No. 12-1313

In the Supreme Court of the United States

ESTATE OF ARTHUR SALM, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute of limitations applicable to fraudulent-transfer actions filed pursuant to the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, governs a proceeding before the National Labor Relations Board (Board) to impose personal liability by piercing a corporate veil.

2. Whether substantial evidence supports the Board's decision to pierce a corporate veil and hold petitioner personally liable for the backpay liability of the corporations of which he was a principal owner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 105a-111a) is not published in the *Federal Reporter* but is reprinted in 509 Fed. Appx. 94. The decision and order of the National Labor Relations Board (Pet. App. 25a-70a) is reported at 357 N.L.R.B. No. 180.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2013. The petition for a writ of certiorari was filed on April 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 10(c) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, authorizes the National Labor Relations Board (Board), upon finding a violation of the NLRA, to order such remedies "as will effectuate the policies of" the Act. 29 U.S.C. 160(c); *NLRB* v. *Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). The Board's broad remedial authority is "not limit[ed] * * * to the actual perpetrator of an unfair labor practice," but may, *e.g.*, extend to a perpetrator's "officers, agents, successors, and assigns." *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 176 (1973) (quoting *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942)).

Generally, a stockholder is "insulat[ed] * * * from the debts and obligations of his corporation." *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960). That rule may be suspended, however, and the corporate veil pierced to impose derivative personal liability on an owner or shareholder of a corporation, in certain circumstances. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 62 (1998) (noting that the corporate veil may be pierced when "the corporate form would otherwise be misused to accomplish certain wrongful purposes").

In *White Oak Coal Co.*, 318 N.L.R.B. 732, 735 (1995), enforced mem., 81 F.3d 150 (4th Cir. 1996), the Board articulated a two-pronged test, derived from federal common law, that governs the Board's decision whether and when to pierce the corporate veil of an entity found to have engaged in unfair labor practices. Under the Board's test, veil piercing is appropriate if: (1) "there is such unity of interest, and lack of respect given to the separate identity of the corporation by its

shareholders, that the personalities and assets of the corporation and the individuals are indistinct"; and (2) "adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *Id.* at 735. When evaluating the first prong, the Board considers a variety of factors indicative of "the degree to which the corporate legal formalities have been maintained" and "the degree to which individual and corporate funds, other assets, and affairs have been commingled." *Ibid.* Specifically, the Board considers the following factors, not all of which are required and no one of which is determinative:

> (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or under capitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

Ibid.; see *NLRB* v. *Bolivar-Tees*, 551 F.3d 722, 728-729 (8th Cir. 2008). The courts of appeals have consistently approved the Board's *White Oak Coal* test. See *Bolivar-Tees*, 551 F.3d at 727-729; *NLRB* v. *West Dixie Enters., Inc.*, 190 F.3d 1191, 1194 (11th Cir. 1999); *Bufco Corp.* v. *NLRB*, 147 F.3d 964, 969 (D.C.

Cir. 1998). The Board's application of its veil-piercing test to the facts of a particular case is subject to substantial-evidence review in the courts of appeals. 29 U.S.C. 160(e); *Bolivar-Tees*, 551 F.3d at 727, 729-730.

2. a. Petitioner[1] was one of two principal owners of three corporations—Domsey Trading Corp., Domsey Fiber Corp., and Domsey International Sales Corp. (collectively Domsey)—that were based in Brooklyn, New York, and were engaged in the business of exporting and selling used clothing and textiles. See Pet. App. 5a. The three corporations constituted a single employer for purposes of the NLRA. *Ibid.* At all relevant times, petitioner held a 48% ownership interest in Domsey and Albert Edery held a 50% interest. *Id.* at 27a. Petitioner also served as the President of two of Domsey's constituent companies. *Id.* at 95a.

In 1989, Domsey employees initiated a labor-organization drive that culminated in a strike. Pet. App. 27a. At the end of the strike, Domsey unlawfully failed to timely reinstate the employees. *Ibid.* In a 1993 order, the Board ordered Domsey to offer reinstatement to the employees. *Ibid.*; see 310 N.L.R.B. 777, 780-782 (1993), enforced, 16 F.3d 517 (1994).[2] The Board also ordered Domsey to make whole the affect-

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[1] The named petitioner is the Estate of Arthur Salm. This brief refers to the individual Arthur Salm as petitioner.

