

Nos. 12-1684 & 12-1783

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NESTLÉ DREYER'S ICE CREAM CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

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THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

Dreyer's has requested oral argument. The Board agrees that argument would be of assistance to the Court.

In its opening brief, Dreyer's argues that the President's recess appointments to the Board on January 4, 2012, were invalid, and therefore the Board lacked a quorum of validly appointed Board members to enter its final order in this unfair-labor-practice case. The issue of whether the Board had a proper quorum during the relevant time period implicates significant constitutional questions concerning the President's power to make recess appointments. Dreyer's also challenges the merits of the Board's decision in this case. Accordingly, if argument is held, the Board requests that the parties each be given 30 minutes.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Nestle Dreyer's Ice Cream Company to review a Decision and Order of the National Labor Relations Board issued on May 18, 2012, and reported at 358 NLRB No. 45. (A.428-30.)¹ The Board found that Dreyer's unlawfully refused to bargain with Local 501, International Union of Operating Engineers, which the Board certified as the bargaining representative of a unit of Dreyer's employees. (*Id.*) The Board has cross-applied for enforcement of its Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(e)&(f). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because Dreyer's operates a facility in Maryland. Dreyer's filed its petition for review on May 23, 2012, the Board its cross-application on June 15, 2012. Both were timely; the Act places no time limitations on such filings.

The Board's unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 31-RC-66625), in which

¹ "A." references are to the joint appendix. References before a semicolon are to the Board's findings; those following are to the supporting evidence. Dreyer's opening brief is referred to as "D-Br." and amici's brief is referred to as "A-Br."

Dreyer's contested the Board's certification of the Union as the employees' collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).²

² *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy's* holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945)(absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993)(once a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982)(rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was

ISSUE STATEMENT

1. **Quorum/Recess Appointments.** Whether the President's recess appointments of three Board Members during a 20-day period in which the Senate had declared by order that no business would be conducted occurred within a "Recess of the Senate" under the Constitution's Recess Appointments Clause.

2. **Unit Determination.** The issue before the Court is whether the Board acted within its discretion in determining that a unit of Dreyer's maintenance employees constitutes an appropriate unit for collective bargaining. If so, then the Board properly found that Dreyer's unlawfully refused to bargain with the Union following its victory in the representation election.

pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981)(the Board lacks jurisdiction to adjudicate a union's unfair labor practice claim when an earlier court decision implicitly rejected that claim). Should the Court disagree with the Board's unit determination, the Board asks that the case be remanded for further processing consistent with the Court's opinion. *See NLRB v. Local 347*, 417 U.S. 1, 8 (1974) (holding appeals court should have remanded question of remedy to the Board rather than deciding the issue).

STATEMENT OF THE CASE

The Board found that Dreyer's violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1), by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit. Dreyer's does not dispute that it refused to bargain with the Union. However, Dreyer's contests the Board's certification of a unit made up exclusively of maintenance workers and also contends that the Board lacked a quorum to issue its Decision and Order. If the Court upholds the Board's certification of the Union and rejects the challenge to the validity of the Board's Order, the Order is entitled to enforcement.

STATEMENT OF THE FACTS

I. The Board's Findings of Fact

A. Background: Dreyer's Operations

Dreyer's manufactures ice cream products at its Bakersfield Operations Center (BOC) in California. (A.404; 12,14.) The Board certified a unit of 113 permanent maintenance employees who work at the BOC. (A.428.) Maintenance workers have significant technical knowledge in mechanics, electronics, and computers, and their primary responsibility is to keep the BOC's equipment running. (A.409; 88,192,267-68,280-81.) This includes the equipment used by production employees to make the ice cream, as well as the HVAC system, the boilers, the alarm and fire systems, the lighting, and the plumbing.

(A.48,86,287,300.) Maintenance workers also resurface the parking lots and paint walls. (*Id.*)

As relevant here, Dreyer's categorizes its employees as either maintenance workers or production workers. Both groups of employees work three shifts, with BOC operations continuing 24 hours a day, 7 days per week. (A.404; 26-27.) The bulk of the manufacturing work is done on the BOC's 26 production lines. (A.404; 36.) In addition, the BOC includes a dry warehouse, a distribution center, a research and development center, and several maintenance shops. (A.404-05; 20,48,53-54,85.)

B. Production workers make ice-cream products

BOC employs 578 permanent production workers. (A.404; 26-27.) These employees work as ice cream maker I, ice cream maker II, mix makers, warehouse specialists, and palletizing specialists. (A.405; 42,53,154-55.) The primary responsibility of the production employees is to manufacture ice cream products. (A.409; 280-81.)

Production employees in the pre-manufacturing section order ingredients for ice cream and mix the ingredients according to computer-generated recipes. (A.404,406; 22-23,30,43,108-10,114.) They use a computer to send the mix to a storage tank and then on to the production lines, where other production employees operate the machinery that manufactures and packages products. (A.406;

43,109,112.) The packaged ice cream goes by conveyer belt to the palletizing area, where other production employees stack it on pallets to be moved to cold storage in preparation for distribution. (A.404; 40,289-90.)

Most production employees work on a specific product line. (A.404; 43,86.) Every third shift, these employees take apart all the machines on their line and clean, sanitize, and reassemble them. (A.407; 209.) Maintenance workers stand by to make any necessary repairs. (*Id.*)

Production employees may attempt to make minor repairs to the equipment when problems arise, but most equipment problems are beyond their skill set. (A.407; 232,267-68,281.) Dreyer's does not want production employees making complicated repairs because they lack the requisite expertise. (A.407; 238.)

C. Maintenance workers keep the equipment running

Dreyer's maintenance employees work as entry maintenance mechanics, maintenance technicians, craftworkers, process technicians, group leaders, and control technicians. (A.406; 153,203.) As noted above, the primary responsibility of maintenance employees is to keep the equipment running. (A.409; 280-81.) Most maintenance employees are assigned to a specific business unit, where they provide support to various production lines. (A.404-05; 35,37,43,103.) Others work in the utilities group, traveling throughout the BOC to perform maintenance on electrical, heating, and ventilation systems. (A.405; 86.) Finally, some

maintenance employees work in one of the maintenance shops, such as the machine shop, which fabricates parts for the production line. (A.405; 48,53-54.)

Preventative maintenance work must be done on all machines, and a computer system determines when. (A.406; 49.) When a maintenance worker begins his shift, he consults with a mechanic from the prior shift to determine which tasks still need to be completed. (*Id.*) Once a week, the first shift on each production line starts late while a maintenance worker does preventative maintenance on that line's machines. (A.407; 240.) The production workers watch to better understand the equipment. (A.407; 240-42.)

Maintenance workers also respond to calls from production workers who have identified problems with the factory's equipment. (A.407; 233,236,281.) For example, the production workers in pre-manufacturing will call a maintenance worker if the computer that generates the ice cream recipes malfunctions. (A.406; 203,259.) The production workers will call a maintenance worker if there is a line jam that the production worker cannot resolve. (A.407; 233,236,238.) And if the conveyer belts stop working in the palletizing area, the production workers will contact maintenance to repair the equipment. (A.407; 291.)

In these circumstances, the maintenance employees generally must obtain permission from a maintenance supervisor before beginning the repair. (A.406; 76-77.) Then the maintenance employee works to identify the cause of the

problem, with input from the production employee. (A.408; 245,281-82.) For example, the production worker may explain the problem and any routine attempts he made to resolve it. (A.281-82.) But the maintenance worker diagnoses the problem and makes the necessary repairs. (A.407; 280-82.)

Maintenance employees spend about 90% of their time performing skilled maintenance work. (A.408; 213-14,268.) The overwhelming majority of repairs are performed by maintenance workers, as production workers lack the appropriate skills. (A.408-09; 267-68.)

D. Production and maintenance employees work in different departments, do different work, and have different supervisors, skills, and pay rates

The BOC is organized into “leadership teams,” each of which has a manager who reports directly to the plant manager. (A.405; 29.) Dreyer’s put all maintenance employees on the technical operations team and all production employees on either the pre-manufacturing team or the manufacturing team. (A.405; 34.)

Because they are on different teams, maintenance and production employees have separate supervision. (A.405; 76.) Under Dreyer’s management structure, the only common supervisor of maintenance and production employees is the plant manager. (A.405; 106.) Accordingly, maintenance and production employees are evaluated by different supervisors. (A.412; 177.)

Dreyer's requires maintenance employees to have significant technical knowledge of mechanics, electronics, and computers. (A.409; 88,192.) To be hired, maintenance employees must have 2 years experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing equipment; 1 year experience in computerized maintenance management; and 5 to 7 years experience in industrial high speed maintenance. (A.409; 263-64.) All maintenance employees must pass a written test assessing their skills in these areas. (A.409; 270.) In addition, Dreyer's requires that some maintenance employees be certified by the Refrigerating Engineers & Technicians Association (RETA), which involves a series of classes and a test. (A.409; 173.)

Dreyer's does not require its production employees to have such expertise. (A.409; 88-89.) Because they are less skilled, Dreyer's does not permit production employees to operate the equipment in the machine shop. (A.409; 89.) Some, such as the mix makers, are required to have a pasteurization license. (A.409 n.8; 174-75.) No maintenance employee is required to have that license. (A.409; 174.)

Dreyer's pays production employees \$15 to \$22 per hour. (A.409; 82.) Because maintenance employees have greater skills, Dreyer's pays them between \$20 and \$30 per hour. (A.409; 81-83,88,265,156.)

Dreyer's requires maintenance employees to work 10-hour shifts, while it assigns production employees to 8-hour shifts. (A.411; 77-78.) This impacts

overtime, holiday, and sick pay. Production employees accrue overtime after working 8 hours, maintenance employees after 10. (A.412; 147-48.) Dreyer's gives both maintenance and production employees 5 sick days per year, but pays maintenance employees for 10 hours per sick day while production workers receive 8 hours per sick day. (*Id.*) The same applies to holiday pay: maintenance employees receive 10 hours of pay while production workers receive only 8. (A.412; 151.) In addition, maintenance employees are paid during their meal break, while production employees are not. (A.411; 77-78.)

