

**Nos. 15-1412, 15-1476**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**SCOMAS OF SAUSALITO, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITE HERE, LOCAL 2850**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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and	)	
	)	
UNITE HERE, LOCAL 2850	)	
	)	
Intervenor	)	
_____	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties**

Scoma’s of Sausalito, LLC (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. UNITE HERE, Local 2850 (“the Union”) was the charging party before the Board and is the

Intervenor in the instant case. The Board's General Counsel was also a party before the Board. There are no amici.

### **B. Rulings Under Review**

This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board (Members Hirozawa, Johnson, and McFerran) in *Scoma's of Sausalito and UNITE HERE, Local 2850*, Case No. 20-CA-116766, issued on August 21, 2015, and reported at 362 NLRB No. 174 (2015).

### **C. Related Cases**

The case on review before this Court was not previously before this Court or any other court. To date, there are no related cases pending before the Court or any other court.

/s/Linda Dreeben

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Dated at Washington, DC  
this 7th day of July, 2016

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## GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to this Court
“The Company”	Scoma’s of Sausalito, LLC
“JA”	Joint Appendix
“The Union”	UNITE HERE, Local 2850

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Scoma's of Sausalito, LLC, ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order issued against the

Company. UNITE HERE, Local 2850 (“the Union”), was the Charging Party before the Board, and has intervened before the Court. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order under review issued on August 21, 2015, and is reported at 362 NLRB No. 174. (JA 143-151.)<sup>1</sup> The Board’s Order is final with respect to all parties.

The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Company filed its petition on November 10, 2015, and the Board filed its cross-application on December 22, 2015. Both filings were timely; the Act places no time limitation on such filings.

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<sup>1</sup> “JA” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Company's unilateral withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act.
2. Whether the Board acted within its broad remedial discretion in issuing an affirmative bargaining order.

## RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

## STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union, the Board's Regional Director issued a complaint on behalf of the General Counsel alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union as the bargaining representative of its unit employees. (JA 42.) The Company filed an answer admitting that it withdrew recognition, but denying that its withdrawal was unlawful. (JA 49.) After a hearing, an administrative law judge issued a decision finding that under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Company failed to show that the Union had lost majority support on the date it withdrew recognition, and that therefore the Company's withdrawal was unlawful. (JA 145-151.) The judge also recommended that the Board order the Company to

bargain with the Union. The Company filed exceptions with the Board. On review, the Board adopted the judge's recommended findings with slight modification. (JA 143-144.) The Company then filed a motion for reconsideration, alleging that the Board failed to consider one of its exceptions and objecting to the remedy. (JA 152-156.) The Board denied the Company's motion. (JA 158-160.) The following subsections briefly summarize the facts and the Board's Conclusions and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company and the Union Enjoyed a Collective-Bargaining Relationship For Over a Decade**

The Company operates a seafood restaurant in Sausalito, California. The Union represents a 54-employee bargaining unit comprised of kitchen and wait staff. (JA 145; JA 63.)

The Company and the Union have had a collective-bargaining relationship since 2000. (JA 145; JA 63.) The parties' most recent signed collective-bargaining agreement was effective through November of 2008. (JA 145; JA 63.) The Company honored an unsigned, ratified collective-bargaining agreement that ran from December 2010 to September 30, 2012. (JA 145; JA 14-15, 28, 63.)

**B. Employee Canche Circulates a Union Decertification Petition;  
The Union Requests Bargaining**

In late September 2013,<sup>2</sup> employee Georgina Canche began circulating a union decertification petition among unit employees. (JA 146; JA 131.) The petition was entitled, “Petition for Decertification (RD)—Removal of Representative,” and stated:

The undersigned employees of Scoma’s Sausalito do not want to be represented by Unite Here Local 2850.

Should the undersigned employees make up 30% or more and less than 50% of the bargaining unit represented by Unite Here Local 2850, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether a majority of employees no longer wish to be represented by this union.

Should the undersigned employees make up 50 percent or more of the bargaining unit represented by Unite HERE Local 2850, the undersigned employees hereby request that Scoma’s Sausalito withdraw recognition from this union immediately as it does not enjoy the support of a majority of employees in the bargaining unit.