[2] The Board also concluded that Domsey had engaged in numerous other unfair labor practices, including threatening, interrogating, and discharging several employees who had joined a union-organizing committee; engaging in acts of violence against union representatives in the presence of strikers; harassing strikers using racial, ethnic, and sexual slurs; and retaliating against several former strikers who returned to work. 310 N.L.R.B. at 777 n.3, 780-781, 785-808.

ed employees who had been either unlawfully discharged or unlawfully deprived of their jobs when Domsey failed to make valid reinstatement offers after the strike. *Id.* at 781, 815.

b. Following the Second Circuit's enforcement of the Board's 1993 order, 16 F.3d 517, 519 (1994), a controversy arose concerning the amount of backpay due. See Pet. App. 7a-13a. In 1999, an administrative law judge (ALJ) issued a supplemental decision finding that Domsey owed a little more than $1 million in backpay. *Id.* at 7a; Nos. 29-CA-14548, 1999 WL 33454669 (Oct. 4, 1999). In 2007, the Board issued a Supplemental Decision and Order modifying some of the ALJ's backpay determinations and remanding additional backpay issues to the judge and to the Board's Regional Director for Region 29 in light of this Court's intervening decision in *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 149 (2002), which held that the Board may not award backpay to undocumented workers. 351 N.L.R.B. 824, 824-830, 844-846 (2007). Following the proceedings on remand, the Board issued a Second Supplemental Decision and Order adopting the Regional Director's recalculations of backpay and affirming the ALJ's findings on the immigration status of certain employees. 353 N.L.R.B. No. 12 (2008), aff'd 355, N.L.R.B. No. 89 (2010).

The Board applied to the Second Circuit for enforcement of its two supplemental orders, which together obligated Domsey to provide $914,784.37 in backpay to 181 employees. Pet. App. 29a-30a; see 636 F.3d 33, 34 (2011). The court denied enforcement and remanded the supplemental orders to the Board, finding that the Board had failed to address Domsey's

objections to certain immigration-related evidentiary rulings made by the ALJ at the backpay hearing. *Id.* at 38. The court ordered the Board to revisit the relevant evidentiary rulings in light of *Hoffman Plastic Compounds*. *Id.* at 38-39. The Board remanded the case to an ALJ for further proceedings consistent with the court of appeals' decision. 357 N.L.R.B. No. 164 (2011). On May 22, 2013, the ALJ issued a further supplemental decision, which calculated that Domsey owes $844,829.58 in backpay, excluding interest. Nos. 29-CA-14548, 2013 WL 2286074 (2013). The Acting General Counsel filed limited exceptions to that decision; the exceptions are pending before the Board.

c. In 2002—during the course of the litigation about the extent of Domsey's backpay liability—the property at 431 Kent Avenue in Brooklyn, at which Domsey operated, was sold. Pet. App. 28a. Domsey had co-owned the property with an entity called Edery-Salm Associates. *Ibid.* In early January 2002, Domsey and Edery-Salm Associates received approximately $12.3 million in exchange for the Kent Avenue property. *Ibid.* Domsey's share of the proceeds from the sale, which was directly deposited into Domsey's corporate bank account, was more than $9 million. *Ibid.* Before that deposit, Domsey's account contained only $848.66. *Id.* at 29a.