Dreyer's requires maintenance employees to provide their own tools. The average tool set costs about \$5,000. (A.420 n.19; 283.) To help offset the cost, Dreyer's gives maintenance employees a tool allowance. (A.411; 79-80.) Production employees receive no such allowance; Dreyer's provides them with the tools they need to make minor adjustments to machinery. (A.411; 80,101-02,216.) Dreyer's provides many maintenance workers, but no production employees, with phones to communicate with each other during the work day. (A.411; 77.)

Dreyer's maintains a formal job bidding system for production employees, but not for maintenance workers. (A.412; 167-68.) Dreyer's maintains separate seniority lists for maintenance and production employees, which are used for shift selection and vacation. (A.411; 92.) Maintenance employees wear distinct shirts that distinguish them from production workers. (A.411; 43-47,82-83.)

Every year, the BOC shuts down for 2 to 4 weeks to clean and make improvements to the facility. (A.410; 217-18.) Dreyer's requires all maintenance employees to work during the shutdown. (A.410; 218.) Only a few production employees – those who volunteer and are chosen – work during the shutdown. (A.410; 218-19.)

E. Production and maintenance workers both use the BOC's common areas, and Dreyer's employment policies apply equally to both

Production and maintenance employees share common parking lots, time clocks, break and lunch rooms, and lockers. (A.411; 121.) They wear the same pants and safety equipment. (A.411; 43-47,82-83.)

The terms of Dreyer's employee handbook – which include EEO, harassment, and other policies – apply to both production and maintenance employees. (A.412; 146.) All employees receive the same benefits, such as health insurance and paid leave. (A.409,412; 150-51,156.) All receive annual performance evaluations. (A.412; 177.) One production and one maintenance employee each attend daily operational review meetings, at which management and the two employees discuss any breakdowns that still need to be addressed. (A.408; 210-11.)

F. Just before the hearing, Dreyer’s restarted its failed cross-training program

In October 2009, Dreyer’s began a Pilot Line project to train some production workers on basic maintenance to keep the lines going, reduce waste, and let maintenance employees focus on more complicated work. (A.410; 35-70.) After 18 months, Dreyer’s ended the pilot because it “hadn’t gained sustainable results.” (A.410; 69-70,217.) The week the hearing was held in this case, Dreyer’s re-started the project. (A.410; 69.) Dreyer’s did not present any evidence about the pilot project’s progress since its reintroduction.

II. The Board Proceedings

A. The Representation Proceeding

The Union filed a petition with the Board seeking a representation election among all permanent maintenance employees at the BOC. (A.1.) Following a hearing, the Regional Director (RD) issued a Decision and Direction of Election finding that the maintenance employees constitute an appropriate unit for collective bargaining and directing an election. (A.402-25.) The RD applied the standard recently elucidated by the Board in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15-16 (2011) (“*Specialty*”), petition for review pending sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 12-1174 (6th Cir. pet. filed Jan. 11, 2012). (A.414-15.) As required by *Specialty*, the RD first applied the traditional community-of-

interest test to determine whether the petitioned-for unit is “appropriate.” (A.416-20.) The RD determined that the maintenance workers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (A.417.)

The RD then addressed Dreyer’s contention that the smallest appropriate unit must include the production employees. (A.420.) The RD explained that *Specialty* requires an employer to demonstrate that the excluded employees share an “overwhelming community of interest” with the employees in the petitioned-for unit, such that there is no legitimate basis upon which to exclude them. (A.415.) Applying the overwhelming community-of-interest test here, the RD found that Dreyer’s failed to show that the production workers share an overwhelming community of interest with the maintenance workers. (A.420-22.)

Dreyer’s requested review of the RD’s decision, again contending that the permanent production employees must be included in the unit. On December 28, 2011, the Board (Chairman Pearce and Members Becker and Hayes) denied the request, finding Dreyer’s had raised no substantial issues warranting review. (A.426.) Member Hayes, who dissented from the Board’s *Specialty* decision, refused to rely on that case but nonetheless agreed that “a unit of maintenance employees is an appropriate unit” because those employees share a community of interest and are “sufficiently distinct” from the production employees. (*Id.*)

The Board conducted a secret ballot election, and the maintenance workers voted for union representation. On January 13, 2012, the Board certified the Union as the exclusive collective-bargaining representative of the maintenance workers.

B. The Unfair Labor Practice Proceeding

Following certification, Dreyer's refused to comply with the Union's bargaining demand to contest the validity of the election. The Union filed an unfair labor practice charge (A.427), and the Board's Acting General Counsel issued a complaint alleging that Dreyer's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5)&(1). The Acting General Counsel subsequently filed a motion for summary judgment. Dreyer's opposed, claiming that production workers must be included in the unit and challenging the recess appointments of three Board members.

III. The Board's Conclusions and Order

The Board (Chairman Pearce and Members Hayes and Griffin) granted the Acting General Counsel's motion for summary judgment, finding that Dreyer's violated the Act by failing and refusing to bargain with the Union. (A.428-30.) The Board found that all representation issues raised by Dreyer's in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (A.428.) In addition, the Board rejected Dreyer's

challenges to the President’s recess appointments, citing *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012). (A.428 n.1.)

The Board’s Order requires Dreyer’s to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A.429.) Affirmatively, the Order directs Dreyer’s to bargain with the Union as the representative of its maintenance employees. (A.429.) The Order further requires Dreyer’s to post a remedial notice and, if appropriate, distribute it electronically. (A.429.)

SUMMARY OF ARGUMENT

1. Dreyer’s first challenges the Board’s authority to issue its May 18, 2012 order, contending that the President lacked authority to make recess appointments of three of the five Board Members in office at the time of that order. Dreyer’s claim is mistaken.

The President made these three recess appointments on January 4, 2012, during a 20-day period in which the Senate had declared itself closed for the conduct of business—a period that is unquestionably a “Recess of the Senate” within the meaning of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. The term “Recess of the Senate” has a well-understood meaning long employed by the Legislative and Executive Branches: the term refers to a break

from the Senate's usual conduct of business, whether that break occurs in the middle of an annual congressional Session, or after the end of such a Session. The available evidence demonstrates that the Senate as a body regarded its 20-day January break to be functionally indistinguishable from other breaks at which the Senate is indisputably away on recess.

Dreyer's is incorrect that the Senate opined that it was not away on recess within the meaning of that Clause. Even if the Senate had so opined, however, Dreyer's is incorrect that the Senate could transform its 20-day recess into a series of short non-recess periods—thereby unilaterally blocking the President from exercising his constitutional recess appointment authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designates “*pro forma* sessions only, with no business conducted.” Moreover, Dreyer's position would upend the carefully calibrated constitutional balance of power between the Senate and the President with respect to presidential appointments—it eliminates Senators' longstanding choice between staying in session to conduct business, including providing advice and consent on presidential nominees, or leaving the Capitol to return to their respective States with the assurance that no business will be conducted in their absence, allowing the President to make recess appointments of only limited duration.

2. Dreyer's maintenance workers chose union representation. Dreyer's has admittedly refused to bargain, claiming it has no obligation to do so because the unit should not have been certified by the Board. Specifically, Dreyer's contends the unit must include the production employees. But the Board reasonably applied the well-accepted community-of-interest test to determine that the maintenance workers constitute *an* appropriate unit for collective bargaining.

After making that finding, the Board found that Dreyer's failed to meet its burden of showing that the production workers share an overwhelming community of interest with the maintenance workers, such that they must be included in order to make an appropriate unit. The Board's application of that heightened standard, recently clarified in *Specialty*, comports with the Board's prior jurisprudence in this area of law. The standard represents a reasonably defensible construction of the Act, which gives the Board broad discretion to make unit determinations.

Dreyer's objects to the *Specialty* test, contending incorrectly that the Board has attempted to hide its announcement of a wholly new standard. The Board did not create a new test, but further elucidated its longstanding test, which focuses on similarities and differences between groups of employees. Dreyer's argues, using terminology different from the Board's, that the differences between the maintenance and production workers are "insignificant." But this contention is at odds with the substantial record evidence showing that the maintenance and

production workers have distinct job functions, skills, supervision, hours, pay, and experience. Dreyer's does not contend that it met its burden of showing the production employees have an overwhelming community of interest with the maintenance employees.

Additionally, Dreyer's erroneously argues that the *Specialty* standard gives improper controlling weight to the extent of unionization. But it is not improper for the Board to first examine the proposed unit, as long as the Board properly scrutinizes that unit using the multifactor community-of-interest test, as it did here. Nor did the Board infringe on the rights of employees to refrain from engaging in union activity, as Dreyer's contends. The production workers retain their statutory rights under the Act whether or not their colleagues unionize.

And Dreyer's speculative argument regarding the size of units that will be certified under the Board's standard should be rejected. The size of the unit is irrelevant so long as the Board certifies a unit that is appropriate under Section 9 of the Act.

ARGUMENT

I. MEMBERS GRIFFIN, BLOCK AND FLYNN HELD VALID RECESS APPOINTMENTS WHEN THE BOARD ISSUED ITS MAY 18, 2012 ORDER

Dreyer's challenges the May 18, 2012, order on the ground that three of the five Board Members in office at the time of that order were not lawfully appointed to their posts under the Recess Appointments Clause. *See* Br. at 18-28. That argument is meritless.

On January 3, 2012, the first day of its current annual Session, the Senate adjourned itself and remained closed for business for nearly three weeks, until January 23. Under the terms of the Senate's own adjournment order, the Senate could not provide advice or consent on Presidential nominations at any point during that 20-day period.³ Messages from the President were neither laid before the Senate nor considered. The Senate passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in its conduct of business with periodic *pro forma* sessions, it ordered that "no business" would be conducted at those times, which involved only a single Senator in the chamber and lasted for literally seconds.

³ The President nominated Terence Flynn to be an NLRB Member in January 2011. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). Sharon Block and Richard Griffin's nominations were submitted in December 2011. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

At the start of this lengthy Senate absence, the NLRB’s membership fell below the statutorily mandated quorum with the end of Craig Becker’s recess appointment term at noon on January 3, 2012, leaving the Board unable to carry out significant portions of its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President exercised his constitutional power to fill vacancies “during the Recess of the Senate,” U.S. Const. art. II, § 2, cl. 3, by appointing three members to the NLRB, ensuring that the Board’s work could continue without substantial interruption.

