No. 14-93

In the Supreme Court of the United States

HEALTHBRIDGE MANAGEMENT, LLC, ET AL.,
PETITIONERS

v.

JONATHAN B. KREISBERG

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's delegation to its General Counsel of authority to file a petition for interim injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), remained in effect when the Board's membership dropped below the level required to maintain its quorum, and whether the Acting General Counsel validly authorized a proceeding pursuant to that delegation.

2. Whether the court of appeals applied the correct standard for granting interim injunctive relief under 29 U.S.C. 160(j).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 732 F.3d 131. The opinion of the district court (Pet. App. 26-53) is not published in the *Federal Supplement* but is available at 2012 WL 6553103. The transcript of the district court's oral ruling granting respondent's petition for relief (Pet. App. 54-73) is not published.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2013. A petition for rehearing was denied on February 26, 2014 (Pet. App. 24-25). On May 13, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 26, 2014. On June 16, 2014, Justice Ginsburg further extended the time to July 25, 2014, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, enumerates unfair labor practices and establishes mechanisms to remedy and prevent them. See 29 U.S.C. 158, 160. The National Labor Relations Board (NLRB or Board) is a "specific and specially constituted tribunal" in which Congress has "confide[d] primary interpretation and application of its rules" about labor relations. *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490 (1953). The Board adjudicates unfair-labor-practice complaints and issues final decisions and orders. 29 U.S.C. 160(a)-(c). It consists of five Members, appointed by the President with the advice and consent of the Senate, and three Members constitute a quorum. 29 U.S.C. 153(a), (b), and (d).

In order to separate the NLRB's adjudicatory and prosecutorial functions, Congress created the office of the General Counsel of the Board. See *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-125 (1987) (*UFCW*). The General Counsel is appointed by the President with the advice and consent of the Senate and has authority to investigate charges and to issue and prosecute complaints before the Board; he also has "such other duties as the Board may prescribe or as may be provided by law." 29 U.S.C. 153(d).[1] The General Counsel "act[s] in the

[1] The actions at issue in this case involved an Acting General Counsel who was named to that position by the President in June 2010 and served until November 2013. See NLRB, *Lafe Solomon* www.nlrb.gov/who-we-are/general-counsel/lafe-solomon.

name of, but independently of any direction, control, or review by, the Board." *UFCW*, 484 U.S. at 124 (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 37 (1947)). NLRB personnel who engage in prosecution and enforcement are directly accountable to the General Counsel. See *NLRB* v. *Federal Labor Relations Auth.*, 613 F.3d 275, 278 (D.C. Cir. 2010).

b. Section 10(j) of the NLRA, 29 U.S.C. 160(j), authorizes the Board, upon issuance of a complaint charging any person with engaging in an unfair labor practice, to petition for (and a district court to grant) "appropriate temporary relief or restraining order" as is "just and proper," pending the issuance of the Board's decision and order on the underlying complaint.[2] Congress enacted Section 160(j) in 1947. See Labor-Management Relations Act, 1947, ch. 120, sec. 101, § 10(j), 61 Stat. 149. Because the administrative process for resolving charges pending before the Board can be lengthy, Congress understood that in some instances the Board was unable "to correct unfair labor practices until after substantial injury ha[d] been done." S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947). Congress therefore authorized the Board to petition

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[2] Section 160(j) provides in relevant part as follows:

> The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. 160(j).

for relief pursuant to Section 160(j). *Ibid.* ("[I]t has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation."); *id.* at 8 (explaining that relief should be available to the Board because "[t]ime is usually of the essence in these matters").

Under longstanding agency practice, when a Regional Director of the Board concludes that an unfair-labor-practice case has merit and that temporary injunctive relief would be appropriate, the Regional Director will submit a written memorandum to the General Counsel recommending the initiation of proceedings under Section 160(j). See Office of the Gen. Counsel, NLRB, *Electronic Redacted Section 10(j) Manual* § 5.2, at 12 (Sept. 2002), www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/redacted_10j_manual_5.0_reduced.pdf. If, upon review, "the General Counsel agrees that [such] proceedings should be sought," the General Counsel will present the recommendation to the Board with "the General Counsel's request for authorization from the Board"; if the Board authorizes the proceeding, the Regional Director will file a petition in district court. *Id.* §§ 5.2, 5.5, at 12, 14.

c. In November 2011, anticipating that it might soon lack a quorum, the Board issued an order, which was to be "effective during any time at which the Board has fewer than three Members" and which delegated to the General Counsel "full authority on all court litigation matters that would otherwise require Board authorization," including "full and final authority and responsibility on behalf of the Board to initiate and

prosecute injunction proceedings under section 10(j)." 76 Fed. Reg. 69,768 (Nov. 9, 2011).[3]

