No. 08-1457

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

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

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

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

The decision below upholding the authority of a two-member Board to issue decisions and orders contravenes the plain language of the NLRA requiring a quorum of three Members. As the largest representative of employers in the United States, the Chamber has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair, and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the statute.

SUMMARY OF ARGUMENT

On December 20, 2007, the Board, which then consisted of only four Members, two of whom had terms set to expire December 31, 2007, delegated its powers to three of its Members effective December 28, 2007. The Board intended the delegation of powers to permit the two Members remaining as of January 1, 2008 to issue decisions and orders as a quorum of the three-member group. The explicit language of section 3(b) of the NLRA makes clear that a two-member Board does not have the authority to act. The decision below upholding two-member Board decisions misinterpreted section 3(b) of the NLRA by, *inter alia*, ignoring its overt requirement that the Board must have three Members "at all times."

Allowing a two-member Board to issue decisions and orders also contravenes the purposes of the

NLRA. It is clear from the relevant legislative history that Congress intended the Board to hear cases in panels of three, but did not intend to authorize two Members to do all of the work of a full five-member Board. Approval of a two-member NLRB, moreover, is not only inconsistent with the explicit requirement of section 3(b), but also distorts and dilutes the administrative process to which the parties are due under the statute.

In view of the foregoing, the judgment of the court of appeals should be reversed.

ARGUMENT

I. THE NLRA CLEARLY STATES THAT AT ALL TIMES THE BOARD MUST BE COMPRISED OF THREE MEMBERS.

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

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

Pursuant to the delegation provision, on December 20, 2007, the then four-member Board, delegated its powers to three Members effective December 28, 2007. Given that two of the four Members had terms set to expire December 31, 2007, the Board, relying on the vacancy and delegee group quorum provisions, intended the delegation of powers to permit the two Members remaining to issue decisions and orders as a quorum of the three-member group. Indeed, since this delegation, the Board has issued hundreds of decisions as a two-member panel or group.[2]

These two-member decisions run afoul of the Board quorum provision of section 3(b). As the D.C. Circuit found in *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009), section 3(b) permits the Board to act with two Members *only if* the Board maintains a quorum of three sitting Members at all times. The Court concluded that "[a] modifying phrase as unambiguous as ['at all times'] denotes that there is no instance in which this Board quorum requirement may be disregarded." *Id.* at 473.

Noting that the Board quorum and delegee group quorum provisions are not mutually exclusive, the Court observed that the use of the word "except" in the statute indicates "that the delegee group's abil-

[2] In fact, only 77 cases are affected by the issue at hand. David Shadovitz, *NLRB Case Creates Uncertainty*, Human Resources Executive Online (Nov. 30, 2009), http://www.hreonline.com/HRE/story.jsp?storyID=295569013. In all other cases, it appears that the Respondent has complied with the Board's decision and order.

ity to act is measured by a different numerical value." *Id.* at 472. Moreover, the Court found that:

> Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than a quorum of the body as a whole.

Id. at 473. Thus, the additional provision of section 3(b) that allows two Members of the Board to act on behalf of a three-member group to whom the Board has delegated authority does not permit a two-member quorum of a group to supplant a three-member quorum of the Board. *Id.* at 472. In this regard, the Court in *Laurel Baye* stated that:

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

Id. at 473. According to the unambiguous words of the statute, the two-member quorum of the group or panel is intended to *subserve* the Board's general three-member quorum requirement, *not supersede*

it. Consequently, the lower court's finding here that the NLRB was authorized to hear and decide the dispute at issue is unsupported by the plain meaning of section 3(b).

The decision of the lower court finding that a panel of the Board may continue to operate once the Board itself loses its quorum also is inconsistent with fundamental principles of agency law. As the D.C. Circuit recognized, when the delegating authority's power lapses, the delegation itself lapses. *Id*. at 473; *see also* 29 U.S.C. § 153(b) ("any or all of the powers which it may itself exercise"). Similarly, the Court discerned that permitting two Members to decide cases contravened "basic tenets" of corporation law, which maintain that an agent's delegated authority terminates upon the resignation or termination of the delegating authority and that a "delegating board of director's powers are suspended whenever the board's membership falls below a quorum." *Id.* at 473. Thus, when the Board loses a third Member, any delegation that the Board previously made becomes moot.[3]

II. THREE-MEMBER PANELS WERE NOT INTENDED TO SUPPLANT THE REQUIREMENT OF A THREE-MEMBER BOARD.

The D.C. Circuit in *Laurel Baye* correctly recognized that in the Taft-Hartley Act's 1947 amendments