These recess appointments were valid because the Senate was plainly in “Recess” at the time under any reasonable understanding of the term. Dreyer’s argument to the contrary is rooted in a serious misunderstanding of the meaning and purpose of the Recess Appointments Clause, one that—if adopted by this Court—would substantially alter the longstanding balance of constitutional powers between the President and the Senate.

A. Under the Well-Established Understanding Of the Recess Appointments Clause, the Senate Was Away On Recess Between January 3 and January 23

1. The Recess Appointments Clause confers on the President the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution’s careful balancing of

governmental powers required of a functioning democracy. The Framers gave the President and the Senate shared roles in the ordinary appointment process, *id.* art. II, § 2, cl. 2, but they also acknowledged the practical reality that the Senate could not (and should not) be “oblig[ated] . . . to be continually in session for the appointment of officers.” *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).⁴ The Framers balanced the President’s power of appointment, the Senate’s advice and consent role, and the infeasibility and undesirability of the Senate remaining perpetually in session, by allowing the President to make appointments, albeit of a limited duration, when the Senate is away on recess. The provision for recess appointments thereby frees Senators to return home to their constituents and families rather than maintain “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.⁵ This balance reflected the Framers’

⁴ 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators “would settle in the state where they exercised their functions, and would in a little time be rather the representatives of that, than of the state appointing them”).

⁵ 3 Elliot’s Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining that requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers” would “have been at once burthensome to the senate, and expensive to the public”).

understanding that the President alone is “perpetually acting for the public,” even in Congress’s absence, because the Constitution obligates the President at all times to “take Care that the Laws be faithfully executed.”⁶

The importance of recess appointments is demonstrated by the frequency with which they have been employed. Since the founding of the Republic, Presidents have made hundreds of recess appointments in a wide variety of circumstances: during the Senate’s intersession and intrasession recesses, during long recesses and comparatively short ones, at the beginning and in the final days of recesses, and to fill vacancies that arose during the recesses and those that arose before the recesses. Even as Senate recesses have become comparatively short, Presidents have continued to invoke the Recess Appointments Clause with regularity, thus confirming the Clause as a critical part of the Constitution’s allocation of powers.

Consistent with the firm foundation of recess appointments in historical practice, courts regularly interpret the President’s recess appointment power broadly. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (holding that the recess appointment power extends to an intrasession recess of eleven days, to vacancies arising before the recess, and to Article III

⁶ 4 Elliot’s Debates 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments . . . can be vested nowhere but in the executive”); U.S. Const. art II, § 3.

appointments); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (holding that the power extends to vacancies that arose before the recess and to Article III appointments); *United States v. Allocco*, 305 F.2d 704, 705-706 (2d Cir. 1962) (same).

2. Dreyer’s first suggests that the Recess Appointments Clause permits recess appointments only during intersession recesses, *i.e.*, recesses that occur after the formal end of an annual Session, and that because the Senate was in an *intrasession* recess on January 4, the President’s appointments that day were invalid. Br. 21.⁷

This argument is contradicted by the Constitution’s text, judicial precedent, and the longstanding interpretations of the executive and legislative branches. “[T]he text of the Constitution does not differentiate expressly between inter- and intrasession recesses for the Recess Appointments Clause.” *Evans*, 387 F.3d at 1224. Dreyer’s sole basis for asserting that the Clause is limited to intersession recesses is the Clause’s reference to “the Recess,” rather than “a Recess.” Br. 21.⁸

⁷ The formal end of an annual Session is marked by a specific type of adjournment resolution, calling for adjournment “*sine die*” (without day), or by the default date of January 3 at noon, as provided by the Twentieth Amendment. *See, e.g.*, Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 1-2 & n.5 (Jan. 9, 2012).

⁸ To the extent that Dreyer’s suggests that “*the* Recess of the Senate” refers to a single event, it is plainly wrong. Each Congress generally takes two intersession recesses (one after each session), and many Congresses—including each of the

However, as the Eleventh Circuit explained, “the Framers’ use of the term ‘the’ [does not] unambiguously point[] to the single recess that comes at the end of a Session.” *Evans*, 387 F.3d at 1224. “Instead, . . . ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate’s acts of recessing, that is, taking a break.” *Id.* at 1224-25. Thus, it is unsurprising that the courts addressing this question have refused to confine the President’s recess appointment powers to intersession recesses. *See id.* at 1224-26 (holding that the recess appointment power extends to an intrasession recess of eleven days); *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1375 n.13 (Ct. Int’l Trade 2002) (concluding that the power includes appointments during an intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (Ct. Cl. 1884) (same).

The Executive Branch has long interpreted the Clause to permit intrasession recess appointments, and such a longstanding interpretation, in which Congress has acquiesced, is highly significant in judicial interpretations of the Constitution. *See Evans*, 387 F.3d at 1226; *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 688-90 (1929) (“[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the

first five Congresses—have taken even more. 2011-12 Official Congressional Directory, 112th Cong. 522.

legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.”) (internal quotation marks omitted).

Presidents have routinely made recess appointments during intrasession recesses. *See* Henry B. Hogue, *Cong. Research Serv., Intrasession Recess Appointments* 3-4 (2004) (identifying 285 intrasession recess appointments made between 1867 and 2004).⁹ This practice originated in the nineteenth century and has continued regularly since 1921, when Attorney General Daugherty concluded that the President could make appointments during an intrasession recess of less than one month. *See* 33 Op. Att’y Gen. 20 (1921). Invoking the Senate Judiciary Committee’s own interpretation of “Recess,” and the Clause’s purpose to enable Presidents to keep offices filled, Attorney General Daugherty reasoned that the Constitution permits recess appointments unless “in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” *Id.* at 21-24 (citing S. Rep. No. 58-4389 (1905)). Subsequent executive precedent uniformly follows, and legislative precedent acquiesces in, the Daugherty opinion on this point. *See,*

⁹ Before the Civil War, intrasession recesses were relatively infrequent. *See* 2011-12 Official Congressional Directory, 112th Cong. 522-25. During Congress’s first lengthy intrasession recess, in 1867, President Johnson made at least fourteen recess appointments. *See* Hogue, *Intrasession Recess Appointments* 5.

e.g., 41 Op. Att’y Gen. 463, 466-68 (1960); 20 Op. O.L.C. 124, 161 (1996) (noting repeated, consistent reliance on the Daugherty opinion); *see also Appointments – Recess Appointments*, 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, relying upon the Daugherty opinion and subsequent widespread adoption thereof).

Dreyer’s reliance on the superseded 1901 opinion of Attorney General Knox is misplaced. Br. 23 (citing 23 Op. Att’y Gen. 599 (1901)). Knox opined that the President could not make intrasession recess appointments, but he acknowledged that, under his view, the President would be powerless to make any appointments during an intrasession recess, even one of “several months,” and that his opinion was contrary to judicial precedent. 23 Op. Att’y Gen. at 603. Attorney General Daugherty’s subsequent opinion carefully considered and repudiated Knox’s opinion as inconsistent with the text and purpose of the Recess Appointments Clause, *see* 33 Op. Att’y Gen at 21-24, and it is Daugherty’s opinion that has controlled Executive Branch practice since 1921.

If Dreyer’s view were to prevail, the President could be unable to make recess appointments during a majority of the time that the Senate is away on recess. For decades, the Senate’s time away on intrasession recesses has routinely exceeded its time away on intersession recesses, often by a significant margin. *See* 2011-12 Official Congressional Directory, 112th Cong. 530-37; *see also Evans*,

387 F.3d at 1226 & n.10 (noting that “an intersession recess might be shorter than an intrasession recess,” that the Senate has taken “zero-day intersession recesses” but has taken “intrasession recesses lasting months,” and that “[t]he purpose of the Clause is no less satisfied during an intrasession recess than during a recess of potentially even shorter duration that comes as an intersession break”). Attorney General Daugherty explained that reading the Constitution to prohibit intrasession recess appointments could lead to “disastrous consequences,” since “the painful and inevitable result will be measurably to prevent the exercise of governmental functions.” 33 Op. Att’y Gen. at 23. Considering the purpose of the Clause, Daugherty did not “believe that the framers of the Constitution ever intended such a catastrophe to happen.” *Ibid.* Dreyer’s offers no justification for its contrary position, one that would significantly impede the ability of the President to fulfill his constitutional duty to keep the government running during the Senate’s now frequent intrasession breaks.

3. Dreyer’s further challenges the President’s recess appointments to the Board by arguing that the Senate was not away on recess at all on January 4, 2012. This challenge, however, rests on a basic misconception of the meaning of “Recess,” one that would effectively render the President’s constitutional recess appointment power a nullity.

The Supreme Court has repeatedly stressed that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.” *United States v. Sprague*, 282 U.S. 716, 731 (1931). So the meaning of a constitutional term necessarily “excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the time of the Founding, like today, the term “recess” was used in common parlance to mean a “[r]emission or suspension of business or procedure,” II N. Webster, *An American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706). The plain meaning of the term “Recess” as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as those periods during which the Framers anticipated Senators would return to their respective States.

The settled understandings of the Executive and Legislative Branches of the term “Recess” are consistent with that plain meaning. The Executive Branch has long and consistently maintained the view that the Clause is implicated when the Senate is not open to conduct business and thus not providing its advice and

consent on Presidential nominations. Attorney General Daugherty explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is actually present and open for business:

[T]he essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

33 Op. Att’y Gen. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

The President’s interpretation reflected in the current appointments under challenge—which is consistent with the more than 1,000 recess appointments since the Founding—is entitled to deference, *see infra* at pages 43-44. But such deference need not even be invoked here because the Legislative Branch has long maintained a similar view of the President’s recess appointment power. In a seminal report issued over a century ago, the Senate Judiciary Committee expressed an understanding of the term “Recess” that, like the Executive Branch’s, looks to whether the Senate is closed for its usual business:

It was evidently intended by the framers of the Constitution that [the word “recess”] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty;

when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. . . . Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). The 1921 Attorney General opinion relied on this 1905 Senate definition, 33 Op. Att’y Gen. at 24, and the Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” See Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992).

