No. 11-622

In the Supreme Court of the United States

HTH CORPORATION, ET AL., PETITIONERS

v.

JOSEPH F. FRANKL, REGIONAL DIRECTOR OF REGION 20 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the National Labor Relations Board's lawful delegation pursuant to Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), to the Board's General Counsel of authority to file a petition for interim injunctive relief under Section 10(j) of the Act, 29 U.S.C. 160(j), continued in effect after the Board's membership dropped below that required to maintain a quorum.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-76) is reported at 650 F.3d 1334. The opinion and order of the district court (Pet. App. 77-142) are reported at 699 F. Supp. 2d 1176, and 699 F. Supp. 2d 1208, respectively. The decision and order of the National Labor Relations Board, which includes the opinion and recommended order of the administrative law judge (Pet App. 143-260), are published at 356 N.L.R.B. No. 182, 2011 WL 2414720.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2011. On October 3, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 11, 2011 (a federal holiday), and the petition was filed on November 14, 2011 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939). To that end, the NLRA establishes 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, as part of its design to fulfill the vital goals of the NLRA, "confide[d] primary interpretation and application of its rules [governing labor relations] to a specific and specially constituted tribunal"—the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. Section 3(b) and (d) of the Act provide that the Board shall comprise five members appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(b). Section 3(d) of the Act provides in addition for a General Counsel, also appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(d). Pursuant to Section 3(d), the General

Counsel has the authority, "on behalf of the Board," to investigate charges of unfair labor practices, to file complaints alleging violations of the NLRA, and to prosecute cases before the Board. 29 U.S.C. 153(d). That provision also specifies that the General Counsel "shall have such other duties as the Board may prescribe."[1] *Ibid.*

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 seek (and a district court to grant) such interim injunctive relief as is "just and proper" pending issuance of the Board's decision and order on the underlying complaint.[2] Congress enacted Section 10(j) in 1947 as part of the Taft-Hartley Act. See Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 10(j), 61

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[1] Section 3(d) of the NLRA, 29 U.S.C. 153(d), provides in relevant part:

> There shall be a General Counsel of the Board who shall be appointed by the President * * * for a term of four years. The General Counsel * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints * * * , and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

[2] Section 10(j) of the NLRA, 29 U.S.C. 160(j), provides in relevant part:

> 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.

Stat. 149. Because the administrative process for resolving charges pending before the Board (and judicial proceedings to effectuate orders resulting from the administrative process) can be lengthy, Congress understood in 1947 that in some instances the Board was not able "to correct unfair labor practices until after substantial injury ha[d] been done." S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947). Congress sought to remedy that problem by authorizing the Board to seek injunctive relief pursuant to Section 10(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.").

2. In late 2007, the Board had four members and one vacancy, and it anticipated losing a quorum when the recess appointments of two of the four members expired at the end of December. See *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2638 (2010). On December 28, 2007, the four sitting Board members temporarily delegated (pursuant to Section 3(d) of the Act) to the General Counsel "full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j)" of the Act until such time as the Board returned to at least three members. Pet. App. 265; see *id.* at 10.[3] On December 31,

[3] The Board also temporarily delegated to the General Counsel full and final authority 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 Section 10(e) and (f) of the NLRA, 29 U.S.C. 160(e) and (f). Pet. App. 265-266. In addition, pursuant to Section 3(b) of the NLRA, the Board delegated all of the its powers to a three-member group. As discussed

2007, the recess appointments of two Board members expired. *Id.* at 10-11. The General Counsel exercised the delegated authority from January 1, 2008, to April 5, 2010, when the recess appointments of new Board members returned the Board to a quorum. App., *infra*, 4a. Thereafter, the Board issued a Minute of Board Action, dated July 1, 2010, "ratify[ing] the court litigation authority of the General Counsel described in the December 28, 2007 delegation." *Id.* at 4a-5a. The Minute stated that, while the Board believed that the court litigation delegation "has always been valid," the ratification was "intended to remove any question that has arisen or may arise regarding this delegation." *Id.* at 4a.