[3] Whether or not dispositive of the issue at hand, it is troubling that a hypothetical situation posited by the Office of Legal Counsel became the legal basis upon which the Board premised a delegation to a three-member group that the Board knew effectively would *never* be comprised of three sitting Members, thereby circumventing the three-member Board quorum provision contained in section 3(b). *See Quorum Requirements*, 2003 OLC LEXIS 20 (Office of Legal Counsel, March 4, 2003).

to the NLRA expanding the Board from three to five Members, Congress wanted to ensure that the Board was authorized to hear cases in three-member panels or groups, but that at all times, a quorum of the Board shall nevertheless be three Members. *Id.* at 470, 475. In fact, the legislative history of the Taft-Hartley amendments demonstrates that Congress never intended that two Members would constitute a quorum of the overall Board.

The only reference in the legislative history to the precise issue at hand may have been a prophetic one. Senator Joseph C. O'Mahoney opposed the Senate overriding President Truman's veto of the Taft-Hartley Act, and sounded the alarm to his fellow Senators that the language of the amended section 3(b) was capable of being read in such a manner as to obviate the three-member Board quorum which he deemed essential. Senator O'Mahoney stated in floor remarks:

> Observe that the Board is given complete and plenary power to delegate any or all of its power to any group of three; and then any two members of that group of three can speak for the Board. So we have a bill—and I invite the attention of lawyers in this body to this—which not only authorizes the Board to delegate its powers, but authorizes the Board to delegate its powers, and all of them, *to less than a quorum of the Board*. This we do in the name of reducing government in Washington. This we do in the name of returning control of the economic life of the people of the United States to the people of the United States; and we undertake a program of delegated powers which,

> so far as I know, has never been suggested before in the history of this Government.

93 Cong. Rec. 7677, 7679 (June 23, 1947) (emphasis added). Senator O'Mahoney's Senate colleagues paid no heed to his warning, however, and the Senate proceeded to override President Truman's veto of the bill. *But see Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 422 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (stating that the Court was "reluctant to draw much significance from a lone remark by a single senator").

The purpose of adding additional Members to the then three-member NLRB was to allow the Board to decide more cases by creating multiple panels of three.[4] S. Rep. No. 80-105, at 8 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 415 (1948). In its day-to-day operations the Board has carried out this Congressional intent. As John C. Truesdale, former Board Member and Executive Secretary of the NLRB explained, "[t]he Board's internal procedures for processing cases have been well established for years. All cases are initially assigned to a panel of three members. There are five panels, and each member is the chair of one panel and participates in two others." John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, The Labor Lawyer, Summer 2000, Vol. 16, No. 1, at 12. For each case considered, the three-member panels, and their staff, prepare a draft

[4] In fact, in order to enable even more cases to be heard by three-member panels, the Senate version of the bill that ultimately became the Taft-Hartley Act proposed a seven-member Board. S. Rep. No. 80-105, at 19.

decision and order. The remaining Members not serving on the panel are given the opportunity to review the draft decisions. Thus, "no case will issue unless it reflects the majority opinion of the full Board." *Id.* at 12, 13 n.1. Furthermore, all Members have "an absolute right to join a panel." John E. Higgins, Jr., *Taft-Hartley Symposium: The First Fifty Years: Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, 953 (Spring 1998). Likewise, any Member, regardless of whether he or she sits on the panel hearing the case, may request that the case be heard by all five Board Members. *Id.*[5]

In addition, the notion that two-member Board decisions are invalid is supported by the fact that with the Taft-Hartley amendments, Congress intended the NLRB to function more like the federal courts of appeals, which hear cases in panels of three. 28 U.S.C. § 46; S. Rep. No. 80-105, at 415 ("Since it is the belief of the committee that Congress intended the Board to function like a court. . . . Since the Board's function is largely a judicial one, *conformance with the practices of appellate courts*. . . ."") (emphasis added); H.R. Report No. 80-245 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 297 (1948) ("[t]he Bill therefore abol-

[5] Notably, *both* former Members Truesdale and Higgins previously have opined that the Board is not authorized to act when it has fewer than three Members. Truesdale, at 6 (noting that during the first year of the Clinton presidency, the Board only had two Members, "less than the necessary quorum."); Higgins, at 954, n. 43 (pointing out that in 1993, the Board only had two Members, "one short of its statutory quorum," and could not act on contested cases).

ishes the existing [NLRB], and creates in its place a new bipartisan Board of *three* fair and impartial persons. . . . Its sole function will be to decide cases . . . according to the facts.") (emphasis added). Moreover, the lower court acknowledged that Congress wrote the statute this way in light of concerns about the courts of appeals hearing cases in panels of two. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 849 (7th Cir. 2009).