4. The Senate’s 20-day break between January 3 and January 23, 2012, fits squarely within this well-established understanding of the term “Recess.” By its own order, the Senate provided that it would not conduct business during this entire period.¹⁰ That order freed virtually all Senators from any duty of attendance

¹⁰ The relevant text of the Senate order provided as follows:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the remainder of the First Session of the 112th Congress. *Ibid.* On January 3, 2012,

and allowed them to be away from the Capitol without concern that the Senate would conduct business in their absence. And it precluded any action by the Senate on Presidential nominations for the duration of the 20-day period, including the pending nominations to the NLRB.

That the Senate effectively closed for business throughout this extended period is underscored by the fact that messages from the President and the House of Representatives sent to the Senate during this period were not laid before the Senate or entered into the Congressional Record until January 23, 2012, when the Senate returned from its recess. *See* 158 Cong. Rec. S37 (daily ed. Jan. 23, 2012) (message from the President “received during adjournment of the Senate on January 12, 2012”). The Senate’s order also made explicit that the Senate would not take up consideration of pending Presidential nominations until it reconvened on January 23, 2012. 157 Cong. Rec. S8784 (daily ed. Dec. 17, 2011).

Given the Senate’s declared and actual break from business over this 20-day period, the President plainly possessed the authority to exercise his constitutional recess appointment power.

the First Session of the 112th Congress ended and the Second Session began. *See* U.S. Const. amend. XX, § 2. We assume for purposes of argument that there were two adjacent intrasession recesses, per the Twentieth Amendment, one on either side of the transition on January 3, 2012, from the First Session to the Second Session, 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

B. The Senate’s Use Of *Pro Forma* Sessions, With No Business To Be Conducted, Did Not Eliminate the President’s Recess Appointment Power

1. Dreyer’s does not claim that the Senate was conducting regular business at any point during its 20-day January break. Nor does it suggest that a 20-day break in business is too short to constitute a recess for the President to exercise his recess appointment power. Instead, Dreyer’s urges that the Constitution allows the Senate to impede the President’s power to make recess appointments by its holding intermittent and fleeting “*pro forma* sessions” where no business is conducted. Br. 19-21, 26-28.

The activity on January 6 was typical of these *pro forma* sessions. A virtually empty Senate Chamber was gaveled into *pro forma* session by Senator Jim Webb of Virginia. The Senate did not say a prayer or recite the Pledge of Allegiance, as typically occurs at the commencement of a regular daily session of the Senate.¹¹ Instead, Senator Webb asked only that a communication be read, prompting an assistant bill clerk to read a two-sentence letter directing Senator Webb to “perform the duties of the Chair.” So appointed, Senator Webb immediately adjourned the Senate until January 10, 2012. The day’s “session”

¹¹ Compare 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) with 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); see also *id.* at S8783-84 (daily ed. Dec. 17, 2011) (making clear that “the prayer and pledge” would be required only during the January 23, 2012, session).

lasted a mere 29 seconds. As far as the video of that session reveals, no other Senator was present. See 158 Cong. Rec. S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, <http://www.youtube.com/watch?v=teEtsd1wd4c>.¹²

Dreyer's suggests that such *pro forma* sessions somehow transformed the Senate's 20-day period of no business into a series of shorter breaks between the *pro forma* sessions, and that brief interruptions in the Senate's business, like those occurring over a long weekend between working sessions of the Senate, are generally understood to not rise to the level of a "Recess of the Senate." See Br. 19-20, 22-24. Dreyer's logic fails at the outset, however, because the *pro forma* sessions were nothing like regular working sessions of the Senate. Instead, the *pro forma* sessions were (as the name implies) technical formalities without substance, whose principal function was to allow the Senate to *not be* in a regular working session during those 20 days, so that Senators could be away from the Capitol, without a duty of attendance and with no concern that the Senate would conduct business in their absence.¹³

¹² See also 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (29-second *pro forma* session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

¹³ Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, 2012, that three-day break would be sufficient to support the President's recess appointments in the unique circumstances of this case. That three-day break was not akin to a long-weekend recess between working sessions of the Senate. Rather, that recess

The mere fact that the Senate employed *pro forma* sessions does not alter the central fact that the Senate broke from business for a continuous 20-day period. In general, when the Senate wants to break from regular business over an extended period of time—that is, to be away on recess—it follows a process in which the two Houses of Congress pass a concurrent resolution of adjournment, which authorizes both Houses to cease business over that period of time.¹⁴ *See infra* at pages 45-46. Since 2007, however, the Senate has used *pro forma* sessions to allow for recesses from business during times when it would historically have obtained a concurrent adjournment resolution, including over the winter and summer holidays.¹⁵

was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity. Under these circumstances, the three-day period between January 3 and January 6 itself qualifies as a “Recess” in the constitutional sense.

¹⁴ Congress regards this process as satisfying the Adjournment Clause, which provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” U.S. Const, art. I, § 5, cl. 4; *see* John Sullivan, Constitution, Jefferson’s Manual and Rules of the House of Representatives of the United States, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011).

¹⁵ The Senate had previously, on isolated occasions, used *pro forma* sessions over short spans of time in which it was unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate’s *regular* use of *pro forma* sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued periodically since. *See* 148 Cong. Rec. 21,138

Regardless of the reasons for this procedural innovation, the change does not alter the Recess Appointments Clause analysis. The Senate’s orders providing for *pro forma* sessions are indistinguishable under this analysis from concurrent adjournment resolutions: both allow the Senate to cease doing business for an extended and continuous period, thus enabling Senators to return to their respective States without concern that business could be conducted in their absence. The only difference is that one Senator remains in the Capitol to gavel in and out the *pro forma* sessions, but no other Senator need attend and “no business [is] conducted.” That difference does not affect whether the Senate is away on “Recess” as the term has long been understood. The core inquiry remains focused on whether “the members of the Senate owe ... [a] duty of attendance? Is its Chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?” 33 Op. Att’y Gen. at 21-22; accord S. Rep. No. 58-4389, at 2.

Under this well-established standard the Senate was away on recess from January 3 to January 23, 2012. The *pro forma* sessions were part and parcel of the Senate’s 20-day recess—its ongoing “suspension” of the Senate’s usual “business or procedure”—not an interruption of that recess. To conclude otherwise would

(Oct. 17, 2002); see generally 2011-12 Official Congressional Directory, 112th Cong. 536-38.

“give the word ‘recess’ a technical and not a practical construction,” would “disregard substance for form,” 33 Op. Att’y Gen. at 22, and would be contrary to the Supreme Court’s admonition to exclude “secret or technical meanings that would not have been known to ordinary citizens in the founding generation” when interpreting constitutional terms. *Heller*, 554 U.S. at 577.

2. Dreyer’s argues that the Senate was, in fact, “available . . . to conduct business when necessary,” however, because it previously passed legislation by unanimous consent during a session originally intended to be a *pro forma* session. Br. 19; *see* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend temporarily the payroll tax cut). That fact, however, does not alter the character of the January 2012 recess in any respect. As noted, the Senate passed no legislation during the January 2012 recess, and so this Court is not faced with the question of whether the passage of legislation would interrupt an ongoing recess.

Moreover, Dreyer’s reliance on the mere theoretical possibility that the Senate *could* have passed legislation, or acted on pending nominations (though only by unanimous consent¹⁶) provides no basis for distinguishing the January

¹⁶ Because the Senate had, in its December 17th order, provided by unanimous consent that there would be “no business conducted” during the *pro forma* sessions, it could conduct business only if it agreed to do so by unanimous consent. *See* Walter Oleszek, Cong. Res. Serv., *The Rise of Senate Unanimous Consent Agreements*, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (Jason B. Cattler & Charles M. Rice, eds. 2008).

2012 recess from any other recess. *See* Br. 19, 27. Concurrent resolutions of adjournment typically allow Congress to reconvene before the end of the recess if the public interest warrants it, and the Senate has previously exercised that authority to pass legislation during what are undisputedly Recesses of the Senate. *See, e.g.*, 156 Cong. Rec. S6995-97 (daily ed. Aug. 12, 2010) (recalling the Senate during a recess scheduled by concurrent resolution to pass border security legislation by unanimous consent). That possibility, however, does not alter the fact that the Senate has gone away on recess. Indeed, before the recess appointment at issue in *Evans v. Stephens*, the Senate had adjourned pursuant to a resolution that expressly provided for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that recess appointment. *Evans*, 387 F.3d at 1222. Indeed, Dreyer’s argument would place virtually *any* recess outside the scope of the Recess Appointments Clause, because resolutions of adjournment typically provide for the recall of the Senate during a recess.

Dreyer’s also contends that the “Senate itself claimed not to be in recess” because it engaged in *pro forma* sessions. Br. 20; *see also id.* at 19. The Senate’s decision to engage in *pro forma* sessions, however, is not the equivalent of a formal Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no

contemporaneous rule or resolution expressing the view of the Senate that it was not away on recess, and the only formal statement from the Senate was its order that there would be “no business conducted” during its *pro forma* sessions.¹⁷

But even assuming the Senate had made the formal determination that Dreyer’s posits, that determination—that the mere artifice of holding *pro forma* sessions at which no business is conducted can trump the President’s constitutional recess appointment authority—would upend the long-standing balance of powers between the Senate and the President in this area. The Supreme Court has repeatedly condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). And accepting Dreyer’s position would do just that, by allowing the Senate to effectively eliminate the President’s recess appointment power.

That balance of powers is founded on the well-established understanding that the Constitution requires the Senate to make a choice between two mutually

¹⁷ Individual Senators’ *post hoc* statements that the *pro forma* sessions precluded recess appointments are not tantamount to a Senate determination on that score. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those “authorized to represent their respective Houses of Congress”); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate’s interest in litigation as *amicus curiae* only upon a resolution adopted by the Senate).

exclusive options: either the Senate can remain “continually in session for the appointment of officers,” *Federalist No. 67*, and serve its function of advice and consent, or it can “suspen[d] . . . business,” II Webster, *supra* at 28, and allow its members to return to their States free from the obligation to conduct such business of the Senate during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This view is evidenced by the historical compromises between the Senate and the President over recess appointments.¹⁸ For example, in 2004, the political branches reached a compromise “allowing confirmation of dozens of President Bush’s judicial nominees” in exchange for the President’s “agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away.” Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004. These political accommodations allowed both branches to vindicate their respective institutional prerogatives: they gave the President assurance that the Senate would act on his nominees, while freeing the Senators to cease business and return to their respective States without losing the opportunity to give “advice and consent” on nominees.