3. Petitioners are HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC, d/b/a Pacific Beach Hotel, a single employer operating a hotel in Honolulu, Hawaii. Pet. App. 5, 43. In 2002, the International Longshore and Warehouse Local 142 (Union) began to organize employees at the hotel. *Id.* at 5-6. The first representation election, held in 2002, was set aside by the Board based on a finding that petitioners had "engaged in objectionable conduct by coercively interrogating employees and maintaining an overly broad no-solicitation policy." *Id.* at 5 (quoting *HTH Corp.*, 342 N.L.R.B. 372, 374 (2004)). A second election was held in 2004, and the Board again found that petitioners had engaged in objectionable conduct. *Id.* at 6 (citing *Pacific Beach Corp.*, 344 N.L.R.B. 1160 (2005)). Notwithstanding that conduct, it was determined that a majority

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at pp. 15-17, *infra*, this Court held in *New Process Steel*, *supra*, that when the three-member group ceased to exist as such after the term of one of its members expired, the group no longer had the authority to act on behalf of the Board through the remaining two members.

of votes were in favor of union representation, and the Board issued a certification of representation. *Id.* at 148.

Bargaining between the Union and petitioners did not go smoothly, and the Union filed numerous charges of unfair labor practices with the office of the Regional Director of Region 20 of the Board (Regional Director) in 2007 and 2008. Pet. App. 6. In particular, the Union alleged that, after the Board certified the Union as the employees' representative, petitioners failed to bargain in good faith with the Union, unlawfully withdrew recognition from the Union, implemented unilateral changes in the terms and conditions of employment, and discharged certain employees because of their support for the Union. *Id.* at 6, 78.

4. Following an investigation of the Union's charges, the Board's General Counsel issued a series of complaints against petitioners and issued a consolidated administrative complaint on September 30, 2008. See Pet. App. 144. The complaint alleged, *inter alia*, that petitioners violated Section 8(a)(1), (3), and (5) of the NLRA, 29 U.S.C. 158(a)(1), (3), and (5), by engaging in the conduct alleged in the Union's charges. Pet. App. 144. After holding a hearing, an administrative law judge (ALJ) issued a decision on September 30, 2009, concluding that petitioners had violated the NLRA, including by failing to bargain in good faith, withdrawing recognition from the Union, unilaterally changing working conditions, and discharging employees because of their union activity. *Id.* at 245-249. Petitioners filed extensive exceptions to the ALJ's decision with the Board, and the Regional Director filed limited exceptions. *Id.* at 6.

5. While the exceptions to the ALJ's decision and recommended order were pending before the Board, the General Counsel, acting pursuant to the Board's 2007 delegation, authorized the Regional Director to file a petition for temporary injunctive relief in district court pursuant to Section 10(j). Pet. App. 6, 78. The Regional Director filed the petition for injunctive relief on January 7, 2010. *Id.* at 6-7. On March 29, 2010, the district court issued an injunction requiring petitioners to bargain with the Union, reinstate certain discharged employees, rescind unilateral changes to the terms and conditions of employment of bargaining unit members, and take various other remedial measures. *Id.* at 7. The district court rejected petitioners' argument that the Board's delegation of Section 10(j) authority to the General Counsel was invalid. *Id.* at 89-92.

6. On July 13, 2011, the court of appeals affirmed the district court's issuance of the Section 10(j) injunction. Pet. App. 1-66.[4] In upholding the injunction, the court rejected petitioners' argument that the Section

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[4] One month before the court issued its decision, the Board issued its decision and order in the administrative case, affirming virtually all of the ALJ's findings that petitioners had engaged in unfair labor practices. See *HTH Corp.*, 356 N.L.R.B. No. 182, 2011 WL 2414720 (June 14, 2011), application for enforcement, No. 11-71676 (9th Cir. filed June 16, 2011). Issuance of a final Board order usually renders an appeal of a grant of an interim Section 10(j) injunction moot because the injunction expires by its terms when a Board order issues. Here, however, a motion for civil contempt related to the injunction was outstanding, and the court of appeals therefore determined that the appeal was not moot because its resolution was "crucial to a pending claim." Pet. App. 7-9. The district court subsequently held petitioners in contempt of the Section 10(j) injunction issued in March 2010. *Frankl* v. *HTH Corp.*, No. 1:10-cv-00014-JMS-RLP, 2011 WL 5975288 (D. Haw. Nov. 29, 2011).

10(j) petition had not been properly authorized. *Id.* at 9-38.