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

The Seventh and Other Circuits

In upholding the validity of two-member Board decisions, the Seventh Circuit held that the "plain meaning" of section 3(b) supported the Board's December 2007 delegation of power. In reaching this conclusion, the court relied upon the language of section 3(b) regarding the quorum of a group, and upon the First Circuit's decision in *Northeastern Land Services v. National Labor Relations Board*, which similarly found that "the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)." *New Process Steel*, 564 F.3d at 846 (*quoting Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009)). Likewise, in *Narricot Industries, L.P. v. National Labor Relations Board*, 587 F.3d 654, 659 (4th Cir. 2009), the Fourth Circuit found that the two-member Board was empowered to act in light of the "unambiguous text" of section 3(b).

Neither the Seventh Circuit below or the First Circuit in *Northeastern Land Services*, however, discussed or reconciled the competing language in section 3(b) that requires a three-member quorum of the Board, as opposed to the group, "at all times." The Fourth Circuit in *Narricot Industries* simply dismissed the three-member quorum of the Board language on the basis that it was "an overly narrow construction of the modifying phrase that directly follows." *Narricot*, 587 F.3d at 659. In the view of the Fourth Circuit, had Congress intended that the Board have a quorum of three regardless of whether its authority is delegated to a group, "it would have simply omitted the words 'except that'" from the statute and as a result the statute would have contained "two independent quorum clauses, one applicable to the Board and the other to three-member groups." *Id.* at 660.

These decisions simply ignore the plain and unambiguous language of section 3(b), which states that "three members of the Board shall, *at all times*, constitute a quorum," and thereby fail to give proper effect to section 3(b)'s separate quorum requirements for the Board and for a delegated group (emphasis added). Indeed, in pursuit of a rationale that would allow the Board to continue to function with only two Members, the First, Fourth and Seventh Circuits' decisions fail to account for, much less reconcile, the unconditional "at all times" language, and effectively re-write section 3(b) to provide a two-member quorum requirement for the Board. Interestingly, the "at all times" language appeared in the original Wagner Act, and in 1947 Congress amended the Board quorum requirement from "two" to "three," a completely unnecessary exercise if two members were intended to act for

the Board under all circumstances. Wagner Act, Pub. L. No. 198, § 3(b), 49 Stat. 449, 451 (1935); Labor-Management Relations Act, ch. 120, sec. 101, § 3(b), 61 Stat. 136, 139 (1947). The amendment of "two" to "three" in 1947 makes clear that Congress intended that a quorum of three Members was required "*at all times*" for the Board to act, but that in those instances where at least three Members sit on the Board, a panel or group is authorized to act pursuant to a valid delegation should one of the panel Members become unable to participate. The *sine qua non* "at all times," however, is that there be at least three sitting *Board* Members.

The two-member Board's insistence that its power to act is grounded in the "plain meaning" of section 3(b) is particularly troubling because, as this Court has held, it is not a "plain meaning" interpretation of a statute when vital provisions of that statute are thereby rendered unnecessary or nugatory. *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."). *See also Corley v. United States*, 129 S. Ct. 1558, 1560 (2009); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Yet that is precisely the result that obtains here if the Board's and the Seventh Circuit's reading of section 3(b) is ratified. In what circumstance would any NLRB facing a deficit of three members *not* delegate its powers to a three-member group so that the remaining two Members be authorized to act at all times for the full Board? And if such a delegation so conveniently allows circumvention of the requirement that the Board at all times have a quorum of

three Members, why did Congress stipulate a three-member quorum at all? In fact, as the D.C. Circuit recognized, the Board's reading of section 3(b) simply reads the three-member Board quorum requirement out of the statute.[6] A fairer reading of the plain language of section 3(b) would give full effect to all of the provisions of section 3(b), both the Board quorum requirement *and* the delegee group quorum requirement, as did the D.C. Circuit, and would not provide justification for Senator O'Mahoney's concern in 1947 that the exception clause in section 3(b) is capable of being read as swallowing the entire rule.[7] Certainly one must presume that Congress' insistence on a three-member quorum "at all times" was neither an empty gesture, nor merely an inconvenient obstacle awaiting circumnavigation by a clever NLRB engaged in statutory legerdemain.