¹⁸ See generally Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 253-55 (2008) (describing various political confrontations over recess appointments culminating in negotiated agreements between the Senate and the President regarding recess appointments).

Under Dreyer’s view, however, the Senate would have had little, if any, incentive to compromise with the President in this fashion, because the Senate always possessed unilateral authority to divest the President of his recess appointment power through the simple expedient of holding fleeting *pro forma* sessions over any period of time without conducting any business. Indeed, under Dreyer’s logic, early Presidents would have been precluded from making recess appointments during the Senators’ months-long absences from Washington if only the Senate had one of its Members gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the fact that the Senate had never even arguably assumed before 2007—when it began using *pro forma* session during absences that it historically would have taken per a concurrent resolution—that it had the power to simultaneously be in session for Recess Appointments Clause purposes and officially away for purposes of conducting business “suggests an assumed *absence* of such power.” *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, the Senate’s “prolonged reticence” to assert that the President’s recess appointment power could be so easily nullified “would be amazing if such [an ability] were not understood to be constitutionally proscribed.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

The separation-of-powers concerns raised by Dreyer’s position are well

illustrated by this case. If, as Dreyer’s urges, the Senate could prevent the President from filling vacancies on the NLRB while simultaneously being absent to act on Presidential nominations for those vacancies, the NLRB would have been unable to carry out significant portions of its mission during the entire period of the Senate’s absence. Such a result would undermine the Constitution’s careful balance of powers, which ensures that all Branches can carry out their constitutional duties, including the President’s duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3.

In contrast, giving effect to the President’s recess appointments here would leave the established balance of constitutional powers unaltered. The President’s recess appointments are only temporary; recess commissions granted by the President “shall expire at the End of [the Senate’s] next Session.” U.S. Const. art. II, § 2, cl. 3. The Senate retains the authority to vote up or down the NLRB nominations, which remain pending before it. More broadly, the Senate still has the choice between remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President’s recess appointment power, or ceasing to conduct business and leaving the Capitol to return home with the knowledge that the President may make temporary appointments during that absence. This Court should decline Dreyer’s suggestion to free the Senate from that long-established constitutional trade-off.

Indeed, since the recess appointments at issue here, the Senate and the President have resumed the traditional means of using the political process to reach inter-branch accommodation regarding Presidential appointments. In April 2012, the Senate agreed “to approve a slate of nominees” while the President “promis[ed] not to use his recess powers.” Stephen Dinan, *The Washington Times*, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of bargain that the political branches have often struck, and reflects the balance of powers that has long characterized inter-branch relations. This Court should not upset that balance.

3. Finally, Dreyer’s raises three additional points, none of which has merit. First, Dreyer’s reliance on the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, misapprehends the relevance of that provision to the issue here. *See* Br. 21. That Clause provides the Senate with authority to “determine the Rules of its Proceedings,” that is, to establish rules governing the Senate’s internal processes. *See INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (the Clause provides each House with “the power to act alone in determining specified internal matters,” and “only empowers Congress to bind itself”). But as noted above, Dreyer’s does not and cannot point to any Senate Rule purporting to define the *pro forma* sessions as interrupting the Senate’s recess. And Dreyer’s argument ignores the plain language of the only pertinent statement of the Senate as a body: its official

announcement that there would be “no business conducted” during its 20-day January break.

Even if Dreyer’s could point to such a Rule defining the effect of *pro forma* sessions as it suggests, that rule would have to be closely scrutinized in light of the grave separation-of-powers concerns discussed above. The Supreme Court has made clear that Congress “may not by its rules ignore constitutional restraints or violate fundamental rights.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).¹⁹ Thus, although Congress may generally “determine the Rules of its Proceedings,” that constitutional provision does not control in this case, which concerns the President’s appointing power, not just matters internal to the Legislative Branch.

Moreover, as Dreyer’s acknowledges, Article II gives the President the power to make appointments whenever the Senate is away on recess, and so the President’s own determination that the Senate is away on “Recess” is owed a measure of deference.²⁰ The Legislative Branch has long acknowledged the President’s role in this regard. In 1980, the Comptroller General affirmed the

¹⁹ Congressional rules are thus subject to judicial review when they affect interests outside of the Legislative Branch. *See United States v. Smith*, 286 U.S. 6, 33 (1932) (“As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.”).

²⁰ *See Alocco*, 305 F.2d at 713 (before making a recess appointment, “the President must in the first instance decide whether he acts in accordance with his constitutional powers”).

President’s authority to make recess appointments during an intrasession recess, relying on the Attorney General’s opinion that “the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate.” John D. Dingell, House of Representatives, B-201035, 1980 WL 14539, at 5 (Comp. Gen. Dec. 4, 1980).²¹ Courts too have accorded the President’s determinations in this context a presumption of constitutionality, and looked to Executive Branch practice and interpretation in addressing the validity of recess appointments.²²

²¹ Similar views were expressed in connection with President Madison’s use of the recess appointment power. Two Senators from opposing political parties agreed that the President was owed deference in his exercise of the recess appointment power. *See* 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (observing that the Recess Appointments Clause “delegates to the President *exclusively* the power to fill up *all* vacancies which happen during the recess of the Senate” and that “where a discretionary power is granted to do a particular act, in the happening of certain events, that the party to whom the power is delegated is necessarily constituted the judge whether the events have happened, and whether it is proper to exercise the authority with which he is clothed”); 26 Annals of Cong. 707-08 (April 1, 1814) (Sen. Horsey) (“Thus, sir, . . . so far as respects the exercise of the qualified power of appointment, lodged by the Constitution with the Executive, that the Senate have no right to meddle with it.”). These Senators’ view prevailed against a movement to censure the President’s use of his recess appointment authority. *See* Irving Brant, JAMES MADISON: COMMANDER IN CHIEF 1812-1836, at 242-43 (1961) (explaining that the effort to censure the President “collapsed when [Horsey] cited seventeen diplomatic offices created and filled by former Executives while the Senate was in recess”).

²² *See, e.g., Evans*, 387 F.3d at 1222 (en banc) (noting that “when the President is acting under the color of express authority of the United States Constitution, we

Second, Dreyer’s reliance on the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4, is mistaken. That Clause provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” *Ibid.* Dreyer’s suggests that because the House of Representatives did not expressly consent to the Senate’s adjournment for more than three days during the January break, there was not a “Recess of the Senate” within the meaning of the Recess Appointments Clause. Br. 21-22.

This Court, however, is not presented with the question whether the Senate complied with the Adjournment Clause and so this Court need not decide that issue. Moreover, Dreyer’s provides no basis in the text or structure of the Constitution for equating Article I’s Adjournment Clause with Article II’s Recess Appointments Clause. *See* Br. 27. Nor does Dreyer’s cite evidence that the Framers viewed the two Clauses as equivalent. Thus, as with any other constitutional provision, the requirements of each Clause must be interpreted based on their separate text, history, and purpose.

The Adjournment Clause relates primarily, if not exclusively, to the Legislative Branch’s internal operations and obligations. In that setting, the view of the Senate and the House as to whether *pro forma* sessions satisfy the

start with a presumption that his acts are constitutional” and upholding the President’s determination that an intrasession recess is a “Recess” within the meaning of the Clause).

requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violations of that Clause.²³ In contrast, as explained above, the Recess Appointments Clause defines the scope of an exclusively Presidential power, and the definition of that provision has ramifications far beyond the Legislative Branch. And as discussed above, the text, purpose, and established historical understandings of the Recess Appointments Clause compel the conclusion that the *pro forma* sessions did not vitiate the President’s recess appointment power, whatever effect such *pro forma* sessions may or may not have with respect to other constitutional provisions.

Third, Dreyer’s is mistaken in suggesting that because an annual Session of Congress began on January 3, 2012, when both Houses held *pro forma* sessions,

²³ The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick’s Senate Procedure, Adjournment at 15 (noting that “in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it”). If this Court were forced to confront whether the Senate’s *pro forma* sessions satisfied the Adjournment Clause—which this Court is not—there are grounds for concluding that the sessions did not suffice. The central purpose of the Adjournment Clause is to ensure the Houses’ simultaneous presence in the Capitol to do business. *See, e.g.*, Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (“It was necessary therefore to keep [each house of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will.”). The Senate’s use of *pro forma* sessions at which no business is conducted, to allow virtually all of its Members to be away from the Capitol for an extended period of time, is in considerable tension with that purpose.

that the Senate’s *pro forma* sessions must be “constitutionally significant” for purposes of the Recess Appointments Clause. Br. 27. Dreyer’s ignores the Twentieth Amendment, whose plain terms, and longstanding Congressional understandings thereof, dictate the start (and at time, the end) of annual Sessions of Congress.²⁴ The Twentieth Amendment provides that each annual “meeting”—that is, annual Session—of Congress “shall begin at noon on the 3d day of January,” unless Congress sets a different date by law. *See* U.S. Const., amend. XX, § 2. That provision commences the annual Session of Congress whether or not Congress in fact assembles on the Session’s first day, because to hold otherwise would vitiate the Twentieth Amendment’s requirement that any rescheduling of a Session’s starting date be done through the enactment of a law. Thus, contrary to Dreyer’s suggestion, the fact that the 1st Session of the 112th Congress ended (and the 2nd Session of that Congress began) on January 3, 2012, does not depend at all on the *pro forma* sessions. Rather, the switch from one Session to the next occurred by operation of the Twentieth Amendment.

²⁴ As with the Adjournment Clause, the Twentieth Amendment relates primarily to the Legislative Branch’s internal operations and obligations, and in that context, Congress’s determinations about the effects of its actions might hold more sway than it would here, where the interbranch balance of powers is implicated.