The court first noted, by way of background, that Congress created the position of General Counsel and assigned to that position the Board's prosecutorial role and other functions in the 1947 Taft-Hartley Act "[i]n response to criticism that the Board's exercise of both prosecutorial and adjudicatory functions was improper." Pet. App. 12. The court further observed that, immediately after passage of the Taft-Harley Act (which also added Section 10(j) to the NLRA), the General Counsel and the Board entered into a "memorandum of understanding" authorizing the General Counsel to "exercise full and final authority and responsibility on behalf of the Board for *initiating* and prosecuting" Section 10(j) injunctions. *Id.* at 13 (quoting *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 888 (S.D. Ind. 1948) (brackets omitted)). Subsequently, the court explained, the Board altered that approach by memoranda in 1950 and 1955, permitting the General Counsel to initiate Section 10(j) proceedings "only upon approval of the Board." *Id.* at 13-14 (citing 15 Fed. Reg. 6924 (Oct. 14, 1950), and 20 Fed. Reg. 2175 (Apr. 6, 1955)).[5]

The court then rejected petitioners' argument that the Act requires the Board to approve every Section 10(j) injunction petition, and therefore does not authorize the Board to delegate its authority to seek such injunctions to the General Counsel at all. Pet. App. 19-36.

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[5] In the 1955 memorandum, the Board authorized the General Counsel to "petition for enforcement and resist petitions for review of Board Orders, as provided in section 10 (e) and (f) of the act," without requiring the General Counsel to obtain case-specific approval from the Board. NLRB, *Authority and Assigned Responsibilities of General Counsel of National Labor Relations Board*, 20 Fed. Reg. at 2175.

The court relied on Section 3(d), which lists particular duties assigned to the General Counsel and provides that the General Counsel shall also "have such other duties as the Board may prescribe." 29 U.S.C. 153(d). That provision, the court reasoned, "supplies the Board's authorization to assign the General Counsel the duty to decide whether § 10(j) petitions should be filed." Pet. App. 21. Rejecting petitioners' contention that Section 10(j) assigned the Board a non-delegable duty to approve each individual Section 10(j) petition, the court concluded that, "although the Board may reserve to itself the ultimate decision whether to petition for § 10(j) relief in individual cases, it may also exercise its power to petition for § 10(j) relief by authorizing the General Counsel to decide in which cases to seek relief on the Board's behalf." *Ibid.* That interpretation, the court explained, harmonized the language of Sections 3(d) and 10(j), as well as the Board's longstanding practice of delegating to the General Counsel the Board's authority to seek enforcement of the Board's orders in the court of appeals under Section 10(e) of the Act, 29 U.S.C. 160(e). Pet. App. 19-36.

The court of appeals also observed that every other court of appeals to consider whether the Board was authorized in 2007 to delegate Section 10(j) authority to the General Counsel agreed that the delegation was valid, although the reasoning of those decisions "differ[ed] somewhat" from that of the court here. Pet. App. 36 (citing *Osthus* v. *Whitesell Corp.*, 639 F.3d 841 (8th Cir. 2011); *Overstreet* v. *El Paso Disposal, L.P.*, 625 F.3d 844, 851-852 (5th Cir. 2010); *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 539-540 (4th Cir. 2009)).

Petitioners did not argue in the court of appeals that, even if the initial delegation of Section 10(j) authority to

the General Counsel in 2007 was valid, the delegation ceased to have effect when the Board lost a quorum several days after the delegation. The court considered that question on its own, however, because it "assumed, without deciding, that the Regional Director's authority to petition for Section 10(j) relief may have jurisdictional implications." Pet. App. 37. Agreeing with the two other courts of appeals that had considered the issue, *ibid.* (citing *El Paso Disposal*, 625 F.3d at 853; *Osthus,* 639 F.3d at 844), the court concluded that "nothing in the Board's quorum requirement would cause the General Counsel's ability to file Section 10(j) petitions to lapse after the Board's membership fell below a quorum," *id.* at 38.

The court of appeals considered and rejected the reasoning employed by the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 473 (2009) (*Laurel Baye*), cert. denied, 130 S. Ct. 3498 (2010). The court in *Laurel Baye* considered whether the Board's delegation (pursuant to Section 3(b) of the NLRA, 29 U.S.C. 153(b)) of its powers to a group of three members, at a time when the Board had four members, permitted a two-member quorum of that group to act on behalf of the Board when the term of one of the group members expired along with the term of the fourth Board member. Relying in part on principles of agency and corporation law, the D.C. Circuit held that two members could not operate on behalf of the Board because the Board's delegation to the group ceased to be effective when the Board itself lost a quorum. 564 F.3d at 473. Although the D.C. Circuit did not address whether the General Counsel's delegated authority under Section 10(j) also lapsed when the Board lost a quorum (because the issue was not presented in that case),

the court of appeals here considered whether the reasoning of the *Laurel Baye* decision should apply to the Board's delegation to the General Counsel of the power to authorize the seeking of injunctive relief under Section 10(j). Pet. App. 37-38.