(JA 146; JA 131.)<sup>3</sup>

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<sup>2</sup> Remaining dates are in 2013 unless otherwise noted.

<sup>3</sup> Under the Board’s procedures, if such a petition is supported by at least 30 percent of the bargaining unit, the Regional Office will conduct an election to determine whether the union retains the support of a majority of the bargaining unit employees. *See Levitz*, 333 NLRB at 724; *see also* NLRB Casehandling Manual, Part 2, Representation Proceedings, § 11023.1 (available at [www.nlr.gov](http://www.nlr.gov)); *Representation-Case Procedures*, 79 Fed. Reg. 74308, 74421 (Dec. 15, 2014).

The petition was in English; Canche read the petition in Spanish to Spanish-speaking employees. (JA 146; JA 37.)<sup>4</sup>

On October 28, after receiving several phone calls from employees concerning the decertification petition, lead Union Organizer Lian Alan emailed the Company requesting negotiations for a new collective-bargaining agreement. (JA 146; JA 17, 53.)

**C. Canche Submits the Decertification Petition to the Company and Files It With The Board**

Also on October 28, Canche submitted the decertification petition to Company General Manager Roland Gotti, and filed the petition with the Board. (JA 146, 146 n.8; JA 30, 55.)<sup>5</sup> The decertification petition was signed by 29 of the 54 unit employees on dates between September 26 and October 28. (JA 146; JA 131.)

**D. Six Employees Revoke Their Decertification Signatures**

On October 29, Alan went to the Company's premises and spoke to employees during their shift change. (JA 146; JA 16-17.) He was accompanied by

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<sup>4</sup> Spanish was the preferred language of 32 of the 54 unit employees. (JA 36.)

<sup>5</sup> The judge incorrectly stated that Canche filed the petition with the Board on October 29 (JA 146 n.8), but there is no dispute that the petition was filed with the Board on October 28 (*see* Br. 4). As the judge further found, the Company and Union were notified by the Board's Regional Office of the decertification petition on October 29. (JA 146 n.8, citing Board Case No. 20-RD-115782.)

union steward Clem Hyman as well as union member Maria Munoz, who worked at a different restaurant. (JA 146, 4 n. 11; JA 17.) Alan had with him a petition stating, in English and Spanish:

If I signed a petition to decertify or get rid of the Union, I hereby revoke my signature. I do wish to continue being represented by Unite Here Local 2850 for the purposes of collective bargaining.

(JA 146; JA 54.)

When Alan, Hyman, and Munoz arrived, they met cook Fernando Montalvo as he was leaving for the day. (JA 146; JA 17.) Alan, who spoke fluent Spanish, asked Montalvo if he had signed a decertification petition, and Montalvo replied that he had. Alan told Montalvo that if the Union were decertified, “it would be 100 percent up to [the Company]” to set the employees’ benefits, wages, and working conditions. Montalvo replied that he did not want to decertify the Union if that was the case. Alan explained that Montalvo could withdraw his support of decertification by signing Alan’s petition revoking his decertification signature.

(JA 146; JA 18, 19, 21.) Montalvo signed the revocation petition. (JA 146; JA 19, 54.)

As Montalvo was leaving, other employees, including Juan Santos, Luciano Yah Chi (L. Yah Chi), Jose Magdeleno Yah Chi (J. Yah Chi), Rene Rivera Rodriguez, and Nicolas Villalobos arrived in front of the restaurant. (JA 146; JA

19.) Because some employees were afraid to be seen with Alan in front of the restaurant, the group moved to a pier about a half block away. (JA 146; JA 20.)

Alan told the assembled employees that there might be a Board election based on any decertification petition being circulated, or the Company might withdraw recognition. In answer to employees' questions, Alan explained that if the Company withdrew recognition, all employee benefits, pay, and wages would be determined by the Company. Alan further stated that the Company might choose to leave everything just as it was, but might also change things. (JA 146; JA 20-23, 54.) Alan told employees they could sign his revocation petition to revoke any decertification signatures they may have made. (JA 146, JA 20-23.) Santos, L. Yah Chi, J. Yah Chi, Rodriguez, and Villalobos signed the revocation petition. (JA 146; JA 24, 54.)<sup>6</sup>

#### **E. The Company Withdraws Recognition from the Union**

On October 31, General Manager Gotti sent a fax to the Union informing it that the Company was withdrawing recognition from the Union based on the October 28 decertification petition. (JA 146; JA 13, 25, 63.) On November 6, Canche withdrew the decertification petition from the Board's Regional Office.