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT A UNIT OF MAINTENANCE EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING AND THEREFORE PROPERLY FOUND THAT DREYER’S VIOLATED THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative of [its] employees.” 29 U.S.C. § 158(a)(5).²⁵ Dreyer’s does not dispute (D-Br.14) that it refused to bargain with the Union. Rather, it objects to the standard that the Board applied in certifying a unit of maintenance workers, and contends that the production employees should have been included in the unit. Because the Board’s standard is reasonable and its findings fully supported by the record evidence, Dreyer’s refusal to bargain violated the Act. *See Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 533 (4th Cir. 1999) (“*Sandvik*”)(enforcing order where “Board did not exceed its discretion in determining the appropriate bargaining unit”).

²⁵ An employer who violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [their organizational] rights.” 29 U.S.C. § 158(a)(1); *see Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 n.4 (4th Cir. 1998).

A. This Court Gives Considerable Deference to the Board’s Finding of an Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen “by the majority of the employees in a unit appropriate for” collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* § 159(b). Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976)(internal quote marks and citation omitted); *accord Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992). Indeed, this Court has repeatedly stated that “the Board is possessed of the widest possible discretion in determining the appropriate unit.” *E.g., Sandvik*, 194 F.3d at 534; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978).

Section 9(b), however, does not tell the Board how to decide whether a particular grouping of employees is appropriate. Accordingly, the Board’s selection of an appropriate unit “involves of necessity a large measure of informed discretion.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees share a “community of interests.” *Specialty*, 2011 WL 3916077, at *12; *accord Sandvik*, 194 F.3d at 535 (“[T]o test a bargaining unit’s appropriateness, the NLRB has historically relied on the ‘community of interest’ test.”). This analysis considers such factors as similarity in skills, interests, duties, and working conditions, degree of interchange and contact among employees, the employer’s organizational and supervisory structure, and bargaining history. *Sandvik*, 194 F.3d at 535. Additionally, the Board is permitted to “consider[] extent of organization as one factor, though not the controlling factor in its unit determination.” *NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965); *accord Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002).

The Board’s decision must be upheld as long as it approves *an* appropriate bargaining unit. The Board has long recognized that there is nothing in the Act’s language requiring “that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be ‘appropriate.’” *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). The Supreme Court agreed, stating that “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *Am. Hosp. Ass’n*, 499 U.S. 606, 410 (1991). The focus of the Board’s determination remains

the unit for which the petition has been filed because, under Section 9(a) of the Act (29 U.S.C. § 159(a)), “the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n. v. NLRB*, 499 U.S. at 610. As the Board has explained, “[a] union’s petition, which must according to the statutory scheme and the Board’s Rules and Regulations be for a particular unit, necessarily drives the Board’s unit determination.” *Overnite Transp. Co.*, 325 NLRB 612, 614 (1998).

This Court has recognized that “[i]n many cases, there is no ‘right unit’ and the Board is faced with alternative appropriate units.” *Corrie Corp. of Charleston v. NLRB*, 375 F.2d 149, 154 (4th Cir. 1967); *see also Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 618 (4th Cir. 2002) (“[T]here may be more than one ‘appropriate’ bargaining unit.”); *Arcadian Shores*, 580 F.2d at 119 (stating it is “well established that there may be more than one appropriate bargaining unit within the confines of a single employment unit and that the Board is free to select any one of these appropriate units as the bargaining unit”). It is within the Board’s discretion to select among different potential groupings of employees in determining an appropriate unit. *See Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992).

Therefore, an employer challenging the Board’s unit determination “has the burden to prove that the bargaining unit selected is ‘utterly inappropriate.’” *Sandvik*, 194 F.3d at 534 (citation omitted). “A unit is truly inappropriate if, for

example, there is no legitimate basis upon which to exclude certain employees from it.” *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008); *accord Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees “share an overwhelming community of interest” with the petitioned-for employees, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421.

The Board’s interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board’s reasonable interpretation of the Act. Indeed, the Court must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996)(citation omitted). Accordingly, this Court will not disturb the Board’s reading of the Act if it is “reasonably defensible.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). Further, the Board’s findings of fact are “conclusive” if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e);

see Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); *accord Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008).

B. The Board Reasonably Determined that a Unit Limited to Maintenance Employees Constitutes an Appropriate Unit for Collective Bargaining

The Board reasonably applied its longstanding, judicially approved community-of-interest test here to find that the petitioned-for unit of maintenance employees is appropriate for collective bargaining. Additionally, applying the standard it clarified in *Specialty* when an employer asserts that additional employees should be included in the unit, the Board found that Dreyer’s failed to show that the production employees shared an overwhelming community of interest with the maintenance employees such that the unit would be inappropriate if they were excluded.

1. The Board properly applied the traditional community-of-interest factors to find that a unit of maintenance employees is an appropriate unit

The record evidence fully supports the Board’s finding (A.417) that the proposed unit of maintenance employees is an appropriate unit because the “maintenance employees are readily identifiable as a separate group” (A.416) and share a community of interest based on the Board’s traditional inquiry (A.417-20). Indeed, neither Dreyer’s nor amici even suggests otherwise.

The Board found (A.416) that maintenance employees are highly skilled and share “technical knowledge in areas of mechanics, electronics, and computers.” (A.416, 409; 270.) They all pass the same test before they are hired. (A.409,416; 270.) All are subject to the unique requirement that they provide their own tools, a significant investment. (A.411,420&n.22; 79-80.)

All maintenance workers are on the technical operations team, and they are supervised by maintenance managers. (A.405,418; 263-64,280-81.) Their primary duties are to keep the BOC’s equipment operating properly. (A.418; 263-64,280-81.) They spend 90% of their time doing skilled maintenance work. (A.408,419.) Significantly, they share work assignments, wage rates, work hours, and uniforms. (A.405,409,411,418; 43-47,76-78, 81-83,264-65.) Maintenance employees are required to work throughout the year, even during the annual shut down when other employees are off. (A.410; 217-19.) Thus, applying the traditional community-of-interest factors, the Board had little difficulty concluding that “this distinct group shares a community of interest” and is therefore an appropriate unit for collective bargaining. (A.420.)

2. The Board acted within its discretion in applying the overwhelming community of interest test to determine that the production employees do not have to be included in the maintenance employees' unit

It is well-settled, as discussed above, that the Act requires only *an* appropriate unit. *Am. Hosp. Ass'n*, 499 U.S. at 610. As the Board stated in *Specialty*, “it cannot be that the mere fact that [the petitioned-for unit of employees] also share a community of interest with additional employees [thereby] renders the smaller unit inappropriate.” *Specialty*, 2011 WL 3916077, at *15. Because a unit need only be *an* appropriate unit, it “follows inescapably” that simply demonstrating that another unit would also be appropriate “is not sufficient to demonstrate that the proposed unit is inappropriate.” *Specialty*, 2011 WL 3916077, at *15. As the D.C. Circuit held in enforcing a Board order where the employer challenged the Board’s unit determination, that “excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit.” *Blue Man Vegas*, 529 F.3d at 421.

Here, the Board applied the standard, clarified in *Specialty*, for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest under the traditional standard. Under that standard, an employer seeking to expand the unit

must demonstrate that employees in the larger unit “share an overwhelming community of interest with those in the petitioned for unit.” *Specialty*, 2011 WL 3916077, at *15. Although different language has been used over the years, the Board has consistently required a heightened showing from a party arguing for the inclusion of additional employees in a unit that shares a community of interest.²⁶

The overwhelming community of interest standard is not new to unit determinations. The Board has applied it many times over the years. *See, e.g., Academy LLC*, 27-RC-8320, Decision and Direction of Election, at 12 (2004)(rejecting petitioned-for unit because additional employees “share an overwhelming community of interest” with the petitioned-for unit), available at www.nlrb.gov/case/27-RC-008320; *Lanco Constr. Sys., Inc.*, 339 NLRB 1048,

²⁶ *See, e.g., Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, 2010 WL 3406423, at *1 n.2 (2010)(including additional employees because interests of petitioned-for unit were not “sufficiently distinct”); *United Rentals, Inc.*, 341 NLRB 540, 541-42 (2004)(employer presented “overwhelming” evidence that employees had “significant overlapping duties and interchange” and a “substantial community of interest”); *Engineered Storage Prods.*, 334 NLRB 1063, 1063 (2001)(larger group and petitioned-for group did “not share such a strong community of interest that their inclusion in the unit is required”); *Lawson Mardon, U.S.A.*, 332 NLRB 1282, 1282 (2000)(finding “such a substantial community of interest exists” between the two groups “so as to require their inclusion in the same unit”); *JC Penney Co.*, 328 NLRB 766, 766 (1999)(stating telemarketing employees “share such a strong community of interest with the employees in the unit found appropriate that their inclusion is required”); *Mc-Morhan Trucking Co.*, 166 NLRB 700, 701 (1967)(employer had not proven “such a community of interest or degree of integration between the truck drivers and the mechanics as would render the requested truck driver unit inappropriate”).

1050 (2003)(rejecting argument that additional employees “shared such an overwhelming community of interests with” the petitioned-for unit); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (including concierges in the unit because they “share an overwhelming community of interest with the employees whom the Petitioner seeks to represent”).²⁷

Moreover, the D.C. Circuit recently approved it in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008). There, a union petitioned to represent a unit of stage crew members, but the employer wanted to add the musical instrument technicians (MITs). The Board found that the stage crew members constituted an appropriate unit and that the MITs did not share an overwhelming community of interest with the stage crew. *Id.* at 423. The court recognized that an employer must demonstrate that an otherwise appropriate unit is “truly inappropriate,” which

²⁷ See also, e.g., *Thomas Motors of Ill., Inc.*, 13-RC-021965, Decision and Direction of Election, at 5 (2010)(party challenging petitioned-for unit “must demonstrate that unit is inappropriate because it constitutes an arbitrary grouping of employees...or excludes employees who share an overwhelming community of interests or have no separate identity from employees in the petitioned-for unit”), available at www.nlr.gov/case/13-RC-021965; *Stanley Assocs.*, 01-RC-022171, Decision and Direction of Election, at 14 (2008)(finding “quality assurance employees do not share such an overwhelming community of interest with the petitioned-for employees as to mandate their inclusion in the unit”), available at www.nlr.gov/case/01-RC-022171; *Breuners Home Furnishings Corp.*, 32-RC-4603, Decision and Direction of Election, at 9 (1999)(stating “receptionists do not share such an overwhelming community of interest with the warehouse employees to be required to be included in the petitioned-for unit”) , available at www.nlr.gov/case/32-RC-004603.

it can do by showing that “there is no legitimate basis on which to exclude certain employees from it” because the excluded employees “share an overwhelming community of interest” with the included employees. *Id.* at 421. Specifically, the court found that the employer failed to meet its burden because the MITs’ working conditions, including supervision, form of payment, and sign-in sheets, differed from the stage crew. *Id.* at 424. In *Specialty*, the Board found *Blue Man Vegas* to be persuasive and consistent with Board law. 2011 WL 3916077, at *16.