On January 3, 2012, Board Member Craig Becker's term expired, leaving the Board with only two Members (and therefore without a quorum). Pet. App. 8. The next day, the President, invoking the Recess Appointments Clause (U.S. Const. Art. II, § 2, Cl. 3), appointed three new Members. This Court later held that those appointments were invalid. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2573-2578 (2014). Meanwhile, however, the Board regained a quorum in August 2013, when the President appointed five Members with the advice and consent of the Senate.[4]

2. Petitioners in this case are sub-acute and long-term healthcare centers in Connecticut (and their management company). Between 2010 and 2012, various labor disputes arose as petitioners engaged in negotiations of new collective-bargaining agreements with the union representing the centers' employees. The union filed charges with the Board, alleging violations of the NLRA. In March 2011, the Board's Regional Director (respondent here) issued a complaint alleging that petitioners had committed several unfair labor practices. An administrative law judge sustained those allegations in August 2012. In the meantime, in response to continuing problems, respondent issued another complaint in 2012 alleging that petitioners committed addi-

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[3] The November 2011 order also stated that materially similar delegations made in 2001 and 2002 remained in effect. 76 Fed. Reg. at 69,769 & n.2.

[4] See Office of Public Affairs, NLRB, *The National Labor Relations Board Has Five Senate Confirmed Members* (Aug. 12, 2013), www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members.

tional unfair labor practices by unilaterally changing terms and conditions of employment without bargaining in good faith and by refusing to reinstate employees who had struck in protest. Pet. App. 2-3, 4-7.

In July 2012, respondent recommended the initiation of proceedings under Section 160(j) in relation to the unfair labor practices alleged in the new complaint. Pet. App. 36. The Acting General Counsel requested authorization from the Board, which was granted on August 16, 2012. *Id.* at 105. At the time, two of the Board's four Members were serving on the basis of recess appointments that this Court later held were invalid. *Id.* at 8-9. That same day, the Acting General Counsel issued a separate memorandum stating: "Pursuant to the Board's delegation of court authority to me, 76 FR 69768-02, 2011 WL 5357994 (F.R.) (November 9, 2011), I authorize the Regional Office to initiate Section 10(j) proceedings." *Id.* at 106.

On September 7, 2012, respondent filed a petition in the United States District Court for the District of Connecticut, requesting temporary relief against petitioners pending the Board's adjudication of the unfair-labor-practice complaint. D. Ct. Doc. 1. Specifically, respondent asked the court to reinstate striking employees, restore the terms and conditions that had previously governed their employment, and require petitioners to bargain in good faith with the union. Pet. App. 36. Petitioners moved to dismiss the petition, contesting the merits and contending that the petition had not been properly authorized because the Board lacked a quorum to issue its own authorization and because the Acting General Counsel could not invoke the Board's delegation when the Board lacked a quorum. *Id.* at 8-9, 38, 58.

3. The district court granted the relief requested by respondent. Pet. App. 26-53, 73.

a. At a hearing on December 11, 2012, the district court rejected petitioners' contentions that the Section 160(j) proceedings had not been properly authorized. Pet. App. 54, 58-59. The court concluded that the Acting General Counsel's own memorandum demonstrated that he had in fact authorized the petition, and it further held that the Board's delegation of authority to the General Counsel remained effective even when the Board lacked a quorum. *Id.* at 38 n.9, 58-59, 60-61.

b. In a written decision issued three days later, the district court addressed the merits of the petition for relief. Pet. App. 26-53. Rejecting petitioners' request to depart from the Second Circuit's established two-factor test for evaluating a request under Section 160(j), the district court considered (1) whether there was reasonable cause to believe that petitioners had committed unfair labor practices, and (2) whether the requested relief was just and proper. *Id.* at 39. After reviewing affidavits, correspondence, contract proposals, bargaining notes, the parties' initial briefing, and petitioners' "extensive supplemental brief" and offer of proof (*id.* at 37-38), the court held that respondent had satisfied both prongs of that test. *Id.* at 38, 42-53.

c. Petitioners sought a stay of the district court's order pending appeal, Pet. App. 72-73, but their request was rejected by the district court, the court of appeals, and this Court. See *HealthBridge Mgmt., LLC* v. *Kreisberg*, 133 S. Ct. 1002 (2013) (No. 12A769).

4. The court of appeals affirmed. Pet. App. 1-23.

a. With respect to the initial authorization of the petition under Section 160(j), the court of appeals held

that it did not need to resolve the validity of the President's January 2012 recess appointments to the Board, because, even if those appointments were invalid, the Acting General Counsel had properly authorized the petition pursuant to valid delegations of the Board's Section 160(j) authority. Pet. App. 10-18.[5] In holding that the delegations remained in effect after the Board lost its quorum, the court aligned itself with decisions of the Fifth, Eighth, and Ninth Circuits, while declining to follow the rationale of *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 3498 (2010). See Pet. App. 17. The court also rejected petitioners' suggestion that the Board could not make its delegations to the General Counsel "contingent" on its loss of a quorum, concluding that "[i]t would distort the language and structure of the statute to divest validly conferred powers from an independently appointed officer with explicit 'final authority' over § 10 prosecutions merely because the Board, after lawfully delegating away those powers, lost a quorum." *Id.* at 16-17 n.10.