Almost immediately after the sale proceeds were deposited in Domsey's account, petitioner wrote a corporate check to himself in the amount of $3,262,966.21 and deposited the funds in his personal bank account. Pet. App. 28a. Days later, he routed $4 million from that personal account to a personal brokerage account, then to a second personal brokerage

account, and then to a brokerage account held by his wife. *Ibid.* Eventually, the $4 million was transferred from petitioner's wife's account to yet another of petitioner's brokerage accounts. *Id.* at 28a-29a. Around the same time, petitioner wrote a second corporate check, transferring $4,555,379.85 to Albert Edery. *Id.* at 29a. Edery, like petitioner, deposited his distribution from the Domsey account into a personal brokerage account. *Ibid.* By January 22, 2002, Domsey's corporate account once again contained only $848.66. *Ibid.* None of the proceeds from the sale of the Kent Avenue property remained in the corporate account, and no money had been set aside for the satisfaction of Domsey's impending backpay liability. *Ibid.* Neither Domsey nor petitioner notified the Board of the sale and transfer transactions. *Ibid.*

On January 31, 2002, Domsey ceased operations. Pet. App. 30a, 95a, 103a. Domsey dissolved as a corporation in 2009. *Id.* at 30a, 77a.

3. a. On August 11, 2010 (while the Board's first two supplemental backpay orders were pending before the Second Circuit), the Regional Director for Region 29 issued an amended compliance specification alleging that several Domsey owners and officers, including petitioner, are personally liable for Domsey's backpay obligations. Pet. App. 93a-101a. The Regional Director based the allegation on evidence that petitioner and the other named individuals had diverted all of the proceeds from the 2002 sale of the Kent Avenue property to themselves, and had commingled the proceeds with their personal funds. *Id.* at 95a-98a.[3] After a hearing on the amended compliance

[3] In a separate action filed the same day against petitioner and other Domsey officers, the Board sought a pre-judgment writ of

specification, the ALJ found insufficient evidence to warrant piercing Domsey's corporate veil to hold petitioner personally liable for the backpay award. *Id.* at 60a-68a.

On December 30, 2011, the Board issued a Third Supplemental Decision and Order reversing the ALJ and finding petitioner personally liable, along with Domsey, for the amount of backpay ultimately determined by the Board to be due. Pet. App. 25a-41a. Recognizing that "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception," the Board noted that "the corporate veil is not inviolate" and may be pierced "[w]hen equity demands." *Id.* at 31a (quoting *NLRB* v. *Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993)).[4]

In considering the factors relevant to the first prong of the *White Oak Coal* analysis, the Board found "no evidence that the disbursements" of the sale

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garnishment under Section 3104 of the Federal Debt Collection Procedures Act of 1990, to protect petitioner's assets from dissipation pending resolution of the personal-liability issue before the Board. 28 U.S.C. 3104; see No. 10-0543 (E.D.N.Y. filed Aug. 11, 2010). In agreeing to settle that action, petitioner agreed to sequester $1.35 million for use as backpay in the event he is determined to be personally liable. Pet. App. 71a-92a.

[4] The Board noted that the Acting General Counsel alleged in his amended compliance specification that three other individuals—Albert Edery's widow and executrix Fortuna Edery and petitioner's sons Peter and David Salm—were also personally liable for the backpay. Pet App. 27a n.2. The Board also noted that those individuals have entered into agreements with the Acting General Counsel to make contributions toward the backpay due if petitioner is found personally liable in this case. *Ibid.* Accordingly, the Board's Third Supplemental Decision and Order addresses only petitioner's liability.

proceeds to petitioner "and Edery in January 2002 served any valid corporate purposes or otherwise represented fair consideration for services." Pet. App. 35a. On the contrary, the Board concluded, the disbursements constitute "evidence [of] a lack of separation between [Domsey] and its principals." *Ibid.* Petitioner, the Board found, "regarded the proceeds as being freely available for the taking, notwithstanding that they belonged to" Domsey. *Ibid.* The Board concluded that petitioner "commingled [Domsey's] assets with his own, which * * * is one of the most serious forms of abuse of the corporate form." *Ibid.* In so doing, the Board observed, petitioner "effectively rendered [Domsey] judgment proof." *Ibid.* The Board rejected the argument that petitioner did not commingle his funds with Domsey's because the transfer of funds "was tied to one major corporate transaction as opposed to many smaller transactions occurring over months or years." *Ibid.* "Either way," the Board explained, "a corporate respondent can be left undercapitalized and without the ability to satisfy its legal obligations." *Id.* at 35a-36a. And "[t]hat," the Board concluded, "is precisely what happened here." *Id.* at 36a. Indeed, although petitioner "was well aware" of Domsey's prospective backpay liability, petitioner and Edery liquidated the company's major asset and transferred the proceeds to their personal accounts before cessation of the company's operations and without providing for means to pay the backpay liability. *Ibid.* Finally, the Board concluded that the payments to petitioner and Edery "did not involve adherence to normal legal formalities or arm's-length dealings," but were diversions of corporate funds to noncorporate uses. *Ibid.*