This Court has applied a similar standard, holding an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest. In *Sandvik Rock Tools v. NLRB*, a union petitioned to represent workers in an employer’s chemical products division. 194 F.3d at 533. Like here, the employer admitted those employees shared a community of interest, but it insisted that additional employees – the mineral tools division employees – ought to be included in the unit as well. This Court rejected that argument. Even if the two groups of employees shared a community of interest, the Court recognized, “that alone is not enough to overcome the Board’s unit determination.” *Id.* at 537. The employer had to prove more: that the unit of employees certified by the Board –

whom everyone agreed shared a community of interest – was “utterly inappropriate.” *Id.* at 534, 538.²⁸

Here the Board properly applied the overwhelming community-of-interest standard to determine whether the maintenance employees constitute an appropriate unit without including the production employees. *See Sandvik*, 194 F.3d at 534 (“[T]he Board is possessed of the widest possible discretion in determining the appropriate unit.”).

3. Dreyer’s has not shown that the production workers share an overwhelming community of interest with the maintenance workers

The Board reasonably concluded that Dreyer’s failed to meet its burden of showing that the maintenance and production employees share such a strong community of interest that the exclusion of the additional employees renders the unit inappropriate. (A.420.) Before this Court, Dreyer’s attacks the standard but does not assert that production employees share an overwhelming community of interest with maintenance employees. Rather, it claims (D-Br.44-46) that the differences between the two groups of employees are “insignificant,” and the

²⁸ *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999)(“[I]t is not enough for the employer to suggest a more suitable unit; it must ‘show that the Board’s unit is clearly inappropriate.’”); *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991)(“An employer who challenges the Board’s determination has the burden of establishing that the designated unit is clearly not appropriate”).

Board downplayed the similarities, like common employment policies. Viewed in the most favorable light, these claims assert only that a unit consisting of maintenance and production employees would be a *more* appropriate unit. But this Court long ago held that “[i]t is the employer’s burden to convince us, not that another unit is more appropriate, but that the unit selected is utterly inappropriate.” *Arcadian Shores*, 580 F.2d at 120.

In any event, Dreyer’s claim that the differences are “insignificant” is wrong. As fully explained above on pages 8-11, maintenance and production employees work in different departments, do different work, and have different supervisors, skills, and pay rates. They have different functions: production workers manufacture the ice cream product; maintenance workers keep all of the BOC’s equipment running (not just the ice cream equipment). (A.409; 280-81.) Significantly, maintenance workers are considerably more skilled than production workers. Maintenance employees have considerable technical knowledge in mechanics, electronics, and computers. They have experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing; in computerized maintenance management; and in industrial high-speed maintenance. (A.409; 88, 192,263-64,267-68.) Production employees do not.

Dreyer’s requires maintenance workers to provide their own tools, valued at about \$5,000, while production workers have no such requirement. (A.411,420

n.19; 79-80,283.) And Dreyer's provides maintenance workers with a tool subsidy to help offset these costs. The higher-paid maintenance employees work longer shifts (10 hours) than production employees (8 hours), which impacts overtime, holiday, and sick day pay.

Dreyer's makes much (D-Br.12-13,45) of its effort to institute some integration between the maintenance and production employees. But as the Board found (A.422), the claim that the workers are integrated is without foundation. Dreyer's launched its integration effort mere days before the hearing in this case, on just one of its 26 production lines. (A.67.) And Dreyer's abandoned an earlier effort at integration because the program "hadn't gained sustainable results." (A.410; 217.) As the RD found, "[b]y [Dreyer's] own admission, production employees currently lack the skills even to perform even the routine preventative maintenance that the [pilot program] seeks to implement." (A.422.)

Notwithstanding that maintenance and production workers share a parking lot, and some common employment policies, their limited interaction and the distinct differences in their community of interests warrants the Board's finding that a unit of maintenance employees is an appropriate unit.

D. Dreyer's Provides No Basis for Denying Enforcement of the Board's Order

In asserting that production employees must be included in the maintenance unit, Dreyer's raises a plethora of claims, variously arguing that the standard gives controlling weight to the extent of organization; constitutes an abuse of discretion; and will result in the undue proliferation of units. These arguments have no merit.

1. The overwhelming-community-of-interest standard does not give controlling weight to extent of organizing

Dreyer's and amici argue (D-Br.33-35, A-Br.19-24) that the Board's overwhelming community-of-interest test improperly gives controlling weight to a union's extent of organization in the workplace. In *Specialty*, the Board properly rejected this contention. 2011 WL 3916077, at *13, *16 n.25.

Section 9(c)(5) of the Act provides that the Board, in making unit determinations, shall ensure that "the extent of organization shall not be controlling." 29 U.S.C. § 159(c)(5). The Supreme Court has construed this language to mean that "Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of extent of organization," but that Congress did not preclude the Board from considering organization "as one factor" in making unit determinations. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965). In other words, as the Board noted in *Specialty*, "the Board cannot stop with the observation that the petitioner proposed the unit, but must

proceed to determine, based on additional grounds (while still taking into account petitioner's preference), that the proposed unit is an appropriate unit." 2011 WL 3916077, at *13.

Procedurally, the Board processes unit determinations consistent with this twin admonition. It "examines the petitioned-for unit first," and if that unit is appropriate under the traditional community-of-interest test, the Board's *initial* inquiry "proceeds no further." *Id.* at *12; *see also Wheeling Island*, 355 NLRB No. 127, 2010 WL 3406423, *1 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the Board did that and reasonably determined that the proposed unit of maintenance employees was "readily identifiable as a separate group of employees and that this distinct group shares a community of interest" and is therefore an appropriate unit. (A.416-20.)

As Dreyer's admits (D-Br.33), "[b]y examining twelve separate factors bearing on the unit determination decision," the Board's traditional community-of-interest test "ensure[s] that the extent of organization would not be the controlling factor." And the Board's thorough decision here makes clear that it considered a number of factors in making its decision, "none of which [were] singularly dispositive." (A.417.) Rather, the Board found that the maintenance workers share a community of interest based on their wages, hours, supervision, and common skills and functions. (A.418-19.) It did not give controlling weight to the

unit that was petitioned for; instead, the Board, separately and independently, identified a number of facts that under the community-of-interest test, support its determination that the maintenance worker unit is appropriate. Simply put, Dreyer's and amici failed to "show that the extent of organization was the *dominant* factor in the Board's unit determination." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002).

Nor did the Board violate Section 9(c)(5) when it applied the overwhelming-community-of-interest test to determine whether other employees must be included in the unit. Because the Board had already found the maintenance employees to be a clearly identified group and to share a community of interest without giving controlling weight to the petitioned-for unit, Section 9(c)(5) was satisfied. *See* p.62-63 *supra* (citing cases). Simply because the employer then has the opportunity to demonstrate that other employees share such an overwhelming community of interest that they should be included in the unit, does not mean that the Board allowed "the extent of organization . . . [to] be controlling." 29 U.S.C. § 159(c)(5).

Despite Dreyer's repeated claims to the contrary, this Court's decision in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), does not prohibit the test the Board applied here. The *Lundy* Court's objection was that the Board had *presumed* the petitioned-for unit was appropriate rather than properly applying the

traditional community-of-interest standard. *Id.* at 1581; *see Lundy Packing Co.*, 314 NLRB 1042, 1043-44 (1994). The Court characterized the presumption applied by the Board as “a novel legal standard” that could only be explained by an effort to give controlling weight to the extent of organizing. 68 F.3d at 1581-82. The Court specifically stated that a union’s desire for a certain unit alone is not grounds for certification if a unit is “otherwise inappropriate.” *Id.* at 1581. *See also Sandvik*, 194 F.3d at 538 (upholding Board’s unit determination and noting *Lundy* was unexplained departure from long history of prior precedent). Here, the Board applied no presumption of appropriateness. It did not rely solely on the Union’s request for a certain unit, but examined the community of interest factors as well as Dreyer’s claims that the unit was “otherwise inappropriate.” This approach is consistent with *Lundy*.

In fact, to avoid the problem raised by *Lundy* in this and future cases, the Board in *Specialty* clearly stated that it must first determine whether the petitioned-for employees constitute a readily identifiable group who share a community of interest. 2011 WL 3916077, at *16 n.25, *17. This must be done *before* the Board assesses whether the employer has met its burden of showing that additional employees share an overwhelming community of interest with employees in the proposed unit. In *Blue Man Vegas*, the D.C. Circuit agreed that the Board did not run afoul of *Lundy* under these circumstances: “As long as the Board applies the

overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." 529 F.3d at 423.

That is exactly what the Board did here, and what it will do "in each case" as required by Section 9(b) of the Act. Unlike *Lundy*, here the Board first expressly found that the maintenance workers share a community of interest under the traditional test,. (A.416-19.) Only then did the Board apply the overwhelming-community-of-interest standard to determine whether additional employees ought to be included. (A.19-21.)

And while Dreyer's and amici suggest that the Union has complete control over who ends up in the unit, in reality it is the employer who has control over nearly all of the community-of-interest factors that the Board assesses. In fact, the community-of-interest test "focuses almost exclusively on how the employer has chosen to structure its workplace." *Specialty*, 2011 WL 3916077, at *14 n.19; *see also Int'l Paper Co.*, 96 NLRB 295, 298 n.7 (1951)("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees."). For this reason, amici are wrong when they claim (A-Br. 12) that the Board's unit determinations under *Specialty* "bear no relation to the way in

which the employer has organized its operations.” All of the relevant facts in this case – supervision, wage rates, skill requirements, job classifications, departments, functions, and uniforms – were determined by Dreyer’s.