The court of appeals rejected the reasoning of *Laurel Baye*, relying instead on this Court's more recent decision in *New Process Steel*, *supra*, which addressed the delegation that was at issue in *Laurel Baye*. Pet. App. 37-38. The court of appeals explained that the Court in *New Process Steel* held that a "three-member group with one vacancy could not exercise the powers of the Board," because "such a 'delegee group ceases to exist once there are no longer three Board members to constitute the group.'" *Id.* at 11 (quoting *New Process Steel*, 130 S. Ct. at 2641-2642 & n.4). But, the court explained, *New Process Steel* "expressly declined to discuss the legality of the Board's assignment of litigation authority to the General Counsel," noting that this Court's conclusion "that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as * * * the general counsel," an issue that "implicates a separate question" that the Court did not decide. *Ibid.* (quoting *New Process Steel*, 130 S. Ct. at 2642 n.4). The court of appeals further explained that the Court in *New Process Steel* "rejected the D.C. Circuit's underlying premise in *Laurel Baye*," namely that agency and private corporation principles govern delegations within a government agency. *Id.* at 37-38. "In other words," the court of appeals summarized, "*New Process Steel* instructs that the Act's quorum requirement must be satisfied when the Board is acting directly through its members, but does

not need to be satisfied for the Board's earlier exercises and assignments of its authority, made with a proper quorum, to remain valid and in effect." *Id.* at 38.

After affirming the ongoing validity of the delegation of Section 10(j) authority to the General Counsel, the court of appeals went on to affirm the district court's decision on the merits to issue the injunction. Pet. App. 56-66.

ARGUMENT

Petitioners urge (Pet. 14-27) the Court to grant the petition for a writ of certiorari in order to consider whether the Board's concededly valid delegation to the General Counsel of authority to authorize injunction actions under Section 10(j) of the Act, 29 U.S.C. 160(j), lapsed when the Board subsequently lost a quorum. Because petitioners failed to raise that argument before either the district court or the court of appeals, the Court should deny the petition. In any event, further review is not warranted because the court of appeals' decision was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. As the court of appeals noted (Pet. App. 37), petitioners did not argue below that the Board's December 2007 delegation of Section 10(j) authority to the General Counsel lapsed shortly thereafter when the Board lost a quorum. Rather, petitioners argued only that the initial delegation was itself invalid—an argument they now expressly decline to renew, see Pet. 13 n.7. Although the court of appeals did pass on the question on which petitioners now seek this Court's review, petitioners' failure to raise or press it below counsels in favor of denying the petition for a writ of certiorari, particularly in

light of the agreement among the courts of appeals about the correct resolution of that question.

2. a. Review of the question presented would not be warranted even if petitioners had raised it below because the court of appeals correctly held that the Board's delegation to the General Counsel did not lapse when the Board lost a quorum. It is true that the NLRA vests Section 10(j) authority with the Board as an initial matter. See 29 U.S.C. 160(j). But Section 3(d) the Act authorizes the General Counsel to exercise, in addition to the powers and duties specifically enumerated in that Section, any "other such duties as the Board may prescribe." 29 U.S.C. 153(d). Pursuant to the Act, the Board in December 2007 delegated to the General Counsel the authority to exercise "full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j)." Pet. App. 265. The court of appeals correctly concluded that that delegation continued to be in effect after the Board lost a quorum when its membership dropped to two.