b. The court of appeals also sustained "the merits of the underlying injunction." Pet. App. 18. It first rejected petitioners' argument that it should replace its two-factor test for evaluating petitions for relief under Section 160(j) with the four-part "preliminary injunction standard" articulated in *Winter* v. *NRDC, Inc.*, 555 U.S. 7 (2008). Pet. App. 18. The court observed that it had already "recognized that the 'just and proper'

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[5] Because petitioners were challenging the validity of the Board's November 2011 delegation, the court of appeals relied on the Board's materially similar 2001 and 2002 delegations. Pet. App. 14-15. Petitioners no longer contest the Board's ability to issue a delegation in November 2011. See note 9, *infra*.

prong of the § 10(j) injunctive relief standard for labor disputes incorporates elements of the four-part standard for preliminary injunctions that applies in other contexts." *Ibid.* The court also noted that "[t]here are good reasons to employ a slightly different standard for labor disputes." *Id.* at 19. It explained that, "well before *Winter*," several courts of appeals had articulated "a standard specific to the specialized injunctive relief that may be sought under § 10(j)," and none of those courts had concluded that *Winter* required them to replace their specialized articulations with "the regular preliminary injunction standard." *Id.* at 19-20 (citing cases from the Third, Fifth, Sixth, and Eleventh Circuits).

c. Turning to the merits of the district court's order for relief, the court of appeals found that the record evidence had "amply supported" the findings that petitioners had committed an unfair labor practice by unilaterally imposing changes in the terms and conditions of employment before the bargaining parties had reached a lawful impasse. Pet. App. 21. The court upheld the district court's determination that the relief was just and proper, noting that petitioners had substantially changed terms of employment without bargaining and that, "[w]ithout a restoration of the status quo, any future bargaining would occur in the shadow" of those unilaterally imposed changes. *Id.* at 22. The court further held that the district court did not abuse its discretion in discounting petitioners' allegations of employee sabotage as "unsubstantiated." *Id.* at 7, 23. The court also rejected petitioners' contention that the district court failed to consider their claims of financial hardship, noting that a bankruptcy court had already

modified the terms of employment that could allegedly produce such hardship.[6]

ARGUMENT

1. Petitioners do not contest the long-established proposition that the Board may delegate to its General Counsel the authority to initiate a proceeding for injunctive relief under 29 U.S.C. 160(j). See, *e.g.*, *Osthus* v. *Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011) (citing cases); *id.* at 845 (Colloton, J., concurring) (same); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 888-889 (S.D. Ind. 1948). Instead, petitioners contend (Pet. 17-25) either that the Acting General Counsel was disabled from invoking that authority, or that the delegation lapsed when the Board temporarily lost its quorum. Both of those contentions lack merit. The decision below does not conflict with that of any other court of appeals, and petitioners' objections arise from circumstances that are unlikely to recur in the future. Further review is accordingly unwarranted.

a. Petitioners first contend (Pet. 17-20) that the Board's delegation was not in effect in August 2012 because it was contingent on the loss of a quorum of the Board and the Board itself believed that it possessed a quorum after the President invoked the Recess Appointments Clause to name three new Board Members. In light of this Court's decision in *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014), it is now clear

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[6] Whether the bankruptcy court possessed statutory authority to modify the terms of employment was neither briefed nor argued before the court of appeals in this case. It is a subject of the Board's appeal in the bankruptcy proceeding. See *In re 710 Long Ridge Rd. Operating Co. II, LLC*, 13-13653-DHS, Docket entry No. 939, at 15 (Bankr. D.N.J. filed Feb. 18, 2014).

that the Board did lack a quorum at that time, which would satisfy the condition contained in the delegation. Yet, in petitioners' view (Pet. 19-20), the delegation still could not have been invoked by the Acting General Counsel because he was "wholly incapable of exercising any *independent* judgment about the propriety of section 10(j) relief while the Board maintained that it possessed a quorum and insisted on making that determination in the first instance."

As an initial matter, petitioners' objection flouts the "presumption of regularity [that] supports the official acts of public officers." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Here, there is no doubt that the Board intended for the delegation to take effect when the Board lacked a quorum, and the Acting General Counsel expressly stated that he authorized the initiation of proceedings against petitioners "[p]ursuant to the Board's delegation." Pet. App. 106. "[I]t is not the province of the courts to inquire into the *bona fides* of agency action or to label administrative determinations a facade." *National Ass'n of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 566 (2d Cir. 1972).