Having concluded that the evidence established several types of misconduct enumerated in *White Oak Coal* as potential bases for piercing the corporate veil, see Pet. App. 34a-37a & n.23, the Board turned to the second prong of the *White Oak Coal* test and found it satisfied as well. *Id.* at 37a-38a. The Board concluded that "[a]dherence to the corporate form here would promote injustice and lead to the evasion of legal obligations." *Id.* at 37a. The Board found that petitioner's removal of funds from Domsey's account had "the 'natural, foreseeable, and inevitable consequence' of diminishing [Domsey's] ability to satisfy [its] remedial obligation," and that a finding of specific intent to evade Domsey's backpay liability was not required. *Id.* at 38a (quoting *D.L. Baker Inc.*, 351 N.L.R.B. 515, 523 (2007)).

The Board also rejected petitioner's argument that any personal liability had been extinguished by the running of the statute of limitations in Section 3306(b) of the Federal Debt Collection Procedures Act of 1990 (FDCPA), governing "claims for relief with respect to a fraudulent transfer." 28 U.S.C. 3306(b); see Pet. App. 40a. The Board explained that "[t]he FDCPA pertains to the collection of debts," whereas "[t]he issue here is whether Salm should be held personally liable for backpay." *Ibid.* As to that issue, the Board reasoned, "the only applicable statute of limitations is the 6-month period for the filing of a charge under Section 10(b) of the Act." *Ibid.*; see 29 U.S.C. 160(b).

Finding that petitioner is jointly and severally liable with Domsey for any backpay determined to be due based on Domsey's unfair labor practices, the Board ordered petitioner and Domsey to place in escrow, for a period of one year, the amounts due

under the Board's earlier supplemental orders, recognizing that those amounts were subject to adjustment in the related proceeding that remains pending before an ALJ following remand from the Second Circuit. Pet. App. 40a-41a; see pp. 5-6, *supra*.

b. Member Hayes dissented. Pet. App. 41a-48a. In his view, the *White Oak Coal* analysis should not be applied here because the relevant transactions amount to "a one-time liquidation and distribution of corporate assets." *Id.* at 46a-47a. In Member Hayes' view, the "one-time distribution of funds" at issue here did not qualify as "commingling." *Id.* at 47a. Member Hayes also opined that the Board's analysis of the transactions was in truth a "fraudulent transfer" analysis rather than a veil-piercing analysis. *Id.* at 47a-48. Member Hayes viewed that as error because the amended compliance specification did not allege a fraudulent-transfer theory. *Ibid.*

4. In an unpublished summary order, the court of appeals enforced the Board's decision "to pierce the corporate veil and find [petitioner] personally liable for the remedial obligations of Domsey." Pet. App. 110a; see *id.* at 105a-111a. The court of appeals held that "the Board rightly concluded that an analysis of the [*White Oak Coal*] factors showed that [petitioner] had indeed abused the corporate form * * * by drawing down virtually all of the assets of [Domsey] for his personal use," thereby satisfying the first prong of the *White Oak Coal* test. *Id.* at 109a-110a.

The court of appeals similarly concluded that the second prong of the *White Oak Coal* test had been satisfied "because it is clear that the abuse of the corporate form here would indeed promote injustice and allow for the evasion of legal obligations." Pet.

App. 110a. The court explained that, "[b]y removing nearly all of the assets of the corporation, outside of the context of a legitimate winding down or dissolution, [petitioner] made it likely that the corporation would be unable to meet its remedial obligations." *Ibid.* The court emphasized that "it is clear that his removal of these funds had the 'natural, foreseeable, and inevitable consequence[]' of diminishing Domsey's ability to satisfy its remedial obligations." *Ibid.* (quoting *Bufco Corp.*, 147 F.3d at 969).