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<sup>6</sup> Although an additional employee signed the revocation petition, the judge found her signature irrelevant because she had not signed the earlier decertification petition. (JA 146 n. 10, JA 54, 131.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Hirozawa, Johnson, and McFerran) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition from the Union. (JA 143-145.) The Board agreed with the judge that the Company failed to establish, as required by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001) (“*Levitz*”), that a majority of the 54 employees in the bargaining unit did not want to be represented by the Union at the time the Company withdrew recognition on October 31. (JA 143, 147-148.) In so finding, the Board upheld the judge’s determination that the Company could not rely on the decertification signatures of 6 of the 29 employees who signed the decertification petition, because those 6 employees had validly revoked their signatures two days earlier on October 29. (JA 143, 147-148.) The Board rejected the Company’s claim that the Board should have imposed on the Union an affirmative duty to inform the Company that it had gathered revocation signatures. (JA 143, 148.)

The Board’s Order requires the Company 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 by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to recognize and bargain with the Union and to embody any agreement

reached with the Union in a signed document. The Order also requires the Company to make unit employees whole for any losses suffered as a result of its repudiation of the collective-bargaining relationship, and to post a remedial notice. (JA 143-144.)

Thereafter, the Company filed a motion for reconsideration primarily claiming that the Board failed to consider its exception that the judge erred in not finding that the Union had a duty to inform the Company that it had obtained the signed revocations. The Company based its contention on Member Johnson's concurring statement that had "the issue [been] raised in exceptions," he would modify *Levitz* to require unions to present evidence of majority support. (JA 143 n.2; JA 153-154.) The Company also claimed that the Board should have reinstated the withdrawn decertification petition and ordered an election instead of a bargaining order. The Board denied the motion, explaining that it had rejected both arguments that a union must provide an employer with evidence of majority support, and the Company's proposed remedy. Accordingly, the Board concluded that the Company had not raised any "substantial argument not previously considered by the Board." (JA 158 at 2.)

### **SUMMARY OF THE ARGUMENT**

Substantial evidence supports the Board's finding that the Company's admitted withdrawal of recognition from the Union violated Section 8(a)(5) and (1)

of the Act (29 U.S.C. § 158(a)(5) and (1)). As the Board found, the Company failed to establish, by a preponderance of the evidence, and as required by *Levitz Furniture Co.*, 333 NLRB 717 (2001), that the Union had lost the support of the majority of the bargaining unit at the time the Company withdrew recognition.

The Company does not contest the Board's math, nor does it challenge the Board's consequent unfair-labor-practice finding based on the Board's extant law as embodied in *Levitz* and its progeny. Instead, the Company suggests that this Court should adopt a change to the *Levitz* standard, which was rejected by the Board, that would place a duty on a union to affirmatively demonstrate majority support in the face of an employer's withdrawal of recognition. The Company has failed to show that the Board's decision, based squarely on *Levitz* and its progeny, is irrational or inconsistent with the Act. Finally, the Company's challenge to the Board's affirmative bargaining order in the circumstances of this case fails to establish that the Board abused its broad remedial discretion.

### **STANDARD OF REVIEW**

This Court's review of Board decisions "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have

reached a different conclusion *de novo*.” *U. S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). *See generally* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

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. The Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)); *see also Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015) (the Court defers to the requirements imposed by the Board if they are “rational and consistent with the Act.”). Moreover, the Court must “give deference to [an agency’s] interpretations of its own precedents.” *Pacific Coast Supply*, 801 F.3d at 333.

It is uniquely within the Board’s expertise and discretion to determine how a withdrawal of recognition can be accomplished. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-10 (1974) (relying on Board’s expertise in

affirming rule that union must petition for an election after an employer has refused to recognize it based on a card majority); *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (noting that matters “appropriately determined” by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). Finally, as the Court recently recognized in another withdrawal-of-recognition case, “policy arguments are for the Board—not this Court—to resolve.” *Pacific Coast Supply*, 801 F.3d at 333 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364-66 (1998)).

