No. 08-1457

In the Supreme Court of the United States

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 564 F.3d 840. The decisions and orders of the National Labor Relations Board (Pet. App. 26-71, 72-81) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. A petition for writ of certiorari was filed on May 22, 2009, and was granted on November 2, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

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

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

STATEMENT

1. In enacting the National Labor Relations Act (NLRA 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 Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted in 1935, the Board comprised three members.

National Labor Relations Act (National Labor Relations Act or Wagner Act), ch. 372, § 3(a), 49 Stat. 451 ("There is hereby created a board to be known as the 'National Labor Relations Board' * * *, which shall be composed of three members."). The original vacancy and quorum provisions of Section 3(b) of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." § 3(b), 49 Stat. 451.[1]

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 3(a), 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all

[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." Sec. 101, § 3(b), 61 Stat. 139. Since 1947, three-member groups constituted pursuant to the Board's Section 3(b) delegation authority have issued the overwhelming majority of the Board's decisions.[2] The current version of Subsections 3(a) and 3(b) of the Act and the 1935 version of Subsections 3(a) and 3(b) of the Act are reprinted in Appendix B, *infra*.

2. In 2002, following a brief period during which the Board was reduced to two members, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Requirements,* 2003 WL 24166831, at *1 (Mar. 4, 2003), *reprinted in* App., *infra*, 1a. Prior to that request, the Board had not issued decisions in the short periods after 1947 when it had only two sitting members.[3] The OLC opinion concluded that, under Sec-

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[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

[3] As noted at note 1, *supra*, when composed of only three members (between 1935 and 1947), the Board routinely issued decisions with only two members sitting. After Congress increased the size of the Board in 1947, the Board's membership did not fall to two until late 1993 (November 26, 1993, through January 24, 1994). In addition to that

tion 3(b), if the Board, at a time when it had at least three members, "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." App., *infra*, 3a.[4]

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[5] Pet. Br. Add. 4a-7a (Minute

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two-month interval, the Board had only two members for approximately one month beginning in late 2001 (December 20, 2001, through January 22, 2002). See NLRB, *Board Members Since 1935* (visited Feb. 1, 2010) <http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx> (*Board Members Since 1935*).

[4] The Board first relied on the OLC opinion on August 26, 2005, at a time when the Board had three sitting members. The Board delegated to itself as a three-member group all of the Board's powers in anticipation of the expiration of Member Schaumber's term on August 27, 2005. See Susan J. McGolrick, *Unprecedented Board Action Allows Just Two Members to Issue Decisions*, Daily Labor Rep. (BNA) No. 166 at A-1 (Aug. 29, 2005). Member Schaumber received a recess appointment to the Board on August 31, see *Board Members Since 1935*, but in the few days prior (August 28 through August 31), the two sitting members, acting as a two-member quorum of the delegee group, issued a few unpublished orders and one published ruling on a procedural motion. See *Extendicare Homes, Inc.*, 345 N.L.R.B. 905 (2005). None of the Board's rulings issued during that time was challenged on the ground that it was issued by a two-member quorum of the group.

[5] By its terms, the delegation "shall be revoked when the Board returns to at least three [m]embers." Pet. Br. Add. 7a. Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-

of Board Action (Dec. 20, 2007)). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the Board had delegated to the three-member group.[6]

Since January 1, 2008, that two-member quorum has issued over 500 decisions.[7] Those decisions resolved a wide variety of disputes over union representation and allegations of unfair labor practices, including cases involving employers' discharges of employees for exercis-

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compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Subsections 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Pet. Br. Add. 4a-5a; NLRB, *Press Release No. R-2653*, *Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/ R-2653.pdf>.

[6] On July 9, 2009, the Senate received the President's nominations of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009). On December 24, 2009, the Senate returned the Becker nomination to the President but held over the remaining nominations to the next session of Congress. *Id.* at S14141 (daily ed. Dec. 24, 2009). On January 20, 2010, the Senate received the President's renewed nomination of Becker. *Id.* at S59 (daily ed. Jan. 20, 2010).

[7] On November 12, 2009, it was reported that the two-member quorum had issued approximately 538 decisions, published and unpublished, and that the two-member quorum's authority had been challenged in approximately 77 cases pending in the courts of appeals. See Susan J. McGolrick, *"We're Poised for Changes" in Labor Law, Chairman Liebman Says at ABA Conference*, Daily Labor Rep. (BNA) No. 216 at C-3 (Nov. 12, 2009). The published decisions and summary judgment rulings are or will be reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), 354 N.L.R.B. (129 decisions), and 355 N.L.R.B. (nine decisions as of January 29, 2010).

ing their statutory rights[8]; disputes over secret ballot elections in which employees voted to select a union representative[9]; protests over employers' withdrawal of recognition from union representatives designated by employees[10]; refusals by employers or unions to honor their obligation to bargain in good faith[11]; and challenges to the requirement that employees pay union dues as a condition of employment.[12]

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[8] See, *e.g.*, *Saigon Gourmet Rest., Inc.*, 353 N.L.R.B. No. 110, 2009 WL 616703 (Mar. 9, 2009); *American Directional Boring, Inc.*, 353 N.L.R.B. No. 21 (Sept. 30, 2008), application for enforcement pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009).

[9] See, *e.g.*, *Eagle Ray Elec. Co.*, 354 N.L.R.B. No. 27, 2009 WL 1569255 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009); *Snell Island SNF LLC*, 352 N.L.R.B. No. 106, 2008 WL 2962651 (July 18, 2008), enforced, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009).

[10] See, *e.g.*, *Bentonite Performance Minerals, LLC*, 353 N.L.R.B. No. 75, 2008 WL 5427720 (Dec. 31, 2008), petition for review pending, No. 09-60034 (5th Cir. argued Feb. 1, 2010); *SFO Good-Nite Inn, LLC*, 352 N.L.R.B. 268 (2008), petition for review pending, No. 08-1148 (D.C. Cir. argued Apr. 16, 2009).

[11] See, *e.g.*, *Hartford Head Start Agency, Inc.*, 354 N.L.R.B. No. 15, 2009 WL 1311466 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009); *Local 17B of the Graphic Commc'ns Conference*, 353 N.L.R.B. No. 4, 2008 WL 4490042 (Sept. 12, 2008); *Local 155, Int'l Union, UAW*, 352 N.L.R.B. 1122 (2008); *Wayneview Care Ctr.*, 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008); *Laborers' Int'l Union, Local Union No. 169*, 352 N.L.R.B. 33 (2008), enforced, 337 Fed. Appx. 646 (9th Cir. 2009).

[12] See *e.g.*, *United Food & Commercial Workers Union, Local 4*, 353 N.L.R.B. No. 47, 2008 WL 4774553 (Oct. 31, 2008), application for enforcement pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009); *Laborers Int'l Union, Local Union 578*, 352 N.L.R.B. 1005 (2008), petition for review pending, No. 08-9564 (10th Cir. argued Sept. 23, 2009).

3. Petitioner New Process Steel operates four steel processing plants in the United States and one in Mexico. Pet. App. 2. In September 2006, petitioner commenced negotiating a collective-bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (Union), which was certified as the exclusive bargaining representative for employees at petitioner's plant in Butler, Indiana. *Id.* at 2-3. After extensive negotiations, representatives of petitioner and the Union reached a tentative agreement. *Id.* at 3. The Union ratified the agreement according to its procedures, and petitioner's representatives then executed it. *Id.* at 5-6. But after petitioner subsequently received some employee complaints about the ratification procedure the Union used for the agreement, petitioner withdrew its recognition of the Union. *Id.* at 6.

