No. 24-138

In the
Supreme Court of the United States

HOSPITAL MENONITA DE GUAYAMA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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The Board's response is an apt demonstration of the need to vacate the D.C. Circuit's judgment in light of this Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244, 2261 (2024). Rather than engage with the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, the applicable statute, the Board repeatedly cites to outdated opinions deferring to the Board's legal interpretations to claim a broad grant of authority from Congress through the Act. What it does not cite for this proposition is the Act itself. Given this Court's intervening decision in *Loper Bright* requiring courts to decide legal questions by applying their own judgment (*i.e.*, without blind deference to the agency),[1] Petitioner respectfully requests this Court to grant certiorari, vacate the

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[1] The Board's assertion that Petitioner no longer challenges whether the Board's decision to restore an irrebuttable presumption reflected reasoned decision-making is incorrect. *See* BIO. 12. The Petition's central issue is whether the Board's current iteration of the successor bar is improper under *Loper Bright*. Pet. 10-15. The lack of reasoned decision-making is a fundamental part of that analysis. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024)("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is…to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," … and ensuring the agency has engaged in 'reasoned decisionmaking'" (internal citations and quotation marks omitted)). Regardless, the reasonableness of the decision-making is at issue only if the Board has the authority to act.

D.C. Circuit's judgment, and remand for further consideration of the merits in light of *Loper Bright*.

I. The D.C. Circuit Incorrectly Deferred to the Board.

Rather than engage with Petitioner's argument, the Board simply asserts the D.C. Circuit did not rely on *Chevron*. BIO. 17; *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This is incorrect.

The use of the term "*Chevron*" is not dispositive as to the issue. The D.C. Circuit deferred to the Board to interpret a doctrine the latter treated as law. *See* App. 22-23 (deferring to agency policy and stating permissibility under statute, good reason, and *agency's belief* that policy is better suffices to uphold agency's change in course[2]); *N.L.R.B. v. Lily Transportation Corp.*, 853 F.3d 31, 39 (1st Cir. 2017) (stating successor bar "is a legal rule, not a factual finding"). But such deference, no matter what it is called, is not permitted under *Loper Bright* or the APA. *Loper Bright Enterprises*, 144 S. Ct. at 2261 (APA "prescribes no deferential standard for courts to employ" in answering legal questions when reviewing agency action). Regardless, there is no real doubt that the appellate court relied on *Chevron* or, at the very least, *Chevron*-based reasoning, to draw its conclusion.

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[2] This standard directly contradicts this Court's determination in *Loper Bright* that an agency's "permissible" interpretation of a statute does not warrant deference when deciding questions of law. 144 S. Ct. at 2266.

A. The Majority Opinion Employed *Chevron* Deference.

In upholding the Board's successor bar, the D.C. Circuit did not conduct a *de novo* review of the NLRA; rather, it relied on so-called Board precedent. *See* App. 22 ("Lest there be any confusion here, we want to make it clear that, *in reaching its decision in this case, the Board adhered to established precedent. The Board's decision* in *UGL-UNICCO*,[3] which *controls the disposition of this case*, was issued 13 years ago and has been followed ever since." (emphasis added)). Indeed, the D.C. Circuit's majority opinion demonstrates substantial deference to the Board, repeatedly citing *Lily Transportation* and quoting a portion of that case explicitly relying upon *Chevron*. *Compare* App. 29 ("However, the First Circuit handily upheld the successor bar, seeing 'no cause to doubt that the Board's position … is within the scope of reasoned interpretation [of the NLRA].'" (alteration in original)), *with N.L.R.B. v. Lily Transportation Corp.*, 853 F.3d 31, 38 (1st Cir. 2017) ("We see no cause to doubt that the Board's position taken here is within the scope of reasoned interpretation and *thus subject to judicial deference under Chevron*…." (emphasis added)). The completed sentence cited by the D.C. Circuit makes the reliance on *Chevron* clear. And, even if it did not, the D.C. Circuit's expressed deference to the Board's purportedly "reasoned interpretation *of the NLRA*," demonstrates the abdication of judicial responsibility

[3] Notably, *UGL-UNICCO Serv. Co.*, relies on *Chevron* deference to justify the Board's change from a rebuttable successor bar to a conclusive one. 357 NLRB 801, 805, n.15, 806, n.22 (2011).

rejected in *Loper Bright*. *See* App. 29 (brackets omitted); 144 S. Ct. at 2261 ("The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.").

Similarly, the rule of law cited by the appellate court was a direct quote from *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). App. 23 (citing *Encino Motorcars* for proposition that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change"). *Encino*, in turn, cited *Chevron* and *National Cable & Telecommunications Assn. v. Brand X Internet Services*, which also relied upon *Chevron* deference, as the bases for the D.C. Circuit's cited rule. *Encino Motorcars*, 579 U.S. at 221; *National Cable,* 545 U.S. 967, 981–982 (2005). This is the standard the Court considered and overruled in *Loper Bright*. 144 S. Ct. at 2254 ("Since our decision in *Chevron*…, we have sometimes required courts to defer to 'permissible' agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.").