The court of appeals also rejected the fraudulent-transfer theory set forth in Member Hayes' dissent, noting that the conflicting views among the Members "amount to 'fairly conflicting views' of the application of the law," and therefore required the court of appeals to "defer to the decision of the Board." Pet. App. 110a.

The court of appeals summarily rejected petitioner's "remaining arguments," Pet. App. 111a, including his statute-of-limitations argument, see Pet. C.A. Br. 9-14.

ARGUMENT

Petitioner argues that the court of appeals erred in affirming the Board's decision to hold him personally liable for Domsey's backpay liability because the Board's effort to hold him personally liable was barred by the statute of limitations in the Federal Debt Collection Procedures Act and because there was insufficient evidence of commingling to support the decision to pierce Domsey's corporate veil. Neither argument merits review. The court of appeals' unpublished summary decision is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner argues (Pet. 9-18) that the Board's decision piercing Domsey's corporate veil and holding petitioner personally liable for Domsey's backpay obligation was barred by the statute of limitations set forth in 28 U.S.C. 3306(b). As an initial matter, petitioner does not suggest that the court of appeals' decision rejecting his argument conflicts with any decision of this Court or of any other court of appeals. Indeed, petitioner does not identify any court other than the Second Circuit that has ever considered the applicability of the FDCPA to Board proceedings, and the Second Circuit's decision in this case is unpublished and does not even establish binding precedent in that Circuit. That is sufficient reason to deny the petition for a writ of certiorari.[5]

In addition, petitioner's argument lacks merit. Section 3306 sets forth limitations periods applicable to "claim[s] for relief with respect to a fraudulent transfer or obligation." 28 U.S.C. 3306(b). The petition for a writ of certiorari arises out of proceedings to enforce the NLRA, not out of a suit to avoid a fraudulent transfer. The Board did initiate a separate action

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[5] Petitioner's suggestion (Pet. 2) that the court of appeals' decision conflicts with another Second Circuit decision, see *NLRB* v. *E.D.P. Med. Computer Sys., Inc.*, 6 F.3d 951 (1993), is without merit and would not provide a basis for review in any case. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In *E.D.P. Medical Computer Systems*, the court held that the Board may file a petition for a pre-judgment writ of garnishment pursuant to the FDCPA because a backpay award qualifies as a "debt" under that statute. 6 F.3d at 954-955. But the court had no occasion to consider or opine on the application of the FDCPA's limitations periods to NLRB proceedings in which the Board seeks to hold an individual personally liable for the obligations of a corporation.

in federal district court pursuant to the FDCPA, 28 U.S.C. 3304, seeking a pre-judgment writ of garnishment against petitioner pending resolution of the personal-liability issue presented in this case. See No. 10-0543 (E.D.N.Y. filed Aug. 11, 2010). That matter was ultimately settled when petitioner agreed to sequester funds for use in the event that he is found liable for the backpay award. Pet. App. 71a-92a. This action, in contrast, neither relies on any provision of the FDCPA nor seeks to avoid any fraudulent transfer.

As the court of appeals held, the Regional Director's request (in the compliance specification) to hold petitioner personally liable for Domsey's backpay obligation was a request to pierce Domsey's corporate veil, not an attempt to avoid a fraudulent transfer. Pet. App. 110a. As discussed at pp. 15-18, *infra*, that decision was correct. Because the Board did not proceed on a fraudulent-transfer theory, Section 3306 does not apply here.