The Union filed an unfair labor practice charge with the NLRB on September 17, 2007. Pet. App. 6. In December 2007, the Board's General Counsel filed a complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by wrongfully repudiating a valid collective-bargaining agreement. Pet. App. 6-7, 30. After holding a hearing, an administrative law judge (ALJ) issued a decision in May 2008, finding that petitioner violated the Act as alleged. *Id.* at 7, 26. Later that month, the General Counsel issued a second complaint alleging that petitioner further violated its duty to bargain by withdrawing recognition of the Union during the term of a binding contract. *Id.* at 73. The General Counsel filed with the Board a motion for summary judgment on the second complaint in July 2008, based on petitioner's admission that it had withdrawn recognition. *Id.* at 73-74.

The Board issued decisions resolving both complaints in September 2008. In the first decision, the Board adopted the ALJ's finding that petitioner violated the Act by repudiating the collective-bargaining agreement, and ordered petitioner to adhere to the contract, to restore and give retroactive effect to its terms, and to make the employees whole for their resulting losses. Pet. App. 26-27, 67-69. In its second decision, the Board granted the General Counsel's motion for summary judgment and ordered petitioner to cease and desist from its unlawful withdrawal of recognition during the term of the contract, and to recognize and bargain with the Union. *Id.* at 72-80.

4. Petitioner filed petitions for review of the Board's orders in the United States Court of Appeals for the Seventh Circuit. The Board cross-applied for enforcement of the orders, and the court of appeals consolidated the cases. Pet. App. 7. Petitioner challenged the authority of the two-member quorum of the delegee group to issue the decisions and orders and also disputed the substance of the Board's unfair labor practice findings. *Id.* at 17-18. The court of appeals granted the Board's cross-applications for enforcement and denied petitioner's petitions for review. *Id.* at 1-25.

Petitioner argued that the delegation clause of Section 3(b) prohibited the Board from delegating its power to a group of three members when the Board knew that the term of one of the three was about to expire. The upshot of petitioner's view, the court noted, was that "the first sentence of § 3(b) restricts the Board from acting when its membership falls below three." Pet. App. 10. The court rejected that position, concluding that the plain language of Section 3(b) provides that the Board may act where, as here, the Board "delegated its

full powers to a group of three Board members" and two of those members remain as a quorum. *Ibid.* The court reasoned:

> As we read it, [Section] 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the [Board]'s delegation procedure.

Id. at 10-11 (footnote omitted).

The court further explained that, contrary to petitioner's contention, that reading of Section 3(b) does not deprive its first sentence of meaning. "The first sentence," the court reasoned, "establishes a requirement for delegation in the first instance, while the vacancy and quorum provisions allow the Board to proceed in the event that the terms of Board members subsequently expire." Pet. App. 10-11 n.2. By contrast, the court continued, petitioner's reading of Section 3(b) "appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two." *Id.* at 11 n.2.

The court of appeals further explained that its view of Section 3(b) was consistent with the legislative history of the Taft-Hartley Act, Pet. App. 13-15, and with quorum principles applicable to public boards in other circumstances, *id.* at 16-17.

On the merits, the court of appeals rejected petitioner's challenges to the Board's findings of unfair labor practices. Pet. App. 17-25.

5. Petitioners sought review in this Court and the Board agreed that the Court should grant the petition for a writ of certiorari in order to resolve this important question over which the courts of appeals are divided. Compare *Teamsters Local Union No. 523* v. *NLRB*, 590 F.3d 849, 850-852 (10th Cir. 2009); *Narricot Indus., L.P.* v. *NLRB*, 587 F.3d 654, 658-660 (4th Cir. 2009); *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 414-424 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); Pet. App. 8-17; *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36, 40-42 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009), with *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 472-476 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009) (*Laurel Baye*).

SUMMARY OF ARGUMENT

Section 3(b) of the NLRA establishes several rules that govern the five-member NLRB's exercise of its authority. First, it authorizes the Board to delegate any or all of its powers to a group consisting of three members. Second, it establishes a general Board quorum provision, which requires the participation of at least three members in any action taken by the Board as a whole. Third, it includes a special group quorum provision that operates as an exception to the general three-member Board quorum rule. This special quorum provision permits a group to exercise the authority delegated to it by the Board when at least two members of the group are participating. By using the word "except" to yoke the

general and special group quorum provisions together, Congress provided that the ability of a delegee group to transact business is governed by the more specific, special group quorum provision. In insisting otherwise, petitioner ignores Section 3(b)'s inclusion of the word "except" and distorts the meaning and purpose of quorum requirements.

The legislative history of the NLRA confirms that the plain language of Section 3(b) means what it says—that it allows the two sitting Board members to operate as a two-member quorum of the three-member group to which a quorum of the Board delegated all of its powers. Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum. In the 12 years preceding those amendments, the Board had routinely conducted business with a two-member quorum of the then-three-member Board. If Congress had intended to prevent the Board from continuing to operate through two members, it would have done so. Instead, it intentionally enhanced the Board's opportunities to operate through two members in order to increase the Board's efficiency.

Petitioner argues that the Board's act of delegation to the three-member group lapsed when the Board as a whole lost its quorum. But that reasoning is contrary to the general rule that the act of a government official or body continues in effect even after that official or body no longer has the authority to take action. Congress authorized a quorum of the full Board to delegate its powers to a group, and that delegation continues, as do

all of the Board's actions, even after the full Board has lost a quorum.

Finally, petitioner's repeated assertions about the wisdom of allowing the Board to operate with two members are irrelevant. This Court is called upon to determine what a statute authorizes, not whether that authorization is sound policy. And, in any event, Congress had good reason to give the NLRB the discretion (which it may or may not exercise) to continue operating in these circumstances. That authority enables the NLRB to continue to perform its statutory responsibilities even in the face of multiple vacancies.

ARGUMENT

CONGRESS AUTHORIZED THE NLRB TO OPERATE WITH A TWO-MEMBER QUORUM OF A THREE-MEMBER GROUP TO WHICH THE BOARD PREVIOUSLY DELEGATED ITS FULL POWERS

All the participants in this case agree that Congress has the constitutional authority to permit a quorum of the five-member NLRB to delegate all of its powers to a three-member group. All the participants further agree that, if Congress does permit such delegation to a three-member group, it also has the constitutional authority to permit two members of that group to exercise the delegated powers when they are the only two members remaining on the Board. The question presented in this case is whether Congress in fact exercised that authority. The plain text of Section 3(b) of the NLRA, 29 U.S.C. 153(b), as well as its history and context, demonstrate that Congress did so.

Congress authorized the Board to delegate "any or all of the powers which it may itself exercise" to a three-member group of the Board when it sees fit. 29 U.S.C.

153(b). The Board did that in December 2007, delegating all of its authority to a three-member group consisting of Members Liebman, Schaumber, and Kirsanow. Congress also—in plain statutory text—authorized a three-member group to exercise the authority delegated to it by the Board when it has a quorum of two members. That is exactly what Members Liebman and Schaumber have done for the last two years, following the expiration of Member Kirsanow's appointment. As the great majority of courts of appeals to have considered the issue have decided, Section 3(b) of the NLRA permits the Board to continue operating in these circumstances.

A. The Plain Language Of Section 3(b) Demonstrates That The Board Can Operate In These Circumstances

"As in any case of statutory construction, [the Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted). As this Court has noted, "the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). The plain language of Section 3(b) of the NLRA permits the NLRB to operate with only two sitting members if the Board, at a time when it had at least three members, previously delegated the Board's full authority to a three-member group that includes the two current members.