The D.C. Circuit's avoidance of the term "*Chevron*" in the majority opinion does not make its reliance on the defunct doctrine any less real. *Chevron* deference by any other name is still *Chevron* deference.

B. The Concurring Opinion Makes the Court's Use of *Chevron* Deference Clear.

Should any doubt regarding the appellate court's dependence on *Chevron* remain, Judge Katsas made that reliance clear in his concurring opinion. There, Judge Katsas plainly stated that the opinion was required under *Chevron*; he took "no position on whether the bar would survive under *de novo* review in a post-*Chevron* world." App. 36.

The Board's Opposition points to a purported finding by the First Circuit in *Lily Transportation* and by the D.C. Circuit in the instant matter that the "Board's decision to apply the successor bar was adequately explained and consistent with this Court's decisions." BIO. 19; *see* BIO. 8. But, as recognized by the First Circuit, the successor bar is a legal doctrine. *Lily Transportation*, 853 F.3d at 39. As a legal doctrine, the successor bar is subject to judicial review. *Loper Bright Enterprises*, 144 S. Ct. at 2261 ("The APA…specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action" (citing APA § 706; emphasis added by the Court)). An "adequate" interpretation, therefore, is insufficient under *Loper Bright*; rather, the interpretation must be the "best." 144 S. Ct. at 2266.

Regardless of how the appellate court characterized its deference to the Board, there is no real argument that it did not rely on *Chevron* deference (or at least impermissible *Chevron*-esque deference) to uphold the Board-created successor

bar.[4] Granting certiorari, vacating the decision below, and remanding for reconsideration of the decision (GVR) in light of *Loper Bright* is therefore appropriate. 28 U.S.C. § 2106 (the "Supreme Court … may … vacate … any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and … require such further proceedings to be had as may be just under the circumstances").

II. The Board's Purported Broad Grant of Authority Is Not Statutorily Based and Therefore Contravenes *Loper Bright*.

Throughout its Brief in Opposition, the Board repeatedly refers to its "authority," BIO. 3-4, 8, 9-11, 15, 18, calling it, among other things, a "statutory grant of discretion," *id.* at 9, "statutory authority," *id.* at 15, a "congressional grant of discretion," *id.* at 18, and "congressionally conferred discretion," *id.* at 10, without once citing to the NLRA — *i.e.*, the statute Congress created — to support its claims of boundless authority. Congress, not the Board, has declared this country's labor policy, which is to "mitigate and eliminate" certain "substantial obstructions to the free flow of commerce" and their causes "by encouraging the practice and procedure of collective bargaining *and by protecting the exercise by workers*

[4] The Board's reliance on the D.C. Circuit's denial of Petitioner's Motion for Rehearing as indicative of the court's position regarding whether *Loper Bright* applied to its decision is misplaced. *See* BIO. 18. The denials of the Petitioner's Motions for Rehearing occurred on May 7, 2024, App. 39-42, and the denial of the Petitioner's Motion to Stay Issuance of the Mandate occurred on June 11, 2024, *id.* at 43-44, before this Court's June 28, 2024 decision in *Loper Bright*.

of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (emphasis added). While ignored by the Board, its authority to enforce the NLRA is subject to the national labor policy declared by Congress. The Board can point to no statutory authority supporting its successor bar.[5]

The Board uses this self-proclaimed power to develop policy to imply immunity from judicial review. *Loper Bright* countenances no such exemption.

A. The Only Appellate Court to Consider the Successor Bar prior to *Chevron* Rejected an Irrebuttable Presumption.

The Board gives short shrift to *Landmark Int'l Trucks, Inc.* v. *N.L.R.B.*, 699 F.2d 815, 818 (6th Cir. 1983)—the only court that determined the legality of the successor bar pre-*Chevron*. BIO. 16. Rather than address the Sixth Circuit's holding in *Landmark*, the Board claims *Landmark* addressed "a previous iteration of the successor bar doctrine that…is not at issue here." BIO. 16. This argument is patently incorrect. It ignores the Sixth Circuit's consideration

[5] As recognized by Judge Katsas, the NLRA provides only one bar—a contract bar. App. 34 (NLRA "sets forth one—and only one—time bar for challenges to the continuing support of a previously certified union, which runs for one year after any valid election. *Id.* § 159(c)(3); *see also id.* § 159(e)(2). Under normal principles of statutory construction, the express imposition of that time bar may preclude, by negative implication, the imposition of others.").

of the Board's claim that "regardless of how long the union has been certified, a successor which 'voluntarily' recognizes the union may not withdraw recognition for a reasonable time, regardless of the fact that it may have reasonable, good faith doubts about the continuing majority status of the union." *Landmark Int'l*, 699 F.2d at 818. In *Landmark*, the Board expressly argued for an irrebuttable presumption of the union's majority status, the same rule that is at issue in this case.