Although an effort to pierce a corporate veil and an effort to avoid a fraudulent transfer can arise from the same set of facts, each remedy is distinct. See *Wachovia Securities, LLC* v. *Banco Panamericano, Inc.*, 674 F.3d 743, 759 (7th Cir. 2012) (noting that "[b]ehavior raising fraudulent conveyance claims prompts veil piercing claims") (citing Robert C. Clark, *Corporate Law* § 2.4 (1986)); *Brandon* v. *Anesthesia & Pain Mgmt. Assocs.*, 419 F.3d 594, 597-598 (7th Cir. 2005) (treating the two theories as "alternative[s]" arising out of the same facts). Whereas the United States can seek to avoid a fraudulent transfer as a stand-alone cause of action, see 28 U.S.C. 3306, veil-piercing is not itself a cause of action, but is a means

of enforcing a liability or judgment. See 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 41.28 (2006) ("An attempt to pierce the corporate veil is not itself a cause of action."); *Local 159* v. *Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999), cert. denied *sub nom. Pettit* v. *Bay Area Pipe Trades Pension Trust Fund*, 528 U.S. 1156 (2000); cf. *Peacock* v. *Thomas*, 516 U.S. 349, 354 (1996) ("Piercing the corporate veil is not itself an independent ERISA cause of action, but rather is a means of imposing liability on an underlying cause of action.") (citation and internal quotation marks omitted).

Petitioner's alternative argument (see Pet. 14-18) that the court of appeals should have borrowed New York's state-law catch-all limitations period also does not warrant review. Petitioner did not raise that argument until his reply brief in the court of appeals, and the Second Circuit typically deems issues raised for the first time at that point to be waived. See, *e.g.*, *Connecticut Bar Ass'n* v. *United States*, 620 F.3d 81, 91 n.13 (2010) ("Issues raised for the first time in a reply brief are generally deemed waived.").

2. Petitioner's argument (Pet. 18-26) that the Board erred in piercing Domsey's corporate veil to impose personal liability on him also does not warrant further review because the court of appeals correctly rejected it, the Second Circuit's decision is nonprecedential, and that decision in any event does not conflict with the decision of any other court of appeals.

a. The court of appeals correctly held that there was sufficient evidence to justify piercing Domsey's corporate veil and holding petitioner personally liable for Domsey's backpay liability. Petitioner agrees with the court of appeals that the analysis set forth in the

Board's decision in *White Oak Coal*, 318 N.L.R.B. 732 (1995), enforced mem., 81 F.3d 150 (4th Cir. 1996), governs the question whether to pierce a corporate veil in any particular case. See Pet. 18. The validity of that test is therefore not at issue in this case. The Board's application of the *White Oak Coal* test involves consideration of a variety of factors, each one fact-dependent. See *White Oak Coal*, 318 N.L.R.B. at 735 (setting forth two-prong test, including two inquiries and nine factors potentially relevant to the first prong). Courts of appeals review the Board's fact-specific application of the *White Oak Coal* test under a substantial-evidence standard. See *NLRB* v. *Bolivar-Tees, Inc.*, 551 F.3d 722, 729-732 (8th Cir. 2008); *Carpenters & Millwrights, Local Union 2471* v. *NLRB*, 481 F.3d 804, 808-809 (D.C. Cir. 2007); *NLRB* v. *West Dixie Enters., Inc.*, 190 F.3d 1191, 1193 (11th Cir. 1999); *Bufco Corp.* v. *NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998); see also see *Vitol, S.A.* v. *Primerose Shipping Co.*, 708 F.3d 527, 544 (4th Cir. 2013) ("[T]he question of whether to pierce the corporate veil is a fact-intensive inquiry, * * * and every case where the issue is raised is to be regarded as *sui generis* to be decided in accordance with its own underlying facts." (citation and internal quotation marks omitted)).

The court of appeals correctly affirmed the Board's conclusion, based on its fact-specific examination of the *White Oak Coal* factors, that petitioner abused the corporate form "by drawing down virtually all of the [corporate] assets * * * for his personal use." Pet. App. 109a-110a. The evidence demonstrated that, after Domsey had been found liable for a substantial backpay award, petitioner and Albert Edery, the

other principal owner of Domsey, sold Domsey's only major asset and transferred all of the proceeds to their personal accounts. *Id.* at 34a-36a. Petitioner's actions left Domsey with only $848 in its corporate bank account and no apparent means of satisfying its nearly million-dollar backpay liability. *Id.* at 36a; see *id.* at 30a. Petitioner is incorrect in contending (Pet. 18-20) that his siphoning off of the sale proceeds into his personal account does not qualify as commingling. But even if there were some force to his argument, the Board's decision to pierce Domsey's corporate veil was correct in light of the substantial evidence that there was not only "commingling of funds," but also "undercapitalization, diversion of corporate assets to non-corporate purposes, [and] dispersal of corporate assets without fair consideration." Pet. App. 37a n.23; *id.* at 34a-36a.