1. As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "any or all of the powers which it may itself exercise" to a group of three or more Board members; (2) a declaration that a vacancy in the Board "shall not im-

pair" the authority of the remaining Board members to exercise the Board's powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board's delegation authority. 29 U.S.C. 153(b).

The validity of the continuing action of the two current Board members follows from a straightforward reading of the pertinent statutory provisions. When the then-four-member Board delegated all of the Board's powers to a group of three Board members in December 2007, it did so pursuant to Section 3(b)'s delegation clause, the first clause identified above. When the term of one of the delegee group members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two Board members constituted a quorum of the three-member group to which the Board had lawfully delegated its powers. Consistent with the second and third clauses identified above, those two members, whose authority was "not impair[ed]" by a vacancy in the other positions on the Board, 29 U.S.C. 153(b), continued to exercise the previously-delegated powers of the Board.

2. The central controversy in this case concerns the meaning of Section 3(b)'s quorum rule, which states that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the" delegation clause. 29 U.S.C. 153(b). Petitioner, relying on the reasoning of the United States Court of Appeals for the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (2009), petition for cert. pending,

No. 09-377 (filed Sept. 29, 2009), argues (Pet. Br. 19-22) that the Board quorum provision (*i.e.*, the language preceding the express "except" clause) controls this case, and that, by including the phrase "at all times," Congress intended that both the Board and the delegee group have at least three members before either may act, regardless of whether the Board has previously delegated its authority to a three-member group. That interpretation is incorrect because it ignores Congress's decision to adopt a special group quorum provision, qualifying its general quorum rule with an express exception applicable to delegee groups that allows them to operate with two members.

The word "except" in Section 3(b) decides the question presented. "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of the word "except" is now and was in 1947: "[b]eing excepted or left out; with exception of; excepting." *Webster's New International Dictionary of the English Language* 608 (2d ed. 1945)) (*Webster*). Thus, the ordinary meaning of the quorum provision in Section 3(b) is that the special two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full Board. See, *e.g.*, *Narricot Indus., L.P.* v. *NLRB*, 587 F.3d 654, 660 (4th Cir. 2009) (*Narricot*) ("statutory phrase 'except that' ordinarily introduces an exception").

The upshot of Section 3(b)'s text is the following: The full Board must have three or more participating members to take any action, including the delegation of any or all of its powers to a group of three members. That resulting delegee group in turn must have at least

two members to exercise the powers delegated to it. Which two members—or whether the third continues on the Board at all—is unimportant. Where, as here, a quorum of the full Board previously delegated all of the Board's powers to a three-member group, any two members of that group constitute a quorum that may continue to exercise the delegated powers, regardless whether the third group member participates in that exercise or continues to sit on the Board. The legality of such actions by the two-member quorum does not depend on whether a quorum remains in the full Board because the Board has already delegated all of its authority to the delegee group, which is authorized to act through a quorum of two members. See *Narricot*, 587 F.2d at 659; *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009).

Although petitioner purports to apply the rule that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," Pet. Br. 18 (quoting *Hibbs* v. *Wynn*, 542 U.S. 88, 101 (2004)), petitioner in fact treats the statute as though it did not contain the word "except." Giving it less than its ordinary meaning, petitioner—relying on the D.C. Circuit's decision in *Laurel Baye*—opines that "the word 'except' is * * * present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value" than the larger Board's ability to act. Pet. Br. 21 (citation omitted). But Congress could have accomplished that result by leaving out the word "except" altogether and instead codifying two independent clauses or sentences, the first stating that "three members of the Board shall, at all times, constitute a quorum of the

Board," and the second stating that "two members shall constitute a quorum of any group designated pursuant to" the delegation clause. 29 U.S.C. 153(b); see *Narricot*, 587 F.3d at 659-660. Congress did not do that; instead, Congress yoked the two clauses with a comma and the word "except," signifying that the special quorum rule in the second clause is an exception to the general quorum rule in the first.

Nor is Congress's construction novel or ambiguous. On the contrary, Congress has used the construction "at all times * * * except" in a number of statutes to accomplish exactly what it did in Section 3(b)—to provide that a general rule should apply at all times *except* in the instances specified by Congress in the statute. See, *e.g.*, Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328 (to be codified at 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008)) (Secretary of Education shall "maintain and preserve *at all times* the confidentiality of any program review report * * * *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review") (emphases added).[13]

This reading is confirmed by the language Congress used after "except," in declaring that "two members shall constitute a quorum of *any* group designated pursuant to" the delegation clause. Congress did not create

[13] Accord 42 U.S.C. 4954(a) (full-time commitment of VISTA volunteer "shall include a commitment to live among and at the economic level of the people served * * * *at all times* during their periods of service, *except* for authorized periods of leave") (emphases added); cf. Proclamation No. 4064, 85 Stat. 916, 916 (4 U.S.C.A. 6 note) ("[T]he fifty flags of the United States of America displayed at the Washington Monument in the District of Columbia [are to] be flown *at all times* during the day and night, *except* when the weather is inclement.") (emphases added).

a two-member quorum provision for only some delegee groups: it created a single rule for all such groups. Whether or not the Board currently has three members is not an enumerated feature of that rule. To the contrary, Congress used broad language in the special group quorum provision to cover all groups exercising delegated powers.

3. In insisting that the general quorum provision overrides the special group exception, petitioner also fails to give the word "quorum" its ordinary and contemporary meaning. That meaning was (and is): "[s]uch a number of officers or members of any body or association as is competent by law or constitution to transact business." *Webster* 1394. The purpose of a quorum provision is to set the minimum participation level required before a body may act. Thus, Section 3(b)'s statement that two members constitute a quorum of a delegee group denotes that the group may legally transact business when two of its members are participating. Similarly, Section 3(b)'s statement that three members constitute a quorum of the Board denotes that the Board may legally transact business when three of its members are participating. Under petitioner's view of the law, however, the full Board quorum provision may disable a delegee group from acting, even though that group has the requisite two-member quorum. See *Narricot*, 587 F.3d at 660. That reading untethers the quorum requirement for the full Board from its purpose of establishing a *participation floor*. Under petitioner's interpretation, the full Board quorum rule in Section 3(b) more broadly establishes a *membership floor* that must be satisfied in order for any delegee group to act, even though the non-group member(s) of the full Board would not participate in the delegee group's action.

At the same time, petitioner's reading of Section 3(b) prevents the quorum requirements for the delegee group from having the effect quorum rules ordinarily do. Under petitioner's construction, a two-member quorum of a delegee group is never in itself sufficient to permit the group to transact business; there must also exist a third sitting member of the Board and the delegee group. But whether the Board and group have this third member has no bearing on whether the group has the quorum that makes it able to transact business. The purpose of the quorum provision is to ensure that at least two members of a delegee group actually participate in a decision; if they do, that should be the end of the matter. By definition, a two-member quorum provision enables a tribunal to dispose of a case by a unanimous two-person vote.[14]

In accordance with the usual meaning of a two-member quorum rule, two members of the Board's delegee groups have routinely issued opinions when the third sitting member cannot participate because, for example, of a conflict. Petitioner attempts to harmonize its position with this settled practice by asserting that, "[i]n those cases, the decision is still issued by all three members of the panel." Pet. Br. 22 n.9. But that assertion blinks reality and common sense; when one member of a group cannot participate in a case because of a conflict, that member *does not participate* in the making or

[14] In other contexts in which two members of a three-member body acted as a quorum for that body, federal courts have permitted the quorum to take action through a unanimous two-person vote. See, *e.g.*, *de Vera* v. *Blaz*, 851 F.2d 294, 296 (9th Cir. 1988); *Nicholson* v. *ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); see also *Ethan Michael, Inc.* v. *Union Twp.*, 108 Fed. Appx. 43, 45 (3d Cir. 2004).