## ARGUMENT

### I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY’S UNILATERAL WITHDRAWAL OF RECOGNITION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with a labor organization that represents its employees. It is undisputed that although the Company withdrew recognition of the Union based on a decertification petition signed by 29 of its 54 employees (a majority), 6 of those employees had validly revoked their petition signatures two days before the Company withdrew recognition.<sup>7</sup> Thus,

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<sup>7</sup> In its opening brief, the Company does not contest the Board’s finding, grounded in the judge’s credibility determinations, that the six employees validly revoked their signatures. (JA 147.) The Company has therefore waived any such challenge. *See* Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court

under *Levitz*, the Company violated the Act by withdrawing recognition from the Union at a time when only 23 of 54 employees (less than a majority) had indicated that they no longer supported the Union.

The Company essentially attacks the *Levitz* standard, asking the Court to require the Board to adopt a different rule in the decertification context, which the Board reasonably rejected. As shown below, the Company has failed to provide any basis to disturb the Board's chosen requirements, which are firmly grounded in policy determinations that are based on rational interpretations of the Act.

**A. An Employer Violates the Act by Withdrawing Recognition From the Union Unless It Can Prove, As an Affirmative Defense, That, at the Time of Withdrawal, the Union Lacked Majority Support**

Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees.<sup>8</sup> In order to give effect to employees' free choice, the collective-bargaining relationship

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must contain party's contention with citations to authorities and record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

<sup>8</sup> Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guarantees in [S]ection 7 [of the Act]," which includes employees' right to "bargain collectively through representatives of their choosing." 29 U.S.C. §§ 157, 158(a)(1). As such, an employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). See *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

between an employer and a union “must be given an opportunity to succeed, without continuous baseless challenges.” *Levitz Furniture Co.*, 333 NLRB 717, 723 (2001).

In order to promote the Act’s policies of industrial stability and employee free choice, the Board presumes that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). *See also Pacific Coast Supply*, 801 F.3d at 325-26. Such a presumption “enabl[es] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. at 786 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)) (internal quotation marks omitted). *See also Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-87 (1996). *Accord McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1004 (D.C. Cir. 2003).

Consistent with these principles, the Board in *Levitz* reconsidered past precedent and held that an employer may lawfully withdraw recognition from an

incumbent union, and defeat the rebuttable presumption of majority support, only by showing that the union *actually* lacked majority support *at the time* recognition was withdrawn. See *Pacific Coast Supply*, 801 F.3d at 326; *Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 407-408 (D.C. Cir. 2008); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31-32 (D.C. Cir. 2007); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006). In short, “unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally.” *Levitz*, 333 NLRB at 725.

Indeed, the Board has emphasized that “an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril.” *Flying Food Group, Inc.*, 471 F.3d at 182 (quoting *Levitz*, 333 NLRB at 725); *Highlands Hosp. Corp.*, 508 F.3d at 31-32 (D.C. Cir. 2007). This is because “the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.” *Flying Food Group, Inc.*, 471 F.3d at 182.

In *Levitz*, the Board summarized the evidentiary burden that an employer faces once it has unilaterally withdrawn support from its employees’ bargaining representative:

An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily

prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.

333 NLRB at 725 n.49. Moreover, to prove an actual lack of majority support, “the employer must make a numerical showing that a majority of employees opposed the union as of the date that union recognition was withdrawn.” *NLRB v. Hollaender Mfg. Co.*, 942 F.2d 321, 325 (6th Cir. 1991). If the employer fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate the Act. *Flying Food Group, Inc.*, 471 F.3d at 182.