Furthermore, petitioners' objection rests on a fundamental misunderstanding of the process by which decisions are made to institute Section 160(j) proceedings. Petitioners assert (Pet. 20) that the General Counsel was incapable of exercising "*independent* judgment" after the Board decided "in the first instance" whether to initiate a proceeding. But the Board did not decide first. The General Counsel is an independent officer appointed by the President, and he has independent statutory authority to investigate unfair-labor-practice charges and to issue and prose-

cute unfair-labor-practice complaints. See 29 U.S.C. 153(d). In that capacity, even when no Section 160(j) delegation is in effect, the General Counsel receives recommendations from regional offices about potential Section 160(j) proceedings and makes his own decisions about which ones should be pursued. As a result, the Board does not actually receive a request for an authorization to seek judicial relief unless "the General Counsel agrees that 10(j) proceedings should be sought." Office of the Gen. Counsel, NLRB, *Electronic Redacted Section 10(j) Manual* § 5.2, at 12 (Sept. 2002), www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/redacted_10j_manual_5.0_reduced.pdf; see *Frankl* v. *HTH Corp.*, 650 F.3d 1334, 1345 (9th Cir. 2011), cert. denied, 132 S. Ct. 1821 (2012); see also Pet. App. 105 (memorandum informing the Acting General Counsel that the Board "authorizes you to institute 10(j) proceedings in this case, *as requested*") (emphasis added). Because it is the General Counsel who screens recommendations for the Board—and who is therefore the one who acts in the first instance—there is simply no basis for petitioners' assertion that the Acting General Counsel did not exercise independent judgment both in requesting authorization from the Board and, in an abundance of caution, in issuing a separate authorization pursuant to the Board's delegation of authority to him.[7]

Petitioners do not identify any decision from any court that has adopted their lack-of-independence rationale. Nor is there any reason to believe that the

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[7] To the extent that petitioners speculate (Pet. 19) about whether the Acting General Counsel would have felt free to authorize proceedings if the Board had not concurred in his recommendation, that issue is not presented by this case.

circumstances that gave rise to the parallel authorizations in this case—namely, legal uncertainty about whether the Board possessed a quorum—are likely to recur, now that the Court has clarified when the President may (and may not) make recess appointments (see *Noel Canning*, *supra*) and has clarified that the Board cannot use delegations to operate with a two-Member quorum when it has fewer than three Members (see *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674 (2010)). Accordingly, petitioners' contention that a Section 160(j) authorization is ineffective when it is made in parallel with another authorization of potentially doubtful validity does not warrant further review by this Court (or by the court of appeals).[8]

b. Petitioners alternatively contend (Pet. 21-25) that the Board's November 2011 delegation lapsed when the Board lost its quorum between January 2012 and August 2013 by virtue of the invalidity of the President's recess appointments. The court of appeals, however, correctly held that the Board's delegations to the General Counsel are not suspended whenever the Board itself ceases to have a quorum.[9]

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[8] Petitioners suggest (Pet. 20, 32) that the Court should remand the case "for reconsideration in light of *Noel Canning*," but the court of appeals has already concluded that the delegation to the General Counsel remained effective, whether or not the January 2012 recess appointments were valid. Pet. App. 17-18.

[9] Although the court of appeals' decision relied on earlier, materially similar delegations, Pet. App. 14-15, petitioners no longer contest that "the Board had three members" (*i.e.*, a quorum) when it issued its November 2011 delegation. Pet. 7. One of those members was Craig Becker, who had received a recess appointment "during an intra-session recess [of the Senate] that was not punctuated by *pro forma* sessions, and the vacancy Becker filled had come into existence prior to the recess." *Noel Canning*, 134

The NLRA expressly authorizes the General Counsel to "have such other duties as the Board may prescribe," 29 U.S.C. 153(d), and nothing in the statute indicates that such a prescription by the Board is deprived of its legal force and effect if the Board thereafter loses its quorum. Cf. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 866 (2009) (noting that the "expiration of the *authorities* * * * is not the same as cancellation of the *effect* of the * * * prior valid exercise of those authorities"). Although petitioners briefly suggest (Pet. 23-24) that the Board should not have been able to issue a delegation that was contingent on its lack of a quorum, the statute imposes no such limitation on the Board's ability to prescribe duties for the General Counsel, and "federal courts have ruled consistently for more than sixty years" that such delegations are valid, whether or not they depend on such a contingency. *Osthus*, 639 F.3d at 845-846 (Colloton, J., concurring) (citing cases and identifying prior delegations).[10]

Given that the Board made a valid delegation to the General Counsel of its authority to institute proceedings under Section 160(j), the Board's subsequent loss of a quorum did not abrogate that delegation, any more than the loss of a quorum abrogated the Board's other prior actions and decisions. The court of appeals' decision is thus in harmony with the general principle, essential to stable yet responsive government, that

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S. Ct. at 2558. This Court sustained the validity of recess appointments made in those circumstances. *Id.* at 2558, 2566-2567, 2573.

[10] Despite petitioners' suggestion that the Board "has attempted only to 'contingently delegate'" the power to institute Section 160(j) proceedings (Pet. 18), the delegation that was in effect between 1947 and 1950 did not contain such a contingency. See *Frankl*, 650 F.3d at 1344.