issuing of that decision.[15] Rather, as the OLC opinion recognizes, such decisions are issued by a two-member quorum of the delegee group.[16] App., *infra*, 6a-8a; see *Photo-Sonics, Inc.* v. *NLRB,* 678 F.2d 121 (9th Cir. 1982)[17]; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1186-1187 (2000) (discussing cases holding that members of multi-member agencies who are disqualified from participating in a decision do not count towards the quorum).[18]

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[15] Congress has declared it to be a crime for an officer or employee of the executive branch or of any independent agency of the United States to participate in a decision in which he or a member of his family has a financial interest. 18 U.S.C. 208; see 5 C.F.R. 2635.101 *et seq.*

[16] Petitioner is correct that, in such cases, the Board lists in each published decision the composition of the three-member group to which the case was assigned, but when one member is recused from the case, the Board also notes the member who is not participating "in the decision on the merits." *E.g.*, *Pacific Bell Tel. Co.*, 344 N.L.R.B. 243, 243 & n.1 (2005); *Bricklayers, Local #5-N.J.*, 337 N.L.R.B. 168, 168 & n.4 (2001); *Cable Car Advertisers, Inc.*, 336 N.L.R.B. 927, 927 & n.1 (2001), enforced, 53 Fed. Appx. 467 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *McDonnell Douglas Corp.*, 324 N.L.R.B. 1202, 1202 & n.4 (1997); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 991 & n.1 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989). The provision of this information may serve a variety of interests, including disclosing to the public the composition of the original group to which a case was assigned, as well as the identity of the recusing member.

[17] Petitioner erroneously describes (Pet. Br. 9-10) as "dictum" the Ninth Circuit's holding in *Photo-Sonics* that a decision made by a two-member quorum of a delegee group was valid, 678 F.2d at 122-123.

[18] Petitioner cites (Br. 22 n.9) *Wisconsin Bell, Inc.*, 346 N.L.R.B. 62 (2005), a case in which the then-three-member Board, departing from its practice, reached a decision with the participation of only two members without first delegating the power to decide the case to a three-member group. Because of the absence of a delegation, that decision

Petitioner suggests a further misunderstanding of the purpose of a quorum rule in contending that "[t]he natural meaning" of the clause governing the quorum requirement is that "the fully constituted five-member Board may decide a case if three members *agree*" (Pet. Br. 20 (emphasis added)). But the requirement that three members agree to an action when all five members participate in a decision is a function of the majority-rule principle that governs multimember bodies. It has nothing to do with the general Board quorum requirement, which has force only when fewer than five Board members participate in a decision. Under the general Board quorum requirement, the Board may transact business with the participation of only three members. In such a situation, the principle of majority rule would require that at least two of the participating members agree on any particular decision or course of action, but does not require unanimity among the three members.

4. Finally, petitioner misconstrues Section 3(b)'s vacancy provision, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." 29 U.S.C. 153(b). Petitioner contends (Pet. Br. 13, 19-20) that this provision has no application to a delegee group because it refers to the "Board" rather than to a "group." But petitioner fails to acknowledge that every member of a delegee group is necessarily a member of the Board. Thus, the first reference to "Board"—"[a] vacancy in the Board"—must include a vacancy in a delegee group because any vacancy in such a group is by definition also a vacancy in the Board. The second reference to "Board"—"shall not impair the right of the

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was subject to the general Board quorum requirement and is therefore not relevant to the issue in this case.

remaining members to exercise all of the powers of the Board"—applies equally to a delegee group to which "all of the powers of the Board" have been delegated. Thus, the vacancy clause establishes that there is no minimum membership level required of either the full Board or a delegee group before the Board or group may exercise its authority, as long as the Board or group complies with the relevant three- or two-member participation requirement in the relevant quorum provision.[19]

B. The History Of The Wagner Act And The Legislative History Of The Taft-Hartley Act Confirm That Section 3(b)'s Two-Member Group Quorum Requirement Operates As An Exception To The Three-Member Board Quorum Requirement

Because Section 3(b)'s language is clear, there is no need to consult its history. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 539 (2004). Nevertheless, that history confirms the plain meaning of the statutory text: that a two-member quorum of a three-member group to which the Board has legally delegated all of its

[19] Amicus Michigan Regional Council of Carpenters (MRCC) argues (Amicus Br. 4-5) that the Board's delegation of authority to the three-member group consisting of Members Liebman, Schaumber, and Kirsanow was illegal from the start because the Board knew at the time that Member Kirsanow's term would soon expire, leaving the delegee group with only two members. But the anticipated departure of one member of a group has no bearing on the legality of the delegation at a time when the full Board had a quorum and the delegee group included three members. See *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 419 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). In any case, petitioner did not challenge the validity of the Board's initial delegation to the three-member group in either its petition for a writ of certiorari or its brief as petitioner; amici may not assert that challenge in petitioner's stead.

powers may continue to operate when those two members are the only sitting members of the Board.

As discussed at pp. 2-3, *supra*, the Wagner Act originally created a three-member Board, two members of which could—and did—act as a quorum. Wagner Act § 3(a) and (b), 49 Stat. 451. Between the creation of the Board in 1935 and Congress's amendment of the NLRA through the Taft-Hartley Act in 1947, the three-member Board routinely issued decisions with only two sitting members. See, *e.g., Southern Bell Tel. & Tel. Co.*, 35 N.L.R.B. 621 (1941) (issued on Sept. 23, 1941, when Board had only two members, see *Board Members Since 1935*, *supra* note 3, at 5), set aside *sub nom. Southern Ass'n of Bell Tel. Employees* v. *NLRB*, 129 F.2d 410 (5th Cir. 1942), rev'd *sub nom. NLRB* v. *Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943).

Although petitioner impugns the practice of ever allowing two Board members to decide a case (see Pet. Br. 25-27, 32-35), Congress showed no concern about that regular practice when it considered the Taft-Hartley amendments. Indeed, the bill originally introduced in the House would have maintained a three-member Board and continued to allow two of the three members to exercise all of the Board's powers. See H.R. 3020, 80th Cong., 1st Sess. § 3 (1947) (as passed by House), *reprinted in* NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 171-172 (1948) (*1947 Leg. Hist.*); H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947), *reprinted in 1947 Leg. Hist.* 297.

The bill proposed in the Senate similarly showed comfort with the Board's acting through two members. Although that bill would have enlarged the Board to seven members and set the full Board quorum at four members, it also proposed to preserve the ability of the

Board, even at that larger size, to exercise its powers through a two-member quorum by authorizing the Board to delegate "any or all" of its powers "to any group of three or more members," two members of which would constitute a quorum. S. 1126, 80th Cong., 1st Sess. § 3 (1947) (as reported by Senate comm.), *reprinted in 1947 Leg. Hist.* 106-107. In proposing to expand the size of the Board, the Senate Committee on Labor expressed concern that the Board was taking too long to decide cases. Explaining that "[t]here is no field in which time is more important," the Committee sought to increase the Board from three to seven members in order to "permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage." S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947) (*Senate Report*), *reprinted in 1947 Leg. Hist.* 414. The Senate Committee contemplated that those panels, along with other delegee groups, could act with a two-member quorum (just as for 12 years the three-member Board had done) to increase the Board's flexibility and speed.