Petitioner also argues (Pet. 1-2, 18-26) that the Board erred in viewing his actions as improper commingling of funds rather than as a fraudulent transfer because Domsey had ceased operations at the relevant time. That is incorrect. On the evidence presented to it, the Board correctly concluded that each of Domsey's corporate components ceased operations on January 31, 2002—after petitioner had emptied Domsey's bank account of the sale proceeds. Pet. App. 28a-30a. Domsey did not formally dissolve as a corporate entity, moreover, until 2009. *Id.* at 30a. Petitioner is therefore incorrect that the Board should not have applied the *White Oak Coal* test here because that test "was not intended to apply to a corporation that has ceased operations and gone out of business." Pet.

19 (quoting Pet. App. 46a (Member Hayes, dissenting)).[6]

b. There is also no merit to petitioner's argument (Pet. 21-23) that the court of appeals' decision conflicts with decisions of the Eighth and Eleventh Circuits. In both of the cases on which petitioner relies, the courts of appeals concluded that it was appropriate to pierce a corporate veil based in part on the commingling of corporate and private funds. See *Bolivar-Tees, Inc.*, 551 F.3d at 732-733; *West Dixie Enters., Inc.*, 190 F.3d at 1194-1195. As petitioner suggests (Pet. 21-23), both of those cases involved multiple instances of commingling personal and corporate assets. *Bolivar-Tees, Inc.*, 551 F.3d at 729; *West Dixie Enters., Inc.*, 190 F.3d at 1194. But neither court held or even suggested that the concept of commingling is limited to serial transactions such as were at issue in those cases. Every veil-piercing case before the Board turns on the application of the *White Oak Coal* test to the particular facts of the case. The decisions of the Eighth and Eleventh Circuits do not conflict with the court of appeals' decision here merely because all three circuits found reason to pierce a corporate veil based on different sets of facts. Each

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[6] In any case, petitioner is incorrect that veil-piercing is not permitted when a corporation does dissolve and distributes all of its assets to shareholders. See *IMCO/Int'l Measurement & Control Co.*, 304 N.L.R.B. 738, 744 (1991) (imposing personal liability in part because "distribution of the liquidation proceeds [was] conducted * * * in a manner designed in part to evade [the company's] backpay obligations"), enforced, 978 F.2d 334 (7th Cir. 1992); *F&W Oldsmobile*, 272 N.L.R.B. 1150, 1150-1151 (1984) (imposing personal liability on owners who distributed corporate assets to themselves following cessation of operations).

court agreed on the applicable law—a quintessential feature of decisions that do *not* conflict.[7]

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[7] On June 24, 2013, this Court granted certiorari in *Noel Canning* v. *NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, No. 12-1281. The resolution of the two questions presented by the petition for a writ of certiorari in *Noel Canning* would be relevant to the President's exercise of his power to appoint Board Member Becker, who served on the three-member panel that decided this case. In this case, however, petitioner did not discuss or challenge Member Becker's appointment to the Board in the court of appeals; the court of appeals did not address that appointment in its decision; and petitioner has not even noted, much less challenged, the appointment in the petition for a writ of certiorari. Thus, any recess-appointment questions that petitioner might have raised are not properly before this Court, because they were neither pressed nor passed upon below, *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992), and lie beyond the scope of the questions petitioner presented in this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

The Third Circuit has held that a reviewing court must address such recess-appointment issues *sua sponte* because they concern the statutory jurisdiction of a three-member Board panel. *NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203, 209-214 (2013), pet. for reh'g filed (July 1, 2013). The government disagrees with that holding and, on July 15, 2013, the Third Circuit ordered proceedings on the government's rehearing petition stayed pending this Court's decision in *Noel Canning*. Petitioner similarly does not challenge the court of appeals' decision on that ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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