"[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." *United States* v. *Wyder*, 674 F.2d 224, 227 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); accord *Donovan* v. *Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan* v. *National Bank of Alaska*, 696 F.2d 678, 682-683 (9th Cir. 1983); see also *Champaign County, Ill.* v. *United States Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) ("[A] delegation of authority survives the resignation of the person who issued the delegation.").

Petitioners' contrary argument rests (Pet. 21-22) principally on *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 3498 (2010), and its invocation of common-law agency and corporate-law principles. In *Laurel Baye*, the D.C. Circuit considered a question not presented in this case—*i.e.*, 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 powers after the Board itself lost a three-Member quorum. *Id.* at 472. But petitioners err in assuming that the common law of private corporations or of private agency relationships provides the default rules that apply to a public entity such as the Board. In fact, each of petitioners' secondary sources recognizes that governmental bodies are often subject to special rules not applicable to private bodies.[11] Petitioners cite no case or secondary source

[11] See 1 Restatement (Third) of Agency 6 (2006) (noting that the Restatement "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government"); 1 *Fletcher Cyclopedia of the Law of Corporations* § 2, at 6 (2006) (distinguishing

indicating that all orders and delegations of a governmental agency simply cease to have effect during any periods in which the agency temporarily loses its quorum. Moreover, this Court's decision in *New Process Steel*, which addressed the same delegation question that was at issue in *Laurel Baye*, expressly declined to rely on such a premise (albeit without affirmatively rejecting such a premise). See 560 U.S. at 684 n.4 ("Nor does failure to meet a quorum requirement necessarily establish that an entity's power is suspended so that it can be exercised by no delegee.").

Petitioners also invoke (Pet. 21) this Court's decision in *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994). But that case addressed neither an *ex ante* delegation nor an alleged lapse in such a delegation. Instead, it addressed an after-the-fact ratification. *Id.* at 98. The Court explained that, under "presumptively" applicable agency principles, the Solicitor General's ratification of the FEC's decision to file a petition for certiorari was ineffective when the ratification did not occur until after the 90-day period for filing such a petition under the statute governing the Court's jurisdiction had expired. *Ibid.* Here, by contrast, there is no question that the Board had a quorum to act when it issued its delegation to the General Counsel. And nothing in *NRA Political Victory Fund* suggests that, if the Solicitor General had, during the 90-day period, authorized the FEC to make its own decision to file a

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between private and municipal corporations; stating "the law of municipal corporations [is] its own unique topic"; noting the treatise therefore "does not cover municipal corporations"); see also 1 Restatement (Second) of Agency 2 (1958) (explaining that the Restatement "does not state the special rules applicable to public officers").

certiorari petition, then the authorization would nevertheless have expired if the Solicitor General left office before (or after) the end of the 90-day period.

c. Petitioners' policy concerns are similarly unavailing. Petitioners contend (Pet. 24-25) that the decision below effectively allows the Board "to obtain perpetual injunctive relief even when it lacks a quorum to adjudicate the underlying labor dispute." But the lack of a quorum is not a perpetual state. Indeed, in this case, the Board's temporary lack of a quorum (which ended more than a year ago) did not ever prevent it from acting in a timely fashion on the underlying unfair-labor-practice allegations, which have been proceeding before an administrative law judge and have not yet been brought before the Board itself. See Pet. App. 22 n.11 (noting that "any future adjudication of the underlying action [in this case] is likely to proceed without reference to the recess appointments issue").[12] And, more generally, a principal reason for Section 160(j)'s enactment was Congress's recognition that an injunction might be needed before the underlying labor dispute could be adjudicated. See S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) (Sotomayor, J.) ("[A]bsent injunctive relief, the Board's often lengthy administrative proceedings could allow an unfair labor prac-

[12] District courts have recognized that the Board may regain a quorum in a given Section 160(j) case before the underlying unfair-labor-practice case is procedurally ready for the Board's review in the normal course of administrative proceedings. See *Overstreet* v. *SFTC, LLC*, 943 F. Supp. 2d 1296, 1303 (D.N.M. 2013) *(SFTC)*; *Paulsen* v. *Renaissance Equity Holdings*, 849 F. Supp. 2d 335, 352 (E.D.N.Y. 2012).

tice to go unchecked and thereby render a final Board order ineffectual."), aff'd, 67 F.3d 1054 (2d Cir. 1995).

d. Petitioners assert (Pet. 17, 21, 22) that the decision below "exacerbates" "an acknowledged and entrenched circuit split." With the exception of the decision below, every other case in the alleged split (Pet. 22) predated this Court's last decision to deny certiorari on petitioners' first question presented. See *HTH Corp.* v. *Frankl*, 132 S. Ct. 1821 (2012) (No. 11-622). There is no reason for a different result here.