Ultimately, the Sixth Circuit addressed *and rejected* the same irrebuttable presumption the Board puts forward here, finding "no basis for such a holding." *Landmark Int'l*, 699 F.2d at 818. The *Landmark* court specifically rejected the false equivalency drawn by the Board in the instant matter, BIO. 10, between the certification bar and the successor bar.[6] *See Landmark Int'l*, 699 F.2d at 818. In considering a proposed irrebuttable presumption, the Sixth Circuit found there "is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive," reasoning that "[i]n the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship," but,

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[6] The Board points to this Court's decisions in *Allentown Mack*, 522 U.S. 359 (1998) and *Brooks v. N.L.R.B.*, 348 U.S. 96 (1954), both of which were determining the appropriateness of a certification bar, for the proposition that adoption of an irrebuttable successor bar is within the Board's authority. BIO. 10. As discussed by the Sixth Circuit in *Landmark Int'l*, and as argued below, the two bars are readily distinguishable.

"where the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union." *Id.* (noting, "[w]hile the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing."); *accord N.L.R.B. v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 279 (1972); *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 37 (1987).[7]

The Board's reliance on *Allentown Mack Sales & Serv. v. N.L.R.B.*, 522 U.S. 359 (1998), and *Brooks v. N.L.R.B.*, 348 U.S. 96 (1954), is misplaced. The irrebuttable presumption the Court discusses in both of those cases is the certification bar, which has at least some basis in the election bar expressly endorsed by the NLRA. *Compare Allentown Mack*, 522 U.S. at 378 (discussing "irrebuttable presumption of majority support for the union during the year following certification"), with 29 U.S.C. § 159(c)(3)(disallowing elections for one year following a valid election). In any event, the certification bar occurs when the relationship between the union and the employees is new. That is not the case here, and the logic relied upon in *Brooks* and *Allentown Mack* does not apply. Moreover, the employer in *Allentown Mack* was permitted to provide, and the Board and this Court considered, evidence of its doubt as to majority support. *See* 522 U.S. at 368-70. The

[7] *Fall River* endorsed the then-existing successor bar rule, which adopted a rebuttable presumption of majority status. *See* 482 U.S. at 41, n.8.

Hospital in the instant matter was not afforded that opportunity. App. 125.

Contrary to the Board's assertions, its claimed authority to create an irrebuttable successor bar does not find its basis in statute or judicial review through caselaw. The alleged authority was granted through impermissible deference alone.

B. The Court has Remanded for Further Consideration under *Loper Bright* At Least One Other Decision Involving the Board's Use of Its Self-Proclaimed Discretion.

This Court has granted at least one petition for certiorari where the appellate court deferred to the Board's alleged authority. *See United Nat. Foods, Inc. v. N.L.R.B.*, 144 S. Ct. 2708 (2024) (granting petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *Loper Bright*). In *United Natural Foods*, the Fifth Circuit applied *Chevron* deference, ultimately finding the "Board's order [was] a permissible interpretation of the NLRA," and, accordingly must be upheld. 66 F.4th 536, 548 (5th Cir. 2023), *cert. granted, judgment vacated,* 144 S. Ct. 2708 (2024).

As in *United Natural Foods*, the D.C. Circuit deferred to the Board, employing a similar, if not identical, standard to the one used by the Fifth Circuit. App. 23 (new policy need only be permissible under the statute). As with *United Natural Foods*, this case warrants a GVR.

C. The Board Fails to Identify Adequate Statutory Authority to Implement an Irrebuttable Presumption of Majority Status with respect to the Successor Doctrine.

While the Board is correct that it has the authority to develop rules to enforce national labor policy, that authority is subject to *Loper Bright* review and, thus, must have some basis in the implementing statute. *Loper Bright Enterprises*, 144 S. Ct. at 2244; *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) ("[W]e start where we always do: with the text of the statute.") (quoting *Van Buren v. United States*, 593 U.S. 374, 381 (2021)). Here, the NLRA prescribes the Board's rulemaking authority. Specifically, the NLRA provides the Board authority to create rules and regulations; it does not give *carte blanche* to create those rules and regulations by any method. Instead, the NLRA gives the Board authority to "make…, *in the manner prescribed by subchapter II of chapter 5 of Title 5 [i.e., the APA]*, such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. § 156 (emphasis added). The Board, however, did no such thing. The successor bar doctrine is not a rule or regulation promulgated under the APA. It is, instead, a Board-created doctrine that has vacillated between employing an irrebuttable and rebuttable presumption of majority status. Pet. 6, n.2.

Even if the Board is entitled to create rules outside of the APA's process, a rule adopted by the

Board is "judicially reviewable for consistency with the Act, and for rationality." *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 501 (1978); *see Loper Bright*, 144 S. Ct. at 2261. The current iteration of the successor bar is inconsistent with the Act. The statute is clear, and its plain meaning leads to the conclusion that employers are required to bargain with representatives designated by a majority of employees. *See* 29 U.S.C. § 159(a). Without majority status, there is no obligation to bargain. *See id.*

When deference to the Board-created successor bar doctrine is set aside, *de novo* review of the statute provides a different result than the one reached below. Namely, presuming that a union still enjoys majority status when there has been no indication of a change in that status is rational and consistent with the Act. Assuming that status has not changed in the face of evidence to the contrary, is neither rational nor consistent with the Act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, vacate the decision of the D.C. Circuit, and remand for further consideration of the merits in light of *Loper Bright Enterprises v. Raimondo*.

Respectfully submitted,

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