When the Conference Committee reconciled the competing bills, it agreed, as a compromise between the House and Senate, to expand the Board from three to five members. Taft-Hartley Act, sec. 101, § 3(a), 61 Stat. 139, *reprinted in 1947 Leg. Hist.* 4; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36-37 (1947) (*Conference Report*), *reprinted in 1947 Leg. Hist.* 540-541. In addition, it retained the Senate's delegation and two-member quorum provisions, see Taft-Hartley Act, Sec. 101, § 3(b), 61 Stat. 139, *reprinted in 1947 Leg. Hist.* 4; *Conference Report* 37, *reprinted in 1947 Leg. Hist.* 541, thereby preserving the Board's ability to act through two members even as the size of the full Board expanded.

The history of the 1947 changes to the Board's composition and delegation authority thus confirms what is plain in the text of Section 3(b). That history shows that Congress wanted the Board to operate more efficiently and, to advance this objective, it authorized the Board to delegate any or all of its powers to a three-member group, which in turn could exercise those powers through a two-member quorum.[20] Through that authorization, Congress enabled the Board to continue its prior practice of allowing two members to exercise its powers. Indeed, the change Congress made only increased the Board's ability to use two-member quorums to advance its mission. Had Congress been dissatisfied with the Board's practice of operating through two-member quorums, it could have eliminated the Board's authority to do so when amending the statute. Instead, Congress preserved the Board's authority to act through a two-member quorum whenever the Board exercised its delegation authority.

[20] As amicus Chamber of Commerce (CoC) points out (at 7-8), at least one member of Congress explicitly stated—albeit as a criticism of the 1947 amendments—that the amended version of Section 3(b) "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." 93 Cong. Rec. 7525 (1947) (statement of Sen. O'Mahoney), *reprinted in 1947 Leg. Hist.* 1632. Although the view of one member of the Senate by no means binds this Court in interpreting a statute, Senator O'Mahoney's view is perfectly consistent with the Board's view of the plain meaning of the text that his chamber codified in Section 3(b).

C. Congress's Decision To Permit The Board To Delegate Its Authority To A Three-Member Group That May Take Action With A Two-Member Quorum Is Consistent With Background Principles Governing The Operation Of Government Agencies

In enacting legislation authorizing federal agencies to carry out their assigned duties, Congress is free, within the bounds of its enumerated powers, to dictate the manner in which such agencies will function. Section 3(b), by its terms, authorizes the two current members of the NLRB to exercise all of the powers that the Board delegated to the group of which they are members. Generic "background legal principles" cannot supplant the meaning of this specific text. In any event, as the court below found, Section 3(b)'s special group quorum provision is fully consistent with the background rules governing the operation of government agencies.

Petitioner urges this Court to interpret Section 3(b)—indeed, to override its plain language—by borrowing selected common law rules governing private corporations and private agency relationships. Those rules, petitioner contends, would dictate that, at the moment the authority of the Board as a whole expired (*i.e.*, when the Board lost its three-member quorum), the Board's prior delegation of authority to the group also lapsed. See Pet. Br. 23-27; see also *Laurel Baye*, 564 F.3d at 473 (asserting that an agent's delegated authority "terminates when the powers belonging to the entity that bestowed the authority are suspended"). But the rules on which petitioner relies do not govern the continuing validity of lawful government actions.

When a governmental entity such as the Board takes an action, that action—whether a regulation, order, or delegation—acquires the force of law in its own right.

There is no basis in Section 3(b) 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 a three-member group, 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) is 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).[21]

[21] Petitioner errs in assuming that Congress intends the common law rules applicable to private corporations and agency relationships to serve as default rules for public entities. As the Court noted in *FTC* v. *Flotill Products, Inc.*, 389 U.S. 179 (1967) (*Flotill*), when an agency's enabling statute is silent on the matter, quorum rules governing federal agencies are derived from the common law of *public* bodies. *Id.* at 183-184 & n.6 (collecting cases). Indeed, even the agency and corporations treatises on which petitioner relies note that governmental bodies are often subject to special rules not applicable to private bodies. See *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"); 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

In any case, background common law rules cannot override the clear intent of Congress, as expressed in statutory text. See *FTC* v. *Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967).[22] Petitioner's discussion (Pet. Br. 28-32) of four federal agencies that ceased acting when they did not have enough members to constitute a quorum in fact illustrates this principle, rather than advancing petitioner's own argument. Those agencies—the Federal Election Commission, the Consumer Product Safety Commission, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission—ceased acting when their membership fell below the quorum specified in each agency's governing statute.[23] But that supports the

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and entities created by government"). Moreover, when a delegee group possessed of all of the Board's powers acts, it is acting as the Board, not as an agent of the Board.

[22] If background common law rules governing public bodies were relevant in this case, the applicable quorum rule would be that "a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." *Flotill*, 389 U.S. at 183 & n.6; cf. *Assure Competitive Transp., Inc.* v. *United States*, 629 F.2d 467, 472-473 (7th Cir. 1980) (holding valid a decision of the Interstate Commerce Commission (ICC) issued by four members at a time when only six of the ICC's 11 seats were filled because the four members were a majority of those in office and therefore constituted a quorum), cert. denied, 449 U.S. 1124 (1981); *Michigan Dep't of Transp.* v. *ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (upholding as valid a decision of the ICC issued by four members when the other seven Commission seats were vacant).

[23] Petitioner quotes (Br. 30) a report from the Federal Mine Safety and Health Review Commission stating that it lacked a decisionmaking quorum for most of fiscal year 2003, during which time it had only two of five members. Although the Federal Mine Safety and Health Act contains a provision authorizing the commission to delegate any or all of its powers to a group of three, two of whom would constitute a quorum (30 U.S.C. 823(c)), the Commission had not delegated its powers to such a group before it was reduced to two members.

Board's basic point in this case: it is up to Congress to establish participation and membership rules for agencies, which need not be one-size-fits-all, and it is incumbent on each agency to act in accordance with the particular rules Congress has specified. The Federal Election Commission, for example, was not able to act when it had only two of six commissioners because that agency's authorizing legislation includes what Section 3(b) does not—a membership rule requiring "the affirmative vote of 4 members of the Commission" in order to act. 2 U.S.C. 437c(c). The Consumer Product Safety Commission operates under a different set of rules: although generally needing three out of five members to act, 15 U.S.C. 2053, it may, as petitioner concedes (Pet. Br. 30 n.15), conduct business for limited periods with a quorum of only two members. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(a), 122 Stat. 3039. And, in the case of the NLRB, Congress established still other rules, which authorized the Board to delegate its authority to a three-member group and authorized such a group to act with a quorum of two members.

Nor was the delegation-quorum scheme Congress established through adoption of the Taft-Hartley amendments in 1947 unprecedented. At that time, the statute governing the operation of the Federal Communications Commission provided that four of the seven members constituted a quorum, but authorized the commission to assign any of its work to divisions of at least three members, a majority of whom could decide matters with the same force and effect as could the commission. See Communications Act of 1934, ch. 652, §§ 4-5, 48 Stat. 1066. Similarly, the statute governing the Interstate Commerce Commission (ICC) at that time pro-

vided that a "majority of the Commission" (then nine members) constituted a quorum, but authorized the commission to delegate any of its work to divisions consisting of no fewer than three members, a majority of whom constituted a quorum. See Transportation Act of 1940, ch. 722, § 12, 54 Stat. 913-914; *Nicholson* v. *ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983) (holding that an ICC decision in which only two of the three commissioners in a division participated was validly issued by a quorum of the assigned division), cert. denied, 464 U.S. 1056 (1984).