In fact, there is not even a direct conflict in the courts of appeals. Every court of appeals that has addressed the question at issue here—the continuing validity, when the Board lacks a quorum, of its Section 160(j) delegations to the General Counsel—has found those delegations to be effective. See Pet. App. 17-18; *Frankl*, 650 F.3d at 1354 (9th Cir.); *Osthus*, 639 F.3d at 844 (8th Cir.); *Overstreet* v. *El Paso Disposal L.P.*, 625 F.3d 844, 853 (5th Cir. 2010).[13]

The only contrary decision that petitioners identify (Pet. 22) is that of the D.C. Circuit in *Laurel Baye*, *supra*. But this Court has already explained that *Laurel Baye* decided a question different from the one at issue here. See *New Process Steel*, 560 U.S. at 684 n.4. In *New Process Steel*, the Court declined to "adopt the District of Columbia Circuit's" reasoning when resolv-

[13] There is not even disagreement in the district courts. See *SFTC*, 943 F. Supp. 2d at 1302-1303; *Calatrello* v. *JAG Healthcare, Inc.*, No. 12-CV-726, 2012 WL 4919808, at *3 (N.D. Ohio Oct. 16, 2012); *Paulsen*, 849 F. Supp. 2d at 350-351; *Fernbach* v. *3815 9th Ave. Meat & Produce Corp.*, No. 12-Civ-823, 2012 WL 992107, at *1 (S.D.N.Y. Mar. 21, 2012); *Gottschalk* v. *Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964-965 (E.D. Wis. 2012); *Garcia* v. *S & F Market St. Healthcare, LLC*, No. 12-CV-1773, 2012 WL 1322888, at *2 n.1 (C.D. Cal. Apr. 17, 2012).

ing the duration of the Board's delegations of authority to its own Members. *Ibid.* But it noted that its decision did not "cast doubt on" the Board's "prior delegations of authority to * * * the general counsel." *Ibid.*[14]

To the extent that four circuits have declined to extend *Laurel Baye*'s reasoning to the Board's delegations to the General Counsel, that divergence in reasoning does not warrant the Court's review at this time. The D.C. Circuit has not had an opportunity to clarify the scope of its rationale in *Laurel Baye* or to reconsider that rationale since this Court expressly declined to adopt it in *New Process Steel*. But it may well be able to do so in at least two cases already pending before it.[15] As a result, the purported circuit split may be resolved without this Court's intervention, which would make a grant of certiorari premature.

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[14] Petitioners err in suggesting (Pet. 23) that this Court's review is necessary because the decision below and other courts of appeals have "maintained that *New Process Steel* decided" the question at issue here. In fact, the decision below expressly noted that the relevant passage in *New Process Steel* was "dicta." Pet. App. 17. The court of appeals then noted that its decision was "[c]onsistent with"—not controlled by—this Court's refusal "to adopt *Laurel Baye*'s agency theory in the context of the Board's quorum requirement." *Ibid.*; see also, *e.g.*, *Frankl*, 650 F.3d at 1343 (recognizing that *New Process Steel* "expressly declined to discuss the legality of the Board's assignment of litigation authority to the General Counsel").

[15] See Pet. Br. at 22-31, *SSC Mystic Operating Co.* v. *NLRB*, No. 14-1045 (D.C. Cir. filed Aug. 15, 2014) (relying on *Laurel Baye* in challenging Regional Director's delegated authority to conduct election while Board lacked quorum); Pet. Statement Of Issues To Be Raised at 2, *UC Health* v. *NLRB*, No. 14-1049 (D.C. Cir. filed May 9, 2014) (questioning validity of Regional Director's certification of union if Board lacked quorum).

2. With respect to the second question presented, petitioners contend (Pet. 25-32) that the court of appeals erred in applying a two-factor test for assessing whether relief should be granted under 29 U.S.C. 160(j), rather than using the general four-factor test for issuance of an ordinary preliminary injunction that this Court reiterated in *Winter* v. *NRDC, Inc.*, 555 U.S. 7 (2008). The decision below does not conflict with any decision of this Court, and the differences in approach among the circuits are not sufficiently consequential to warrant this Court's review—especially in the absence of any indication that they made any difference to the outcome in this case.

a. In considering whether an injunction under Section 160(j) was appropriate, the court of appeals applied a two-factor test, asking (1) whether there is "reasonable cause to believe that unfair labor practices have been committed," and (2) whether "the requested relief is just and proper." Pet. App. 18 (quoting *Hoffman* v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360, 365 (2d Cir. 2001)). In doing so, the court recognized that, in light of the unique statutory context, a petition under Section 160(j) warrants a "slightly different standard" from the one that generally applies to ordinary preliminary injunctions. *Id.* at 19.