When a governmental entity such as the Board takes a concededly permissible action, that action—whether a regulation, order, or delegation—acquires the force of law in its own right. There is no basis in Sections 3(d) and 10(j) (or in Section 3(b), which prescribes when the Board has a quorum) for concluding that such an action is deprived of its legal force and effect if the full Board thereafter loses its quorum. Cf. *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2194-2195 (2009) (noting that the "expiration of the *authorities* * * * is not the same as cancellation of the *effect* of the President's prior valid exercise of those authorities"). Given that the Board made a valid delegation to the General Counsel of its Section 10(j) authority, the Board's subsequent loss of

a quorum did not abrogate the legal effect of that delegation, any more than the loss of a quorum abrogated the effect of the Board's other prior actions and decisions. In this respect, Section 3(b) and (d) are in harmony with the general principle that "[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*, 696 F.2d 678, 682-683 (9th Cir. 1983).

b. In arguing to the contrary, petitioners rely on the reasoning employed by the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 473 (2009), cert. denied, 130 S. Ct. 3498 (2010). In that case, the court considered a question not presented in this case, *i.e.*, whether the Board's delegation of its authority to a three-member group enabled a two-member quorum of that group to continue to exercise the Board's authority after the Board as a whole lost a quorum when its membership dropped to two. *Id.* at 472.

In concluding that the remaining two members of the Board did not have authority to act on behalf of the Board, the D.C. Circuit in *Laurel Baye* reasoned that the initial delegation to the then-three-member group lapsed when the Board lost its quorum. 564 F.3d at 473. The court relied on the common law of agency and private corporations, which, in that court's view, provides that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Ibid.* (citing 1 Restatement (Third) of Agency § 3.07(4) at 217 (2006)). But that court erred (and petitioners err, see Pet. 23-24) in as-

suming that the common law of private corporations and agency relationships provide the default rules for public entities. Indeed, even the agency and corporations treatises on which the D.C. Circuit relied note that governmental bodies are often subject to special rules not applicable to private bodies. See 1 *Fletcher Cyclopedia of the Law of Corporations* § 2, at 6 (2006) (distinguishing between private and municipal corporations, stating that "the law of municipal corporations [is] its own unique topic," and concluding that "[a]ccordingly, this treatise does not cover municipal corporations"); 1 Restatement (Third) of Agency 6 (2006) (noting in its introduction that it "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government").

c. Nor are petitioners correct (Pet. 14-22) that this Court's recent decision in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2638 (2010), either "is inconsistent in principle" (Pet. 14) with the court of appeals' decision here, or "directly or implicitly rejected the various theories advanced" (Pet. 22) to justify the ongoing validity of the Board's delegation of Section 10(j) authority to the General Counsel.

Initially, the holding in *New Process Steel* does not control this case because the Court in *New Process Steel* considered the ongoing validity of a different aspect of the Board's December 2007 delegation, made to a different entity and pursuant to a different statutory provision. The delegation at issue in *New Process Steel* was made under Section 3(b) of the Act, 29 U.S.C. 153(b), and granted the Board's powers to a group of three Board members with the expectation that a two-member quorum of that group would continue to exercise those

powers after the full Board lost a quorum. 130 S. Ct. at 2638-2639. This Court concluded that Section 3(b)'s "delegation clause," which authorizes the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," 29 U.S.C. 153(b), "require[s] that the Board's delegated power be vested continuously in a group of three members." 130 S. Ct. at 2640. Because the three-member delegee group ceased to exist when the Board's membership dropped to two, the Court reasoned, the delegation could not be acted upon. *Id.* at 2640-2644 & n.4. But the same is not true of the Board's delegation to the General Counsel. The position of General Counsel continues to exist independent of the number of members of the Board at any particular time. The continuing validity of the Board's delegation of Section 10(j) authority to the General Counsel—an independent officer appointed by the President[6]—is therefore not governed by this Court's decision in *New Process Steel*.

Indeed, this Court stated explicitly in *New Process Steel* that it was not addressing whether the delegation of authority to the General Counsel continued after the Board lost a quorum. 130 S. Ct. at 2642 n.4. In explaining the limited nature of its holding, the Court stated:

> 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. The requisite membership of an organization, and the number

[6] Congress provided in the NLRA that the staffs responsible for the Board's prosecution and enforcement work are directly accountable to the General Counsel rather than to the Board. 29 U.S.C. 153(d); see *NLRB* v. *FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-129 (1987).

> of members who must participate for it to take an action, are two separate (albeit related) characteristics.

Ibid. The Court specifically noted that it was "not adopt[ing] the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." *Ibid.* (citing *Laurel Baye*, 564 F.3d at 475). Thus, the Court summarized, its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel"—an issue, the Court stated, that "implicates a separate question that our decision does not address." *Ibid.* The court of appeals' decision here, therefore, that the Board's delegation of authority to the General Counsel survived the Board's loss of a quorum, is in harmony with this Court's decision in *New Process Steel*.