The Second and Tenth Circuits

The Second and Tenth Circuits took a somewhat different approach by applying a *Chevron* analysis. In *Snell Island SNF LLC v. National Labor Relations Board*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009), the Court applied the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for reviewing an administrative agency's attempt to give meaning to the statute it administers. *Snell*, 2009 U.S. App. LEXIS 13008, at *27-41. After finding that the Con-

[6] As for the Fourth Circuit's concern that the "except" language of section 3(b) not be read "overly narrow[ly]," the answer is simply that anything other than a narrow reading of the "exception" clause renders the Board quorum provision of section 3(b) totally meaningless.

[7] See pp. 7-8 *supra*.

gressional intent of the three-member Board quorum requirement in section 3(b) is unclear, the Second Circuit applied the second step of the *Chevron* analysis, which it believed required it to defer to the Board's interpretation of its own power to act with two Members under the NLRA. *Id.* at *38-41. Likewise, in *Teamsters Local Union No. 523 v. National Labor Relations Board*, Nos. 08-9568, 08-9577, 2009 U.S. App. LEXIS 28181 (10th Cir. Dec. 22, 2009), the Court, noting that the split of opinion among the Circuit courts on the two-member NLRB issue is evidence of the ambiguity of the statute, utilized the second step of the *Chevron* analysis and upheld the Board's delegation of authority as a permissible interpretation of section 3(b).

While a two-step *Chevron* analysis of an agency's authority to act in a particular regard or with respect to a particular issue or subject may be appropriate when a statute is ambiguous, *e.g.*, *N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Services. Admin. for Children & Families*, 556 F.3d 90 (2d Cir. 2009), it seems unlikely that such an analysis resulting in deferral to the agency's own view of its authority to act in any matter is apt where, as here, the question presented is the agency's primary power or authority to act at all. *E.g.*, *A.T. Massey Coal Co. v. Barnhart*, 472 F.3d 148, 167 (4th Cir. 2006) (noting that before proceeding to a *Chevron* analysis, the Court must conclude that Congress delegated to the agency the authority to act); *Y.S.K. Construction Co., Inc. v. U.S.*, 30 Fed. Cl. 449, 458-59 (Ct. Fed. Cl. 1994) (finding that where the "central inquiry" is whether the agency in question has the authority to interpret the statute, *Chevron* review is inappropriate because "[g]iving deference to an agency in

such a circumstance would beg the question."); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence, Chevron Deference Agency Jurisdiction and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1551 ("courts should not acquiesce to agencies' efforts to define their own powers."). Notably, the *Chevron* cases cited both by the Second and Tenth Circuits go to the *scope* of agency power, not the agency's power to act in *any* manner. *Snell*, 2009 U.S. App. LEXIS 13008, at *14-16; *Teamsters Local Union No. 523*, 2009 U.S. App. LEXIS, at *3. This Court need not decide whether a *Chevron* analysis is appropriate where the agency is passing on its own power or authority to act, however, because the statute herein is clear on its face that a quorum of the Board at all times must be comprised of three Members.[8]

IV. TWO-MEMBER DECISIONS IMPERMISSIBLY DISTORT ADMINISTRATIVE PROCESS.

To allow the Board to act with only two Members not only contravenes the explicit text of section 3(b), but impermissibly distorts administrative process. The NLRB, like other administrative agen-

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

cies, does not merely "decide cases" as does an Article III court. Administrative agencies serve *both* a quasi-legislative as well as a quasi-judicial function. 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.6 (3d ed. 1994) ("Congress wisely chooses to delegate most policy decisions to expert bodies that can react rapidly to new developments and to new understandings in their areas of expertise."). That means that administrative agencies are sifting facts, relying upon their cumulative experience in administering the statute, and constantly adjusting the application of administrative norms to effectuate the broad statutory mandates articulated by Congress. It is in that "adjusting" of administrative norms or standards based upon each agency's cumulative experience and expertise that the informality and flexibility of administrative jurisprudence and decision-making is given full play. As this Court has recognized:

> [F]lexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Am. Trucking Assocs., Inc. v. Atchison, T. & S.F.R. Co., 387 U.S. 397, 416 (1967). *See also John Deklewa & Sons*, 282 NLRB 1375, 1388 (1987) ("Cumulative experience [of the Board] begets understanding and

insights by which judgments are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.") This, if you will, is the genius or not of administrative process.