As the court of appeals explained, its two-factor inquiry "preserves traditional equitable principles governing injunctive relief," but it is "mindful to apply them in the context of federal labor laws." Pet. App. 18 (quoting *Hoffman*, 247 F.3d at 368). Accordingly, the two-factor test reflects the respective roles and expertise of the agency and the courts under the NLRA, as well as the specific purposes of Section 160(j). Before a district court receives a petition for relief under Sec-

tion 160(j), a Regional Director and the General Counsel have investigated the case and determined that a complaint should issue. In addition, the Regional Director, the General Counsel, and the Board (if no delegation of its Section 160(j) authority is in effect) have also determined that an injunction is necessary to protect the Board's remedial authority. See p. 4, *supra*; see also *Chester* v. *Grane Healthcare Co.*, 666 F.3d 87, 96 n.8 (3d Cir. 2011). And in this case, an administrative law judge, after a hearing, had already found that petitioners had previously committed unfair labor practices, see p. 5, *supra*, which the district court determined supported the conclusion that petitioners had committed an unfair labor practice by unilaterally declaring a bargaining impasse. See Pet. App. 47-49.

Moreover, unlike courts evaluating requests for ordinary preliminary injunctions, a district court in the Section 160(j) context will not ultimately resolve the underlying dispute (because the Board has exclusive jurisdiction to decide unfair-labor-practice cases). See *Chester*, 666 F.3d at 96; *Calatrello* v. *"Automatic" Sprinkler Corp. of Am.*, 55 F.3d 208, 212-213 (6th Cir. 1995). As a result, the court's role in a Section 160(j) proceeding is to determine whether a substantial, supported theory exists on which the Board may ultimately find a violation. The use of a "reasonable cause" standard not only reflects the significant pre-filing consideration that the case has received at the agency, but also helps prevent the court from usurping the Board's ultimate authority. The second prong of the court of appeals' test is also consistent with the statute. Determining whether an injunction would be "just and proper" (Pet. App. 19)—the phrase that appears in 29 U.S.C. 160(j) itself—permits a court to preserve the

status quo to protect the Board's remedial authority and permit meaningful collective bargaining. See *Hoffman*, 247 F.3d at 368-369 & n.5.

b. Despite petitioners' contrary contention (Pet. 15-16, 27-30), the court of appeals' two-factor test is neither inconsistent with, nor precluded by, this Court's decision in *Winter*, which reiterated the traditional four-factor test that generally applies to ordinary preliminary injunctions. See 555 U.S. at 20 (explaining that, under the traditional test, a party seeking an injunction must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest"). As an initial matter, *Winter* did not involve a statutory scheme analogous to the NLRA, under which district courts lack jurisdiction over the merits of the underlying violations. But, even apart from that distinction, the two-factor standard is, in practice, compatible with *Winter*'s reiteration of the traditional four-factor test. Unlike the analysis rejected in *Winter*, it does not require a court to presume irreparable harm based solely on a likelihood of success on the merits. See *id.* at 21-22. By the same token, it does "incorporate[] various considerations that correspond to each of the *Winter* factors." *Chester*, 666 F.3d at 98. And, as the court below recognized, the two-factor version of the inquiry acknowledges that a Section 160(j) injunction remains an "extraordinary remedy indeed." Pet. App. 19 (citation omitted).

Nor does the decision below run afoul, as petitioners suggest (Pet. 25-26), of *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). In that case, the Court specified that Congress must clearly state any intention to re-

quire courts to issue injunctive relief without exercising "equitable discretion." *Id.* at 313, 318. But no court applying a two-factor test in the Section 160(j) context has believed that it was precluded from considering traditional equitable principles.[16]

To the contrary, courts—including the Second Circuit in this case—have repeatedly acknowledged that the two-factor test "incorporates elements of the four-part standard for preliminary injunctions." Pet. App. 18. Thus, the "[t]he reasonable cause prong has substantial overlap with the likelihood-of-success inquiry." *Chester*, 666 F.3d at 99; see also *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009) (describing "likelihood of success" as "an inquiry that essentially parallels the 'reasonable cause' step") (citation omitted). And determining whether injunctive relief is "just and proper" under Section 160(j) "necessarily subsumes various equitable considerations." *Sharp* v. *Webco Indus.*, 225 F.3d 1130, 1137 & n.3 (10th Cir. 2000); see also *Chester*, 666 F.3d at 98. In particular, that inquiry permits courts to consider whether injunctive relief is "necessary to prevent irreparable harm," *Hoffman*, 247 F.3d at 368; to "weigh the relative harms [injunctive relief] may prevent against the harms it may produce," *Chester*, 666 F.3d at 99; and to "focus * * * on the public interest," *Hirsch* v. *Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998).

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[16] For the same reason, petitioners' citation (Pet. 29) of *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006), is unavailing. Although the Court there rejected frameworks that required either a "categorical grant" or a "categorical denial" of injunctive relief, *id.* at 393-394, the two-factor test appropriately permits courts to exercise equitable discretion in each case.