Congress has also permitted some federal agencies to establish and amend their own quorum requirements, and at least two agencies have exercised that authority in order to continue operating when more than half of their seats are vacant. For example, the Securities and Exchange Commission (SEC), whose enabling statute does not include a quorum provision, adopted its own quorum requirements in 1995 when faced with the prospect of having three out of five seats vacant. The rule adopted by the SEC provides that three members of the Commission shall constitute a quorum unless the number of sitting commissioners is fewer than three, in which case "a quorum shall consist of the number of members in office." 17 C.F.R. 200.41; see *Falcon Trading Group, Ltd.* v. *SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding the SEC's quorum provisions and action taken under those provisions by two sitting members). The Federal Trade Commission has also amended its quorum provision, changing from a rule defining a quorum as a majority of all the members of the Commission to a rule defining a quorum as "[a] majority of the members of the Commission in office and not

recused from participating in the matter." 16 C.F.R. 4.14(b).

Thus, there is nothing unusual or unprecedented about Congress's decision to authorize the NLRB to delegate powers to a group, a quorum of which may exercise those powers even when a majority of the Board's seats are vacant.

D. The Board's Determination Is Entitled To Deference

Two of the six courts of appeals that have considered the issue presented here have determined that the Board's interpretation of Section 3(b) is entitled to the deference this Court accords under its decision in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Teamsters Local Union No. 523* v. *NLRB*, 590 F.3d 849, 850-852 (10th Cir. 2009); *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 419-424 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (*Snell Island*). There is no need for the Court to decide this question because Section 3(b) unambiguously authorizes the Board to continue operating with two sitting members when a quorum of the full Board delegated its authority to a three-member group including the two current members. See, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Board of Governors of the Federal Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). To the extent, however, that this Court views the language in Section 3(b) as susceptible to more than one construction, the Court should defer to the Board's understanding of that provision.

Snell Island and *Teamsters* found deference under this Court's decision in *Chevron* appropriate because Congress vested in the Board the authority to interpret and enforce the NLRA. In delegating its powers to the

three-member group that includes the two current members, the Board expressed its view that those members would continue to "issue decisions and orders in unfair labor practice and representation cases." Pet. Br. Add. 5a. The Board based that view on "the statutory language" of Section 3(b) as well as the OLC opinion confirming that interpretation. *Ibid.* At the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of judicial deference owed to agency actions having persuasive authority. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

In this case, the Board exercised care and deliberation in formulating its view that Section 3(b) authorizes it to continue operating with two members of a group to which all of the Board's powers had been delegated. The Board refrained from acting on its interpretation of the delegation and quorum provisions in Section 3(b) until an independent opinion from the Office of Legal Counsel confirmed that interpretation.[24] After receiving that

[24] The Board agreed to be bound by OLC's interpretation of the statute when it requested OLC's opinion. See App., *infra*, 1a. After OLC issued its opinion, the Board noted that its interpretation was the same as the one that the Board had historically used. See Pet. Br. Add. 5a-6a (Minute of Board Action delegating authority to three-member group in anticipation of the Board's losing two members, noting that OLC's opinion is based on "essentially the same theory that the Board has historically used in situations where one member of a three-Member Board is disqualified or recused from participating on the merits of a case"). And the Board further explained that the OLC

opinion, the Board again considered the question and determined to act based on its interpretation of Section 3(b)'s text and its agreement with OLC's conclusion. Pet. Br. Add. 5a-6a. In so doing, the Board made clear that it was making the delegation to enable the two current members "to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board." *Id.* at 6a; see *id.* at 4a ("The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five Members."). And the Board further explained that its decision to delegate accorded with its "continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible." *Ibid.*

The Board's considered construction of its authority is consistent not only with the text of the statute, but also with the legislative history of the NLRA's quorum provisions, the construction of comparable statutes authorizing decisions by two-member quorums, and the overall purpose of the NLRA to promote labor peace and the free flow of commerce. See pp. 13-26, *supra*; *Senate Report* 8 ("There is no field in which time is more important."), *reprinted in 1947 Leg. Hist.* 414; see also *Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'"). The Board's interpretation of Section 3(b) is therefore entitled to this Court's deference.

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opinion merely permitted, and did not require, such a delegation: "[T]he opinion does not require the Board to take the action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority." Pet. Br. Add. 6a.

E. The Policy Arguments Petitioner And Its Amici Advance In Support Of Their View Are Incorrect And Irrelevant

Petitioner and its amici argue at length that this Court should interpret Section 3(b) to bar the Board from continuing to operate in the circumstances currently presented because "Congress would not in the first instance have created a board or commission with adjudicatory powers affecting private adverse parties, consisting of an even number of members." Pet. Br. 25; see *id.* at 25-27, 34; see also CoC Amicus Br. 15-20; MRCC Amicus Br. 14-20. That argument is mistaken.

1. As an initial matter, petitioner's argument (Pet. Br. 25) ignores the actual choice Congress made in enacting the Taft-Hartley amendments. Congress of course did not "in the first instance * * * create[] a board * * * with adjudicatory powers affecting private adverse parties, consisting of an even number of members."[25] *Ibid.* Congress instead established a Board consisting of five members. But Congress also created a mechanism enabling the Board to operate with only two members if the Board (when it has at least three members) lawfully exercises its discretion to delegate. That mechanism, specifically contemplating two-member quorums, represents Congress's judgment "in the first instance" of when the Board should "consist[] of an even number of members."

Moreover, petitioner's attack on the soundness of Congress's policy choice is irrelevant to the question

[25] Although petitioner suggests (Pet. Br. 25) that boards and commissions with an even number of members are presumptively suspect, it does not challenge the validity of the NLRB to act when it has four members. Indeed, petitioner specifically concedes (*id.* at 21) that the Board may exercise its authority when it has "three or four or five members."

presented—namely, what Congress authorized in Section 3(b). As this Court has noted:

> [The Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned * * *, the judicial process comes to an end. [The Court] do[es] not sit as a committee of review, nor [is the Court] vested with the power of veto.

TVA v. *Hill*, 437 U.S. 153, 194-195 (1978). Congress provided in Section 3(b) that (1) the Board have discretion to delegate all of its powers to a group of three members and that (2) such a group have authority to exercise those powers when it has a quorum of at least two members. There is no cause for this Court to inquire into the wisdom of that clear decision.

2. In any event, the reasonableness of Congress's choice in crafting Section 3(b) as it did is apparent. Statutory quorum provisions do not express a legislature's judgment about the optimal number of decisionmakers; rather, they define the minimum number of participants needed to protect "against totally unrepresentative action in the name of the body by an unduly small number of persons.'" *Assure Competitive Transp., Inc.* v. *United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting *Robert's Rules of Order* § 3, at 16 (1970)), cert. denied, 449 U.S. 1124 (1981). So, in enacting Section 3(b), Congress was not opining on whether the Board generally should operate with an even or an odd number of members. On the contrary, Congress was deciding whether, in the circumstance of multiple vacancies, it should permit two members to exercise the Board's au-

thority or force the Board to shut down entirely. In expanding the size of the Board in 1947, Congress expressed its view of the importance of resolving labor disputes as expeditiously as possible. See *Senate Report* 8, *reprinted in 1947 Leg. Hist.* 414. Congress thus made a reasonable decision to permit the Board to operate in the face of three vacancies when a quorum of the full Board thinks such action is appropriate.

Significantly, Congress did not *require* the Board to continue to operate with only two members. Rather, Congress granted to the full Board the discretion to vest "any or all of the powers which it may itself exercise" in a three-member group, two members of which could exercise those powers as a quorum. There may be circumstances in which Board members whose terms or appointments are expiring will decline to exercise the authority to delegate that Section 3(b) provides. Congress vested that discretion in the Board itself, to exercise or not as the members see fit.