This high standard is justified, as the Board explained, because “there is no basis in either the language or the policies of the Act to warrant withdrawing recognition from a union that has not actually lost majority support.” *Levitz*, 333 NLRB at 724. Indeed, “allowing withdrawal of recognition from unions that enjoy majority support undermines the Act’s policies of both ensuring employee free choice and promoting stability in bargaining relationships.” *Id.*

Moreover, this approach is consistent with the Board’s emphasis on secret-ballot elections as “the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). *See also Levitz*, 333 NLRB at 723. Thus, as the Board

provided in *Levitz*, an employer may obtain a Board-conducted election based on the lower standard of producing evidence supporting a showing that it has a “reasonable good-faith uncertainty” as to the incumbent union’s majority status. *Levitz*, 333 NLRB at 724. Additionally, employees have the option of filing their own petition for an election based on a showing of support of only 30 percent of the bargaining unit.

**B. The Board Reasonably Found that the Company Failed To Carry Its Burden of Proving That, at the Time It Withdrew Recognition, the Union Had Lost Majority Support**

Consistent with the above principles, the Board reasonably found that the Company failed to meet its burden, as required under *Levitz*, of proving that at the time of its withdrawal of recognition, the Union had lost the support of a majority of the 54 unit employees. (JA 147-148.) Although the Company relied on the October 28 decertification petition to withdraw recognition on October 31, the credited evidence at the hearing—now unchallenged by the Company—established that 6 of the 29 employees who had signed the decertification petition had validly revoked their signatures on October 29. Therefore, as the Board found (JA 148), the Company could not rely on those 6 decertification signatures to withdraw recognition. *See, e.g., Parkwood Dev. Ctr. v. NLRB*, 521 F.3d at 407-08 (D.C. Cir. 2008) (employer may not rely on decertification signatures when employees submit counter-petition revoking earlier signatures); *HQM of Bayside, LLC*, 348

NLRB 758, 759-60 (2006) (employer may not rely on decertification signature when employee subsequently demonstrates support for the union), *enforced*, 518 F.3d 256 (4th Cir. 2008). Thus, the Board correctly found that the remaining 23 decertification signatures were insufficient to demonstrate that the Union actually had lost majority support as of October 31, the day the Company withdrew recognition. *See Hollaender Mfg. Co.*, 942 F.2d at 325 (employer must make numeric showing of loss of union support as of the date of withdrawal). Thus the Company failed to meet its burden of proving that the Union lost the support of the majority of the unit employees.

The Board observed that the Company “could have proceeded to an NLRB election but, instead, chose to withdraw recognition on October 31, thus acting at its peril.” (JA 148). Indeed, the Company was aware from the October 28 decertification petition itself that employee Canche had gathered the signatures of 30 percent of the unit employees that would meet the Board’s requirement for directing that an election be held, and, as the Board found, even received notice the next day that Canche had actually filed for such an election with the Board. (JA 146 n.8, JA 148.) Thus, rather than abruptly rupturing the collective-bargaining relationship by unilaterally withdrawing recognition, the Company simply could have awaited the outcome of the employee election petition, or filed its own RM petition. *See Levitz*, 333 NLRB at 724 (employer may obtain a Board-conducted

election based on evidence creating a mere “reasonable good-faith uncertainty” as to the union’s majority status). But by withdrawing recognition, the Company risked exactly what happened here—that it would be unable to provide the necessary proof at an unfair-labor-practice hearing sufficient to rebut the Union’s presumption of majority status. Accordingly the Company’s withdrawal of recognition violated Section 8(a)(5) of the Act. *See Flying Foods Group*, 471 F.3d at 182.

**C. The Company’s Request that This Court Adopt a Change to the *Levitz* Standard Is Without Merit**

Despite significant hyperbole (Br. 11, 14-23), the Company inappropriately asks the Court to modify the *Levitz* framework to impose a new requirement, contrary to extant law, that would turn the burden of proof on its head by suggesting that an employer be allowed to ignore a union’s status at the time it withdraws recognition, rely on a decertification petition alone, and impose an affirmative duty on the union to demonstrate its continuing majority status. However, it is for the Board, not the Court, to develop such requirements. *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015) (court defers to withdrawal-of-recognition requirements imposed by the Board if they are “rational and consistent with the Act.”) As shown below, the Company’s policy disagreements with *Levitz* provide no basis to disturb the *Levitz* framework.