The NLRB, for example, is *not* bound by principles of *stare decisis* precisely because adherence to the rule *in each case* is contrary to the very function of an administrative agency. *E.g.*, *U.S. v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991) (citing *Michigan v. Thomas*, 805 F.2d 176, 184-85 (6th Cir. 1986) ("An administrative agency should not be, and is not . . . estopped by its prior precedent from altering its decisions due to increased expertise."); *Texas v. U.S.*, 866 F.2d 1546, 1557 (5th Cir. 1989) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984) ("An agency, however, is not bound by the shackles of *stare decisis* to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past.").

Congress intended, rather, that the administrative agencies in general, and the NLRB in particular, "adjust" and "fine tune" the day-to-day rules based upon evolving experience at the agency in administering the statute and in giving effect to the statute's requirements. What topics may constitute a mandatory subject of bargaining, for example, are not static, but dynamic, as a workplace replete with personal computers, email and personal communication devices with access to the Internet make clear. *E.g.*, *Guard Publ'g Co.*, 351 NLRB 1110 (2007), *aff'd in part*, *rev'd in part*, 571 F.3d 53 (D.C. Cir. 2009). Congress certainly reasonably could have anticipated that such compelling and difficult questions not be answered, adjusted or defined by a minority

of sitting Board Members. It is true that the two remaining Members have self-proclaimed that they would only apply "existing law," but aside from such a declaration effectively denying the very administrative dynamic that Congress intended, what additional adjustments or accommodations were nevertheless made in any particular case by these remaining Members to allow consideration, agreement and issuance of a decision?[9] Could such an adjustment or accommodation by the decision makers unintentionally result in a dilution of the full administrative process to which each litigant in any contested matter was due?

The decisions of the two-member Board at issue herein are replete with instances of one Member putting aside his or her own positions for "institutional reasons." *E.g.*, *Magic Beans*, *LLC*, 352 NLRB 872, 873 n.5 (2008) (noting that while then-Chairman Schaumber would permit a post objection election in a case such as this one, he applied extant Board precedent "for institutional reasons for deciding this case"); *Medco Health Solutions of Spokane*, *Inc.*, 352 NLRB 640, 641 n.8 (2008) (stating that while then-Chairman Schaumber would defer the information request, Board precedent was to the contrary, so "for institutional reasons" he concurred in finding that the deferral of the information request was inappropriate); *AM Property Holding Corp.*, 352 NLRB 279, 281 n.9 (2008) (noting that Member Liebman concurred with the decision to deny the motion for special remedies "for institutional reasons"). In each such case, the setting aside of a Member's view of what the statute may require rep-

[9] Chairman Liebman is a Democrat and Member Schaumber is a Republican.

resents an adjustment or accommodation that is inconsistent with administrative due process. Had a properly constituted three-member Board considered these cases, it is possible that any issue set before the Board would have been decided differently, quite apart from whether that disposition constituted a reversal, departure or "fine tuning" of prior NLRB decisional law. As such, a two-member Board, despite the good intentions of the remaining Members, fundamentally alters the statutory paradigm that Congress envisioned and denies the parties before the Board the administrative process Congress prescribed.[10]

The inability or unwillingness of the President to nominate or the Senate to confirm Members of the NLRB may be regrettable, unfortunate, or merely inconvenient, but it certainly is not an adequate basis for contorting statutory language to avoid untoward results. Our constitutional system of government mandates a modicum of comity by each branch for the other and certainly does not sanction the contortion of statutory language merely because political considerations have slowed or stalled the nomination and confirmation process. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . . or the impossibility of a court's undertaking independent

[10] *Prior* to December 28, 2007, current Chairman Liebman and Member Schaumber participated together in approximately 825 reported decisions. In 238 of those decisions, Members Liebman and Schaumber were on *opposite* sides of at least one issue.

resolution without expressing lack of the respect due coordinate branches of government"). *See also Nixon v. U.S.*, 506 U.S. 224, 235 (1993) (finding that judge's request for invalidation of his impeachment was nonjusticiable as a political question and stating that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'") The D.C. Circuit stated the principle precisely correctly in *Laurel Baye*: "we may not convolute a statutory scheme to avoid an inconvenient result." 564 F.3d at 476. The Court should decline the invitation to convolute the statutory language at issue here. Rather, the Court should give full effect to Congress' explicit intent that national labor policy at all times be determined by not less than three sitting Members of the NLRB.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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