For example, the full Board may take into account the composition of any two-member quorum before deciding to delegate any of its powers. As petitioner notes (Pet. Br. 34), the Board now customarily consists of three members from the President's political party and two members from the opposing party. If foreseen departures from the Board would leave the Board with two members who belong to the same party, the other members might decide not to make any delegation. In the instant case, the two current members belong to different political parties; the two other members whose terms expired at the end of 2007 thought it better to allow the Board to continue operating with those members than to require the Board to shut down altogether. The Board also could have imposed, ex ante, a time-limit

on its delegation of authority, specifying that the delegation would expire on a date certain, rather than when the Board returned to "at least three Members." Pet. Br. Add. 7a. Whether, in any given case, the Board has made the best decision is not relevant to the question at hand. Congress reasonably decided, in enacting Section 3(b), to leave those judgments to the Board's discretion.[26]

Petitioner casts aspersions on the validity of the decisions the Board has issued in the last two years, suggesting (Pet. Br. 34-35) that the decisions were made without "meaningful debate" and "full deliberation." In

[26] Petitioner relies (Pet. Br. 5-6, 32 n.16) on statements of two prior Board members expressing the view that, during a prior period in which the Board's membership fell to two, the Board did not have a quorum to act. But those members were simply stating the effects of the general quorum rule; they were not expressing a view about the permissibility of two members' acting after a delegation. Offering his own view as a former Board member (MRCC Amicus Br. 12 n.6), counsel of record for amicus Michigan Regional Council of Carpenters states his recollection that, when the Board membership fell to two in late 1993, the remaining members did not believe they had authority to act. But once again, that is so because a quorum of the full Board had not previously delegated all of its powers to a group that included those two members. The Board cannot *always* act with only two members; in order to do so, there must be a valid delegation in place, as there was in December 2007. In any case, the personal views or recollections of a small number of former Board members cannot override the meaning of the relevant statute.

Also unavailing is amicus counsel's assertion (MRCC Amicus Br. at 13) that the current Board is not operating in compliance with the requirements of the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. 552b. He offers no support in the record or other authority for his view, and the current Solicitor of the Board confirms that amicus counsel is incorrect as a factual matter in asserting that the Board does not view meetings of the two current members to resolve cases as subject to the Sunshine Act.

particular, petitioner notes (*id.* at 35) that each of the current members has signed on to opinions applying prior Board precedents with which the member may not agree. But an adjudicator's decision to apply an existing precedent with which he or she disagrees in the absence of a sufficient majority to override the precedent—or in a variety of other circumstances—hardly counts as illegitimate. Board members also followed that practice when the Board had three, four, or even five members. See, *e.g. Siemens Bldg. Techs., Inc.,* 345 N.L.R.B. 1108, 1108 n.5 (2005); *Progressive Elec., Inc.*, 344 N.L.R.B. 426, 426 n.2 (2005), enforced, 453 F.3d 538 (D.C. Cir. 2006); *Randell Warehouse of Arizona, Inc.*, 330 N.L.R.B. 914, 914 n.2 (2000); *G.H. Bass Caribbean, Inc.*, 306 N.L.R.B. 823, 823 & nn.1-2 (1992). Indeed, members of this Court have made the same kind of choice. See, *e.g.*, *Sabri* v. *United States*, 541 U.S. 600, 611 (2004) (Thomas, J., concurring in the judgment) ("[U]ntil this Court reconsiders its precedents, and because neither party requests us to do so here, our prior case law controls the outcome of this case."); *Runyon* v. *McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring) ("For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided."). Some might view the actions of the Board's current members that petitioner decries as models of the responsible and restrained exercise of governmental authority.[27]

[27] As petitioner points out (Br. 33), when the term of one member of a delegee group expires, the Board has generally opted to reconstitute the delegee group rather than issue decisions from the remaining two members. But the Board's practice of reconstituting a delegee group when that is an option does not create a requirement to that effect when no such rule appears in the statute.

Moreover, the current Board has refrained from deciding cases raising new issues when the two members do not agree on their proper resolution. See Susan J. McGolrick, *Two-Member NLRB Continues Past Two-Year Point, Will Get Supreme Court Review*, Daily Labor Rep. (BNA) No. 10 at S-11 (Jan. 19, 2010); Susan J. McGolrick, *Board's Case Inventory Not Ballooning Despite Three Vacancies Since December 2007*, Daily Labor Rep. (BNA) No. 122 at A-9 (June 25, 2008). In so doing, the current members are preserving such issues for a more complete Board to consider and decide. A delay in resolving that limited class of cases is preferable—at any rate, Congress and the full Board could have thought—to a delay in deciding all the cases that have come before the Board in the last 25 months.

3. Petitioner admits (Pet. Br. 36-37) that Congress may enable the Board to exercise its authority when it has three vacancies. But that is exactly what Congress did in 1947 when it amended Section 3(b) of the NLRA to include both the delegation and the group quorum provisions, and Congress should not have to replay that decision. If, during the two years in which the Board has operated with only two members, Congress had changed its mind about the wisdom of the scheme it put in place in 1947, Congress could have amended Section 3(b) to reflect its new position. Congress did not do that, nor did it in any other way express displeasure with the Board's approach. This case is therefore governed by the existing provisions in Section 3(b), which allow the two current Board members to exercise the Board's powers as a two-member quorum of a group to which the Board delegated all of its powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

Mar. 4, 2003

QUORUM REQUIREMENTS

The National Labor Relations Board may issue decisions even when only two of its five seats are filled, if the Board, at a time when it has at least three members, delegates all its powers to a three-member group and the two remaining members are part of this group and both participate in the decisions.

Memorandum Opinion for the Solicitor
National Labor Relations Board

Your office has asked for our opinion whether, having delegated all of its powers to a group of three members, the National Labor Relations Board ("Board") may issue decisions and orders in unfair labor practice and representation cases once three of the five seats on the Board have become vacant.[1] We believe that the Board may issue such decisions and orders if the two remaining

[1] Letter for Jay Bybee, Assistant Attorney General, Office of Legal Counsel, from Henry S. Breiteneicher, Acting Solicitor, National Labor Relations Board, *Re: Request for OLC Opinion* (May 16, 2002) ("Board Letter"). In accordance with our Office's policies, the Board has agreed to be bound by the present opinion. *Id*. at 7.

members are part of the three-member group to which the Board delegated all of its powers and if they both participate in such decisions and orders.

I.

The Board consists of five members, who are appointed by the President with the advice and consent of the Senate and serve staggered terms of five years. 29 U.S.C. § 153(a) (2000). The Board may "delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* § 153(b). Although a "vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board," the Board is subject to quorum requirements: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to" the provision on delegation to groups of three or more members. *Id.*

The "primary function of the Board is to adjudicate any contested issues that arise in . . . unfair labor practice and representation cases, i.e. to issue final decisions and orders in the cases, usually after an initial or recommended decision has been issued by an administrative law judge (in unfair labor practice cases), or by a hearing officer or regional director (in representation cases)." Board Letter at 3-4 (footnotes omitted); *see* 29 U.S.C. §§ 158, 159 (2000). As a matter of prudence, when the membership on the Board has fallen to two members, the Board has not issued decisions and orders in such cases. Board Letter at 2. The Board has not attempted to resolve whether a Board with three serving members could delegate its powers to itself as a three-member group and, when the membership of the

Board and of the group fell to two, continue to issue decisions and orders on the theory that a quorum of two for the three-member group would remain. *See id.* at 2-3.[2]

II.

In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.

A.