To begin, the Company apparently agrees (Br. 14) with the Board's *Levitz* view that "[e]mployers should not be permitted to withdraw recognition without absolute proof of the union's loss of majority support" and that *Levitz* correctly reversed earlier law which allowed an employer to legally withdraw recognition if it simply had a "good-faith doubt" of majority status. However, the Company makes the internally inconsistent claim that "employers should be permitted to withdraw recognition when they have a good-faith *certainty* based on a petition signed by a majority of employees." (Br. 14.) Although the Company changes the word "doubt" to "certainty," it fails to mask that its proposed rule would allow an employer, as here, to withdraw recognition from a union that has not actually lost majority support.

Moreover, this approach has already been thoroughly examined and rejected in *Levitz*, 333 NLRB at 723. As established above at p. 17, strong policy reasons support the Board's *Levitz* framework, most notably, that allowing withdrawal of recognition from unions that actually enjoy majority support "undermines employee free choice and stability in bargaining relationships." *Levitz*, 333 NLRB at 724. Indeed, the Court has accepted the application of the test numerous times. *See, e.g., Flying Foods Group*, 471 F.3d at 182; *Highlands Hosp. Corp.*, 508 F.3d at 31-32.

Although the Company poses a series of questions (Br. 15) asking “what’s an employer to do?” if it cannot rely on a decertification petition, *Levitz* has already provided the clear answer. Indeed, the Company’s options were quite clear. It could have avoided any uncertainty that might have, and ultimately did, emerge in the unfair-labor-practice proceeding when several employee signatures on the decertification petition were demonstrated to have been revoked, and instead awaited the results of the election that would have resulted from the employees’ decertification petition filed with the Board. Alternatively, the Company could have filed a petition for an election of its own based on a lower “good-faith uncertainty” standard. *Levitz Furniture*, 333 NLRB at 724, 727-28.

The Board also reasonably rejected the Company’s assertion, repeated here (Br. 18-23), that the Board must require a union to provide an employer who has relied on a decertification petition with notice that it has evidence of majority support. In rejecting the Company’s claim that the union had a duty to inform the Company that it gathered revocation signatures, the Board stated that “there is no duty under *Levitz* for the union to provide such notice.” *See* JA 148, citing *HQM of Bayside, LLC*, 348 NLRB at 759 (union has no duty to demonstrate majority support prior to withdrawal of recognition). The Board reaffirmed this position in its denial of the Company’s motion for reconsideration, rejecting this same argument. (JA 158 at 2.) As the Board explained, requiring that an employer

demonstrate an actual loss of majority support is founded on the “presumption of continued majority based on important principles underlying the Act such as safeguarding industrial stability and fostering employee rights to designate their collective-bargaining representative.” (JA 148, citing *Levitz* at 725). Further, the Board noted that “an employer need not unilaterally withdraw recognition but may petition the NLRB for an election based on a lower ‘uncertainty’ standard.” (JA 148, citing *Levitz* at 727). The Board’s balancing of interests under the Act in this manner, based on its expertise in industrial relations, is worthy of significant deference. *Allied Mech. Servs. Inc. v. NLRB*, 668 F.3d 758, 764-65 (D.C. Cir. 2012).

The Company has simply not overcome the high bar necessary to disturb the Board’s rejection of its argument. As an initial matter, the Company concedes that “requiring the Union to notify the employer *prior* to any withdrawal is unworkable—this would presuppose that the Union must always be one step ahead of the employer and anticipate an employer’s unilateral withdrawal.” (Br. 18.) The Company’s sole remaining claim (Br. 18-23) is that the Board must adopt a rule requiring a union affirmatively to inform an employer it has evidence countering a decertification majority status *after* the employer has already withdrawn recognition. However, the Company’s claim ignores that the “crucial” time to determine whether an unfair labor practice has occurred is at the time the

employer withdraws recognition. *See Highlands Hosp.*, 508 F.3d at 32. Indeed, the Court has repeatedly upheld the Board's refusal to consider post-withdrawal evidence when evaluating claims of unlawful withdrawal. *See Pacific Coast Supply*, 801 F.3d at 334; *Highlands Hosp.*, 508 F.3d at 32.

