granted the petition for review and denied the Board's cross-application for enforcement. App., *infra*, 1a-15a. The court declined to consider respondent's argument that the Board's initial delegation of authority to the three-member group was invalid because the Board knew the group would soon be acting as a two-member group. *Id.* at 6a. Instead, the court concluded that, even if the initial delegation of the Board's authority to the group was valid, the group lost its authority to act under Section 3(b) when the Board as a whole lost its three-member quorum. *Id.* at 6a-14a.

The court relied on the clause in Section 3(b) stating that "three members of the Board shall, at all times, constitute a quorum of the Board," concluding that neither the Board nor any group of the Board may act when the Board's total membership falls below three, "regardless of whether the Board's authority is delegated to a group of its members." App., *infra*, 6a-7a; 29 U.S.C. 153(b). The Court rejected the Board's argument that the subsequent statutory phrase—"except that two members shall constitute a quorum of any group designated pursuant to [Section 3(b)'s delegation provision]," 29 U.S.C. 153(b)—constituted an exception to the quorum requirement for the Board as a whole. *Id.* at 6a-8a. In the court's view, Section 3(b)'s group quorum requirement "does not eliminate the requirement that a quorum of the *Board* is three members." *Id.* at 7a. Thus, the court reasoned, "where, as here, a delegee group acts on behalf of the Board, the Board quorum requirement still must be satisfied." *Id.* at 12a (internal citation omitted). Because the Board quorum require-

ment of three members was not satisfied, the court held that the remaining two Board members could not act. The court accordingly ordered that the Board's decision "be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum." *Id.* at 14a-15a.

#### REASONS FOR GRANTING THE PETITION

The decision below is incorrect and conflicts with decisions of the Seventh, Second, and First Circuits. *New Process Steel, LP v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. pending, No. 08-1457 (filed May 22, 2009); *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). Congress created the NLRB to protect the free flow of commerce by preventing and remedying unfair labor practices. In order to ensure that the Board operates efficiently and effectively, Congress amended Section 3(b) of the NLRA, 29 U.S.C. 153(b), in 1947 to allow the Board to delegate any or all of its powers to a three-member group of the Board and to allow two members of such a group to constitute a quorum of that group. Pursuant to this authority, the Board delegated its powers to a three-member group, including the two current Board members. Those members have issued more than 400 decisions as a two-member quorum of that group. The court of appeals' decision invalidating those rulings prevents the Board from enforcing the NLRA's prohibitions on unfair labor practices and conflicts with the decisions of three other courts of appeals. Moreover, because Sec-



tion 10(f) of the NLRA, 29 U.S.C. 160(f), permits any aggrieved person to seek review of a Board order in the D.C. Circuit, that court's incorrect interpretation of Section 3(b) could prevent the current Board from enforcing the NLRA throughout the country. This Court's review is therefore warranted.

However, a petition for a writ of certiorari presenting the identical question presented in this case is already pending in *New Process Steel, LP v. NLRB*, No. 08-1457 (filed May 22, 2009). Simultaneously with the filing of this petition, the Solicitor General, on behalf of the Board, is filing a brief in response to the certiorari petition in *New Process* agreeing that the Court should grant the petition in that case. For the reasons stated in the Board's brief in *New Process*, the decision of the court of appeals in the instant case is incorrect, conflicts with the decision of the court of appeals in *New Process* and other cases, and presents a question of recurring and sustained importance in the enforcement of the NLRA. The Court should therefore hold the Board's petition in this case pending its disposition of *New Process*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *New Process Steel, LP v. NLRB*, No. 08-1457 (filed May 22, 2009), and then should be disposed of accordingly.

Respectfully submitted.

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