The statute permits the Board to "delegate to any group of three . . . members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). In the proposed arrangement, the three remaining members of the Board would constitute themselves a "group" of the Board and would delegate to that group "all of the [Board's] powers." The statute further declares that, where the Board has delegated power to a group of three or more members, a quorum of the group shall be two members. *Id.* The provision for a two-member quorum of such a group is an express exception to the requirement that a quorum of the Board shall be three members: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group desig-

[2] The Board Letter might be read to leave open the possibility that the last two members, even without a delegation from three members, could act as a group with a two-member quorum. Because only "[t]he Board is authorized to delegate to any group of three or more members any or all of [its] powers" and "three members of the Board shall, at all times, constitute a quorum of the Board," 29 U.S.C. § 153(b), it is unclear how the remaining two members could take action in those circumstances.

nated" by the Board. *Id.* Moreover, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise *all* of the powers of the Board." *Id.* (emphasis added).[3] We therefore conclude that the plain terms of section 153(b) provide that the Board could form a "group" that could exercise all of the Board's powers as long as it had a quorum of two members.

There is judicial authority for reading this statute to mean that the departure of one member of a three-member group designated by the Board would not prevent the remaining two members from acting. In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit upheld the decision of a three-member group when one member's resignation had become effective on the day that the group's decision had been issued. The court ruled that even if the resignation precluded the member from taking part in the decision, "a decision by two members of the panel would still be binding." *Id.* at 122. The court relied specifically on section 153(b)'s provision that two members of a group to which the Board has delegated powers shall constitute a quorum. *Id.* (referring to section 153(b) as section 3(b) of the National Labor Relations Act). In defining the term "quorum," the court drew an analogy to cases where courts having three members

[3] In the construction of an Act of Congress, "unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1 (2000). Thus, the provision under which "[a] vacancy in the Board shall not impair the right of the remaining members," 29 U.S.C. 153(b), also applies to more than one vacancy, as long as the quorum requirement is met. *Cf. Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (interpreting term "vacancies").

"have issued decisions by a quorum of two judges when the third died or was ill." *Id.* (citations omitted). In these cases, "[c]ourts have interpreted 'quorum' to mean the 'number of the members of the court as may legally transact judicial business.'" *Id.* (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)). Applying the analogy to the Board, the Ninth Circuit held that "[u]nder the view that 'quorum' means the number of members that may legally transact business, the Board's decision in this case is valid . . . because a 'quorum' of two panel members supported the decision." *Id.* The resignation of one member thus did not take away the remaining members' power to act.

We note that the legislative history of the statute, though far from exact on this point, is consistent with the view that delegations to groups of members may be used to ensure the Board's capacity to accomplish its business—a capacity that would otherwise be destroyed in the circumstances you have posited. The provision on delegations to groups of three or more members was first enacted in 1947 as part of the Taft-Hartley Act. The bill, as passed by the House, provided for a Board of three members—the same number as under prior law. *See* 93 Cong. Rec. 3549 (1947). The Senate bill called for expanding the Board to seven members, of whom four would be a quorum, and allowing delegation to any group of three members, of whom two would be a quorum. *See* S. Rep. No. 80-105, at 33 (1947). The purpose of this arrangement was to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with the problems of

administration[,] personnel, expenditures, and the preparation of the budget." *Id.* at 8. The conference committee, without giving any reasons, settled on a Board of five members, but retained the provisions for delegations to groups of three. H.R. Conf. Rep. No. 80-510, at 37 (1947). The intent thus seems to have been generally to enable the Board to handle more cases by dividing itself into panels. As the District of Columbia Circuit declared in a case upholding the National Mediation Board's delegation of its authority to a single member expected to remain in office, "it would seem that if the [National Mediation] Board can use its authority to delegate in order to operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1340 n.26 (D.C. Cir. 1983) ("*Yardmasters*"). [4]

B.

We recognize that, here, the Board would be creating a three-member "group" with the intent that it operate as a two-member group upon the departure of the third member. In *Photo-Sonics*, where the Ninth Circuit up-

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[4] *But cf. Hunter v. National Mediation Board*, 754 F.2d 1496, 1498 n.1 (9th Cir. 1985) (because the final administrative action in the case was taken by a quorum of the NMB, the court does not "reach the question of the limits of NMB authority to delegate powers in the event of . . . vacancies" and "adopt[s] the rationale of *Yardmasters* only insofar as necessary for [the] conclusion that interim actions by [the single Board member] did not affect the ultimate validity" of the NMB's action); *Scheduled Skyways, Inc. v. National Mediation Board*, 738 F.2d 339, 341 (8th Cir.) (the "question of one-member certification" had become moot, and the court did not reach the issue), *appeal dismissed*, 746 F.2d 456 (1984).

held the decision of a group whose membership had fallen to two, the Board evidently had not created the three-member group with the intent that it function with only two members, and there appears even to have been a dispute whether in fact only two members of the group had participated in the decision. 678 F.2d at 122. Furthermore, in *Photo-Sonics*, the Board as a whole continued to have four members, even after one member of the "group" resigned. *See* 254 Decisions and Orders of the National Labor Relations Board, at III (1982). Here, the Board itself would lack its quorum of three members, and the proposed arrangement would be designed with the purpose of dealing with that situation.

Nevertheless, the statute provides that once a delegation is made to a group of three or more members, the quorum of the group becomes two. It imposes no requirement that the group continue to have three members, as long as the two-member quorum continues. Furthermore, even if the three-member quorum of the Board as a whole no longer exists, a prior delegation of the Board would remain valid, because a vacancy in the position of a delegating authority does not invalidate prior delegations of institutional power by that authority. *See, e.g., Yardmasters*, 721 F.2d at 1343; *Champaign County v. United States Law Enforcement Assistance Administration*, 611 F.2d 1200, 1207 (7th Cir. 1979); *but see Yardmasters*, 721 F.2d at 1346-47 (Wald, J., dissenting). In addition, when the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a "group" in cases where one member will be disqualified, and then proceeding to a decision with a quorum of the two members able to participate. Board Letter at 5-6.

This practice suggests that three-member groups may be constituted even when it is foreseen that only two members will actually participate in a decision.

We also recognize that our conclusion arguably is in tension with dictum in *Yardmasters*. There, a divided panel of the District of Columbia Circuit held that a single member of the National Mediation Board ("NMB"), acting under a delegation, could exercise the powers of that body when vacancies on the NMB temporarily had deprived it of its statutory quorum. The court ruled that the statutory provision allowing for delegation did not limit the powers that could be delegated; that the loss of a quorum on the NMB did not vitiate the delegation, because the statute provided that vacancies on the NMB would not affect the powers of the remaining members; and that the delegation did not conflict with the quorum requirement, because the statutory provision on delegation provided an independent mode for the NMB to conduct its business, apart from transacting business at NMB meetings. In answering the dissenting judge's argument that a single member could abuse the powers vested in the NMB, the court stressed that, "[u]nlike the National Labor Relations Board, the [NMB] is not principally engaged in substantive adjudications" and "does not adjudicate unfair labor practices or seek to enforce individual rights under [its governing statute]." 721 F.2d at 1345. The court might thus be understood to have disapproved of the use of delegations to deal with the lack of a quorum where an agency exercises the sort of substantive power that is vested in the Board. The court, however, did not analyze the statute applicable to the Board, and, under this statute, there is a separate *quorum* requirement for a three-member group. The

arrangement that would be used to deal with vacancies on the Board, therefore, would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum. The possible abuse of the delegation power that the dissenting judge raised in *Yardmasters*, and the majority sought to avoid, would not arise under the statute governing the Board.

M. EDWARD WHELAN III

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APPENDIX B

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

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

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 Board is also authorized to delegate to its regional directors its powers under section

159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

2. 29 U.S.C. 153 (Supp. I 1935) provides in pertinent part:

National Labor Relations Board; creation and composition; annual reports. (a) There is created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be compose of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each except that any

individual chosen to fill a vacancy shall be appointed for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

* * * * *