3. Nor does any decision of another court of appeals hold that the Board's delegation of Section 10(j) authority to the General Counsel lapsed after the Board lost a quorum. That, too, is a sufficient reason to deny the petition for a writ of certiorari.

As the court of appeals noted, the only two other courts of appeals to have considered the ongoing validity of the Section 10(j) delegation have also held that the Board's loss of a quorum did not cause that delegation to the General Counsel to lapse. Pet. App. 37 (citing *Osthus* v. *Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet* v. *El Paso Disposal, L.P.*, 625 F.3d 844, 853 (5th Cir. 2010)). As the Fifth Circuit explained in *Overstreet*:

> [T]he operative fact here is that, at the time of its delegation to the General Counsel, the Board comprised the requisite number of members to constitute a quorum. The fact that Board membership subsequently dipped below a quorum does not retroactively invalidate the Board's prior delegation.

625 F.3d at 853; accord *Osthus*, 639 F.3d at 844 (holding that the Board's delegation of Section 10(j) authority to the General Counsel "survived the loss of a Board quorum"). Both of those courts of appeals—like the court of appeals in this case, see Pet. App. 38—rejected the reasoning employed by the D.C. Circuit in *Laurel Baye*, noting this Court's determination not to endorse or adopt such reasoning in *New Process Steel*. *Osthus*, 639 F.3d at 844; *Overstreet*, 625 F.3d at 853.[7] Petitioners' contention (Pet. 14, 21 n.10) that the courts of appeals' decisions reach "similar result[s]" by "different path[s]" is incorrect. But even if petitioners were correct that the courts employed different reasoning to conclude that the delegation of Section 10(j) authority to the General Counsel did not lapse when the Board lost a quorum, that would not be a reason to grant the petition for a writ of certiorari. See *Chevron U.S.A. Inc.* v. *NRDC*,

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[7] As explained at p. 14, *supra*, the decision in *Laurel Baye* does not conflict with the decision here because the court in *Laurel Baye* considered a different aspect of the Board's December 2007 delegation. In fact, the D.C. Circuit has never confronted the question on which petitioners seek this Court's review. But even if the cases employed divergent reasoning and such divergence were a reason to consider granting further review, doing so at this time would be premature because the D.C. Circuit has not yet had occasion to reconsider the views it expressed in *Laurel Baye* since this Court declined to endorse those views in *New Process Steel*.

467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions.").

Petitioners, moreover, overstate the extent to which individual judges of different courts of appeals disagree about whether and why the Section 10(j) delegation did not lapse when the Board lost a quorum. Petitioners point (Pet. 21 n.10) to passages in the Fourth Circuit's decision in *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534 (2009), and in Judge Colloton's concurring opinion in the Eighth Circuit's decision in *Osthus*, 639 F.3d at 845-848. But both passages to which petitioners point addressed the separate question whether the Section 10(j) delegation was valid at the time it was made, an issue petitioners no longer raise. Although Judge Riley's separate opinion in *Osthus* (which concurred in part and dissented on this issue) would have held both that the delegation was not valid when made and that it lapsed in any event when the Board lost a quorum, see *id.* at 853-855, the divergent view of a single judge on this question is not a basis for granting further review, particularly in light of petitioners' failure to raise this issue below.

4. Finally, giving effect to the Board's delegation of Section 10(j) authority to the General Counsel after the Board lost a quorum is fully consistent with the structure of the Board, as reflected in the NLRA. As the court of appeals noted (Pet. App. 12), Congress intended by creating the position of General Counsel largely to separate the Board's prosecutorial and adjudicatory functions by assigning the former primarily to the General Counsel.[8] See Pet. 21 n.10 (commenting on a court

[8] The Board does retain some authority over aspects of its prosecutorial functions—such as the authority to approve Section 10(j) petitions upon request by the General Counsel—unless or until the Board

of appeals' "distinguish[ing] between the adjudicatory powers of the Board and the prosecutorial powers of the General Counsel"). As the Fifth Circuit recognized in *Overstreet*, however, "[p]etition power under § 10(j) is prosecutorial in nature." 625 F.3d at 852; see *Muffley*, 570 F.3d at 540 ("The central question, then, is whether the ability to seek § 10(j) relief is prosecutorial or adjudicative in nature. This ability seems to us, as it has to all other courts, clearly prosecutorial: *seeking* § 10(j) relief from a district court adjudicates nothing."). Thus, there is nothing inherently suspect—or inconsistent with the NLRA—about the General Counsel's exercising that power pursuant to a valid delegation by the Board. Indeed, as noted, petitioners no longer challenge the initial validity of that delegation.