Further, the Company's premise (Br. 16) that the absence of such a requirement allowed the Union to be "secretive" (Br. 16) and engage in "gamesmanship" (Br. 17, 19, 20, 26), is erroneous. As noted above, the Company conceded (Br. 18) that prior to the Company's October 31 unilateral withdrawal, there was no way for the Union to predict what the Company would do with the decertification petition, or whether the Company would wait for the decertification election to proceed. The Union's October 29 gathering of the revocation signatures could have helped the Union shore up support for any upcoming election based on the decertification petition, which only required the support of 30 percent of the employees to proceed. Thus, the record does not support a finding that the Union necessarily, as the Company claims, engaged in any "secrecy" or "gamesmanship" prior to the Company's withdrawal.<sup>9</sup>

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<sup>9</sup> To the extent that there was any "gamesmanship" here, it was arguably on the part of the Company, who ignored the election called for by the employees, as well as its own option to request an election to assess the Union's majority status, and instead unilaterally withdrew recognition. Indeed, the Company itself (Br. 5, 6) assumes that it was its own unilateral withdrawal that prompted the employees to withdraw their petition from the Board on November 6.

Nor is there a shred of evidence that the Union engaged in any such conduct *after* the Company withdrew recognition. An employer's reliance on a decertification petition, as the Company expressly notes (Br. 15-16), places the employer at risk that the General Counsel may prove, as he did here, that the signatures on the petition were not reliable. While the Company attempts to characterize this as otherwise, the General Counsel demonstrated, based on the evidence gathered by the Union, that the signatures had been validly revoked by the employees, and thus were unreliable as evidence that a majority of the employees no longer supported the Union as the date of withdrawal.<sup>10</sup>

Put simply, the Company attempts to change the Board's standard, asserting that "[n]ow is the time for the 15 year old standard in *Levitz* to be corrected." (Br. 11.) The Company suggests that an employer should be allowed to rely on a decertification petition—no matter how flawed—to withdraw recognition, and it should be able to avoid an unfair-labor-practice violation if a union does not

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<sup>10</sup> These circumstances are incomparable to *Wilson & Co. v. NLRB*, 162 F.2d 310 (8th Cir. 1947), upon which the Company erroneously relies (Br. 16-17), where the employer made no claim in its pleading or otherwise of loss of majority status, and the court upheld the Board's determination not to accept evidence that the employer hid from the union and the Board until the unfair-labor-practice hearing. 162 F.2d at 313. Moreover, the Company's reliance (Br. 22-23) on language in the administrative law judge's decision in *Johnson Controls, Inc.*, 2016 WL 626283 is unavailing, given that it is not a precedential Board decision.

provide evidence of majority support soon thereafter.<sup>11</sup> But, the Board's considered decision, based on *Levitz* and its progeny, that such a requirement is unnecessary, is neither irrational nor inconsistent with the Act. To be sure, the Company correctly observes (Br. 20-23), that two Board members, while affirming the application of *Levitz*, have expressed concerns about how the Board should best address the circumstances presented in cases involving decertification petitions. And most recently, the Board's General Counsel has suggested that the Board should revisit *Levitz* and adopt a rule that decertification must only be conducted through an election. GC Memorandum 16-03, *Seeking Board Reconsideration of the Levitz Framework* (May 9, 2016), available at <http://apps.nlr.gov/link/document.aspx/09031d45820a955f>. But as this Court has stated, "policy arguments are for the Board—not this Court—to resolve." *Pacific Coast Supply*, 801 F.3d at 333 (citing *Allentown Mack*, 522 U.S. at 364-66). The Court should therefore not disturb the Board's conclusion.

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<sup>11</sup> The Company engages in sheer speculation when it suggests that if a union presents an employer with such evidence, an employer will quickly rescind its withdrawal. As the Company notes (Br. 12, 25-26), in many cases, including *Levitz*, even when a union presented such evidence to an employer, the union was soundly ignored.

## II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ISSUING AN AFFIRMATIVE BARGAINING ORDER

Section 10(c) of the Act authorizes the Board, upon finding a violation of the Act, to order the violator to take affirmative action that “will effectuate the policies” of the Act. 29 U.S.C. § 160(c). The purpose of a Board remedial order is both to “deter [] ... unfair labor practices,” and “to restore, so far as possible, the status quo that would have obtained but for the wrongful act.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969). *Accord NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316-17 (D.C. Cir. 1972).