Thus, the district court and court of appeals in this case considered whether an injunction was necessary to avoid irreparable harm to the collective-bargaining process; and they balanced the potential harm to the union, the employees, and the Board's remedial authority against the possibility of harm to petitioners. Pet. App. 21-23, 49-51. The district court also acknowledged that it "need[ed] to be attentive to the public interest." *Id.* at 67.

c. Petitioners criticize (Pet. 27-29, 31) the courts below for giving "extraordinary deference" to the Board, when those courts also "proceeded on the premise" that the Board itself had not actually authorized the Section 160(j) proceeding. But petitioners mischaracterize the nature of the deference that was given. First, the courts did not purport to defer to the views of the Board's Members, but to the judgment of the Regional Director and the Acting General Counsel. Those officers had investigated the charges and issued the unfair-labor-practice complaint—a determination solely within the General Counsel's authority, see *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117-119 (1987)—and they had further concluded that a petition for temporary relief under Section 160(j) was warranted. Pet. App. 19-23, 40-42; see *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1031-1033 (2d Cir. 1980). Second, while affording some deference, the district court also based its findings on an extensive discussion of the applicable principles and an independent review of the evidence and arguments presented to it by the Regional Director and by petitioners. Pet. App. 42-49. The court of appeals then gave "full[]" review to all of the district court's "conclusions

of law, including findings of reasonable cause." *Id.* at 20 (quoting *Hoffman*, 247 F.3d at 364).

Despite petitioners' focus (Pet. 26-29) on the difference in approach between those courts of appeals that have channeled their Section 160(j) analysis into two factors and those that have used four factors, the courts applying a four-factor test have shown comparable deference to the agency. Compare, *e.g.*, *Chester*, 666 F.3d at 98 (applying two-factor test and finding that reasonable cause requires "a substantial, nonfrivolous, legal theory, * * * [and] sufficient evidence to support that theory") (citation omitted); *Overstreet*, 625 F.3d at 851 n.10 (explaining that proof of reasonable cause under two-factor test requires Board to "present enough evidence in support of [a] coherent legal theory"), with *Frankl*, 650 F.3d at 1356 (stating, in applying four-factor test, that Regional Director "can make a threshold showing of likelihood of success by producing some evidence to support the unfair labor practice charge, together with an arguable legal theory") (citation omitted); *Lineback* v. *Spurlino Materials, LLC*, 546 F.3d 491, 502 (7th Cir. 2008) (stating, in applying four-factor test, that "we must decide whether * * * the [Regional] Director has 'some chance' of succeeding on the merits") (citation omitted). The district court's explanation that its reasonable-cause analysis required it to "be hospitable to the views of the [Regional Director], however novel," Pet. App. 40-41 (brackets in original; citation omitted), precisely tracks what the Seventh and Ninth Circuits have said in applying the four-factor test. See *Lineback*, 546 F.3d at 502; *Frankl*, 650 F.3d at 1356.[17] Moreover, like courts

[17] Petitioners also suggest (Pet. 28, 30) that deference was improper because their requests for discovery and an evidentiary

that apply a two-factor test, courts applying a four-factor test do so in a manner that accounts for the unique statutory context of a petition for temporary relief under Section 160(j). See *Frankl*, 650 F.3d at 1356, 1362-1363; *Sharp* v. *Parents in Community Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999).

d. Thus, despite their differences in formulation, the two-factor and four-factor tests each permit courts to consider traditional equitable considerations in light of Section 160(j)'s statutory purposes, and to give deference to decisions made by the Board's General Counsel and Regional Directors. It is accordingly unsurprising that the circuit split that petitioners allege (Pet. 25-26) is decades old. And, as the court of appeals noted, no court that previously employed a two-factor analysis has concluded that its practice is inconsistent with *Winter*. Pet. App. 19-20 (citing decisions from the Third, Fifth, Sixth, and Eleventh Circuits).

In any event, this case would be a poor vehicle for resolving whether the standard for relief under Section 160(j) should be based on a two-factor or four-factor test, because petitioners have not shown that the court of appeals would have reached a different result if it had applied a four-factor test. As detailed above, the

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hearing were denied. But courts have denied such requests under both the two-factor and four-factor standards. See, *e.g.*, *Gottfried* v. *Frankel*, 818 F.2d 485, 493 (6th Cir. 1987) (denying evidentiary hearing); *Dunbar* v. *Landis Plastics, Inc.*, 977 F. Supp. 169, 176 (N.D.N.Y. 1997) (relying on affidavits and denying motion to compel discovery); *United States* v. *Electro-Voice, Inc.*, 879 F. Supp. 919, 923 (N.D. Ind. 1995) (limiting discovery). The wide-ranging discovery petitioners sought would have delayed proceedings (Pet. App. 104) and was unnecessary given that petitioners had already submitted affidavits, exhibits, and briefs, presented oral argument, and made an offer of proof (see *id.* at 37-38).

courts below already took account of the equitable considerations enumerated in the four-factor test when determining that an injunction in this case would be "just and proper." Pet. App. 21-23, 49-51, 67. Cf. *Muffley*, 570 F.2d at 543 (holding that the district court erred by applying a two-factor test rather than a four-factor test, but nonetheless affirming the injunction, because the district court had "explicitly incorporated equitable principles into its just and proper analysis, and properly balanced the interests of the Board," the employees, the employer, and the public) (internal quotation marks and brackets omitted). Further review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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