Moreover, the Supreme Court has long recognized that the choice of unit is not merely a union’s choice but is the employees’ as well. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941) (“Naturally the wishes of employees are a factor in a Board conclusion upon a unit.”). Employees are fully informed of the composition of the unit on the Notice of Election posted at least 3 days before voting and on the ballot itself. *See* 29 C.F.R. § 103.20. If employees have second thoughts about the unit that was petitioned-for and that the Board approved, the employees can reject representation in that unit.

Dreyer’s speculates (D-Br. 34) that the overwhelming-community-of-interest standard will always result in the petitioned-for unit being approved. This is false. *See Gen. Dynamics Land Sys.*, 19-RC-076743, Decision and Direction of Election, at 2 (May 31, 2012) (including employees union sought to exclude because they “share an overwhelming community of interest with the petitioned for unit”), available at <http://www.nlr.gov/case/19-RC-076743>, review denied, 2012 WL 2951834 (2012).²⁹ And when the Board applied a similarly-heightened

²⁹ *See also Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417, *1-2 (2011) (finding employer demonstrated that its merchandisers shared an overwhelming community of interest with the employees the union petitioned to represent);

standard under a different name, the Board regularly granted requests to expand the unit where the employer showed *more* than that its alternative unit was also appropriate. *E.g.*, *United Rentals*, 341 NLRB 540, 541 (2004); *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000); *J.C. Penney Co.*, 328 NLRB 766, 766 (1999); *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976); *Colorado Nat'l Bank of Denver*, 204 NLRB 243, 243 (1973).

2. The Board did not abuse its discretion or violate the Administrative Procedure Act by clarifying the appropriate standard

Dreyer's argues (D-Br.36,41) that the Board in *Specialty* impermissibly adopted a rule of "broad-scale, general application that conflicts with prior precedents," and that such changes in the law must be done through rulemaking. Dreyer's is wrong, both factually and legally.

The Board in *Specialty* did not make the sweeping changes Dreyer's claims (D-Br.29, 36-38, 40-41). As explained above (pp.55-56), although various terms have been used, the Board has always imposed a heavy burden on a party claiming that additional employees must be included in the petitioned-for unit. In *Specialty*, the Board concluded that the use of "slightly varying verbal formulations" to describe this heightened burden could be improved by unifying terminology. 2011

Academy LLC, 27-RC-8320, *supra* page 56 (rejecting petitioned-for unit because additional employees "share an overwhelming community of interest" with the petitioned-for unit).

WL 3916077, at *17. To provide this clarity, the Board adopted the careful work of the D.C. Circuit in *Blue Man Vegas*, 529 F.3d at 421, which viewed the Board caselaw as articulating an “overwhelming community of interest” standard. *Id.*

Dreyer’s points (D-Br.38-39) in particular to a line of cases considering whether the interests of the petitioned-for unit were “sufficiently distinct” from those the employer sought to include. *Newton-Wellesley Hosp.*, 250 NLRB 409, 411 (1980). Dreyer’s claims that the *Specialty* test is a “dramatic change[]” from the “sufficiently distinct” test, and that the Board failed to acknowledge these cases. But the standards are almost identical,³⁰ and the Board cited a number of those cases in its decision. *Specialty*, 2011 WL 3916077, at *17 & n.26.

Dreyer’s objects (D-Br. 30, 36, 42) to the Board’s use of the word “clarify” to describe its articulation of the overwhelming-community-of-interest standard. But courts “give great weight to an agency’s expressed intent as to whether a rule clarifies existing law or substantively changes the law.” *First Nat’l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999). The court there agreed with an agency that its amendments to an administrative regulation

³⁰ See, e.g., *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000)(most of employees employer sought to include did “not share such a substantial community of interest with the other employees,” except the concierges, who “share[d] an overwhelming community of interest” and therefore had to be included in unit); *Jewish Hosp. Ass’n*, 223 NLRB 614, 617 (1976)(employer argued that two groups had “overwhelming community of interest” and Board agreed that groups did “not have sufficiently separate community of interests”).

were mere clarifications because they did “not represent any major policy changes” and “because the new wording is not ‘patently inconsistent’” with prior interpretations. *Id.* at 479. The same is true here. The Board has made no policy change. It has always required only that the petitioned-for unit be appropriate, and it has always held a party seeking to expand that unit to a heightened standard. Dreyer’s incorrectly claims that the overwhelming community-of-interest test was developed only for, and should only be used in, accretion cases. The Board has used that exact language in prior unit determination cases. *See Blue Man Vegas*, 529 F.3d at 423 (citing Regional Directors’ use of the standard); *Laneco Constr. Sys.*, 339 NLRB 1048, 1050 (2003).

Dreyer’s reliance (D-Br. 41-42) on two non-Board Ninth Circuit decisions³¹ for the idea that any principle of general application that changes existing law must pass through formal rulemaking procedures is misplaced. Even if the Board had made a policy change – which, as shown above, it did not – the Supreme Court has made clear that the Board is “not precluded from announcing new principles in an adjudicative proceeding.”³² And even under Ninth Circuit precedent, a “clarification” of an agency policy that amounts to “a minor adjustment, a fine

³¹ *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981), and *Pfaff v. U.S. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

³² *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

tuning of doctrine” “does not require rulemaking unless it imposes severe hardship or circumvents existing rules.” *Cities of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984). Dreyer’s has made no such showing with respect to the Board’s clarification of its unit determination standard.

Finally, despite Dreyer’s claim to the contrary (D-Br. 29,43), the issue the Board decided in *Specialty* was squarely before it. A union there petitioned to represent a group of CNAs, but the employer argued that additional employees should be included in the unit. The Board properly summarized the law applying a heightened standard in such cases and clarified that it would apply prospectively the overwhelming community-of-interest test when a party seeks to include additional employees into an already-deemed-appropriate unit. 2011 WL 3916077, at *1, 15-17.

3. Dreyer’s and amici’s concerns about unit size and undue proliferation of units are irrelevant

Dreyer’s argues (D-Br. 39 n.15) that the *Specialty* standard will result in the formation of “micro-unions.” Dreyer’s fails to define “micro-union” or explain why the formation of such unions would be inappropriate under any provision of the Act. Perhaps Dreyer’s means that the Board’s test will lead to the certification of small units. However, the Board has held that the size of a proposed unit is “not alone a relevant consideration, much less a sufficient ground” for finding an otherwise appropriate unit to be inappropriate. *Specialty*, 2011 WL 3916077, at

*15. Indeed, a “cohesive unit – one relatively free of conflicts of interest – serves the Act’s purpose of effective collective bargaining” as well as preventing “a minority group interest from being submerged in an overly large unit.” *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985)(citations omitted).

In arguing against “smaller and/or multiple units,” amici (A-Br.12-13) seem to be urging that only facility-wide units are appropriate. But that has never been the law. *Teledyne Economic Development v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997)(enforcing Board’s decision certifying two units at one employer); *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996)(enforcing Board order requiring employer to bargain over three different units). In fact, the Act explicitly recognizes that a unit containing a “subdivision” of employees may be appropriate.³³ 29 U.S.C. § 159(b). Indeed, prior to *Specialty*, the Board had certified maintenance-only units in manufacturing plants where, as here, the maintenance employees were highly skilled, earned higher wages, and worked in a different department with different supervision from production employees. *See*

³³ Even if there were a rule against small units, the units certified in this case and in *Specialty* are not small. The unit in this case includes 113 employees, and the unit certified in *Specialty* included 53. Both are significantly larger than the median unit certified between 2001 and 2010, which ranged from 23 to 26 employees. *Proposed NLRB Rule*, 76 Fed. Reg. 36821 (June 22, 2011). The case Dreyer’s singles out for mention (D-Br.39 n.15) involved a unit of 46; that case is not final as the Board has granted review of the Regional Director’s unit determination. *Neiman Marcus Group*, 02-RC-076954, Order Granting Request for Review, 2012 WL 1951475 (May 30, 2012).

Ore-Ida Foods, Inc., 313 NLRB 1016, 1019 (1994), *enforced*, 66 F.3d 328 (7th Cir. 1995)(table) (certifying maintenance-only unit), cited in *Grace Indus.*, 358 NLRB No. 62, at **5 (2012) (applying *Specialty*).

Amici’s related argument (A-Br. 17) that the Board’s *Specialty* standard will lead to “undue proliferation” of units should also be rejected as irrelevant outside the healthcare industry. That phrase was found in the legislative history of the 1974 healthcare amendments to the Act, which admonished the Board to give “due consideration” “to preventing proliferation of bargaining units in the health care industry.” S.Rep.No.766, 93rd Cong., 2d Sess. 5 (1974); H.R.Rep.No.1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). However, even in the healthcare industry context, the Supreme Court unequivocally found that the “admonition” was not binding on the Board and does not have “the force of law.” *Am. Hosp. Ass’n*, 499 U.S. at 616-17 (“legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute”). Simply put, there is nothing in the Act suggesting that two or more units at one facility constitutes “undue proliferation.” *See Teledyne*, 108 F.3d at 57.

Nor is there merit to Dreyer’s and amici’s argument (D-Br.35 n.14; A-Br. 29-36) that the *Specialty* standard fails to guarantee employees the right to refrain from engaging in concerted activity. The maintenance workers had the right, as

well as the opportunity, to vote for or against unionization, and to encourage their coworkers to do the same. And the statutory rights of the production workers remain firmly intact whether or not their colleagues unionize. *See Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (stating certification of unit of drivers, and excluding mechanics who did not wish to be included, protected the rights of both groups). The Board’s *Specialty* standard “assure[s] to employees,” both those inside and outside the unit, “the fullest freedom in exercising the rights guaranteed by th[e] Act.” 29 U.S.C. § 159(b).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Dreyer's petition for review and enforcing the Board's Order in full.

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September 2012

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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**UNITED STATES COURT OF APPEALS
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NESTLE-DREYER'S ICE CREAM CO.)	
)	
Petitioner/Cross-Respondent)	Nos. 12-1684 & 12-1783
)	Board Case No.
v.)	31-CA-074297
)	
NATIONAL LABOR RELATIONS BOARD)	
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this 10th day of September 2012