Petitioners attempt to impugn the propriety of the General Counsel's exercise of his delegated Section 10(j) authority by citing (Pet. 9 n.4, 26-27) statistics demonstrating that, during periods when the General Counsel did not have the delegated authority to authorize Section 10(j) actions, the Board has not always granted the General Counsel's requests to file such petitions. But such statistics do not undermine the legitimacy of the Board's decision to delegate its Section 10(j) authority to the General Counsel during times when the Board's membership falls below three. The Board was well aware of its own authorization statistics—which illustrate that the Board in fact authorizes a significant majority of the General Counsel's Section 10(j) recommendations—when it opted to delegate temporary Section 10(j) authority to the General Counsel for the pe-

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delegates such authority to the General Counsel, as it has on a number of occasions.

riod during which it lost a quorum. Indeed, the full five-member Board later ratified this and all other Section 10(j) actions initiated under the General Counsel's delegated authority during the period in question. App., *infra*, 4a-5a.

On November 3, 2011, the Board again delegated Section 10(j) authority to the General Counsel during "any time at which the Board has fewer than three Members." 76 Fed. Reg. 69,768-69,769 (Nov. 9, 2011). Petitioners are therefore correct that the question whether that type of delegation survives the Board's loss of a quorum is one that may recur (although the President has since made recess appointments to the Board and it now has a quorum, see U.S. Const. Art. II, § 2, Cl. 3).[9] But that fact counsels against further review in this case. If petitioners' view of the correct resolution of the question presented prevails in some—or any—courts of appeals in the future, this Court will have an opportunity to review the issue at that time with the benefit of more robust airing of the arguments on both sides. See *Brown* v. *Texas*, 522 U.S. 940, 943 (1997) (Stevens, J., respecting denial of certiorari) (likelihood that the issue will be resolved correctly may increase if the Court allows other tribunals "to serve as laboratories in which the issue receives further study before it is addressed by this Court."); see also *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (noting no decisional conflict).

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[9] Those recent recess appointments are the subject of pending challenges in district court proceedings in cases seeking Section 10(j) injunctions. See, *e.g.*, *Paulsen* v. *Renaissance Equity Holdings, LLC*, No. 12-cv-00350 (BMC) (E.D.N.Y. filed Jan. 25, 2011). No recess appointment issue is presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2012

APPENDIX

1. 29 U.S.C. 153 provides in pertinent part:

National Labor Relations Board

* * * * *

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

2. 29 U.S.C. 157 provides in pertinent part:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * * .

3. 29 U.S.C. 158 provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * *

4. 29 U.S.C. 160 provides in pertinent part:

Prevention of unfair labor practices

* * * * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28. * * * .

* * * * *

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the

Board such temporary relief or restraining order as it deems just and proper.

5. Minute of Board Action, July 1, 2010:

Minute of Board Action
July 1, 2010

On December 28, 2007, by Minute, and as announced through a Press Release, the Board temporarily delegated to the General Counsel authority on all court litigation matters that otherwise would require Board authorization. This delegation gave

> the General Counsel full and final authority on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j), or Section 10(e) and (f) of the National Labor Relations Act, contempt proceedings pertaining to the enforcement of or compliance with any order of the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari.

The General Counsel exercised this delegated authority between January 1, 2008 and April 5, 2010, a period during which the Board was reduced to two members. Pursuant to its express terms, this temporary delegation was revoked when the Board returned to at least three members on April 5, 2010.

Although we believe that the court litigation delegation has always been valid, this ratification is intended to remove any question that has arisen or may arise regarding this delegation. Accordingly, the Board hereby

ratifies the court litigation authority of the General Counsel described in the December 28, 2007 delegation.

/s/ WILMA B. LIEBMAN
WILMA B. LIEBMAN, Chairman

/s/ PETER C. SCHAUMBER
PETER C. SCHAUMBER, Member

/s/ CRAIG BECKER
CRAIG BECKER, Member

/s/ MARK GASTON PEARCE
MARK GASTON PEARCE, Member

/s/ BRIAN E. HAYES
BRIAN E. HAYES, Member