“Not only does the Board have broad discretionary power under [Section 10(c)] to fashion remedies that effectuate the policies of the Act, but the Board’s exercise of its discretion is subject to quite limited review.” *Petrochem Insulation v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001). Thus, this Court “will not disturb a remedy ordered by the Board ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly be said to effectuate the policies of the Act.’” *Id.* (quoting *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). *See also NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946) (“[T]he proper scope of a Board order upon finding unfair labor practices calls for ample discretion in adapting remedy to violation.”).

Under these settled principles, the Board acted well within its remedial discretion when it issued an order requiring the Company to recognize the Union and bargain with it. (JA 143 n.3, JA 148-149.) Such a remedy is “the standard Board remedy for more than 50 years when an employer has refused to bargain with an incumbent . . . union.” *Caterair Int’l*, 322 NLRB 64, 65 (1996). As required by this Court, the Board also weighed the factors set forth in *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000) in determining that the imposition of an affirmative bargaining order was an appropriate remedy. (JA 143 n.3, JA 148-149.) Those factors are: (1) employee Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their representative; and (3) whether alternative remedies are adequate to remedy the violations of the Act. *Vincent Indus. Plastics*, 209 F.3d at 738. Noting the “virtually identical facts” present here and in its earlier decision in *Anderson Lumber*, 360 NLRB No. 67 (2014), *enforced sub. nom.*, *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015), the Board performed the same balancing test under *Vincent* that it did in *Anderson Lumber*. (JA 143 n.3, JA 149.)

Considering the first *Vincent* factor, the Board noted that an affirmative bargaining order would vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Company’s unlawful withdrawal of recognition. (JA 149.) At the same time, an affirmative bargaining

order would not unduly prejudice the rights of employees who may oppose continued union representation because, as the Board explained, “the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.” (JA 149.)

Continuing its analysis under the second *Vincent* factor, the Board noted that an affirmative bargaining order would “remove[] the [Company’s] incentive to delay bargaining in the hope of discouraging support for the Union” and insulate the Union from the pressure to achieve immediate results at the bargaining table. (JA 149.)

Finally, under the third *Vincent* factor, the Board explained that a cease-and-desist order alone would be an inadequate remedy “because it would permit another challenge to the Union’s majority status before the taint of the [Company’s] unlawful withdrawal of recognition has dissipated, and before the employees have had a reasonable time to regroup and bargain.” (JA 149.) The Board reasoned that such a result would be particularly unjust here, where the Company’s withdrawal of recognition “would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter.” (JA 149.)

The Company’s primary challenge (Br. 24-26) to the Board’s bargaining order boils down to a claim that the Board should have ordered an election.

However, the Company did not demonstrate that the Union actually lost the support of a majority of employees, and therefore an election is not warranted. Moreover, again, as the Board noted in its analysis of alternative remedies, described above, allowing an election would improperly challenge the Union's majority status before the taint of the unlawful withdrawal of recognition has dissipated, and before the employees have had a reasonable time to regroup and bargain. (JA 149.) This finding is fully consistent with Board precedent. *See Parkwood Dev. Ctr. Inc. & UFCW Int'l Union Local 1996*, 347 NLRB 974, 977 (2006) (affirmative bargaining order warranted to remedy taint from unlawful withdrawal of recognition), *enforced, Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404 (D.C. Cir. 2008); *HQM of Bayside, LLC*, 348 NLRB 758, 762 (2006) (affirmative bargaining order warranted to give employees reasonable time to regroup and bargain), *enforced*, 518 F.3d 256 (4th Cir. 2008).

Nor does the Company advance its argument by complaining (Br. 24, 25) that it only committed a "technical" violation because the Union did not present it with evidence of majority support after the Company withdrew recognition based on the decertification petition. As shown at pp. 18-20, the Company violated the Act on October 31 when it withdrew recognition relying on a decertification petition that did not, in fact, represent the view of a majority of its employees. The Company chose to rely on that petition, at its peril, rather than wait for the election

it now seeks. In withdrawing recognition, the Company refused to bargain with the Union, despite its request for bargaining. Thus, the Union was precluded from negotiating with the Company over relevant issues of concern to the employees, notwithstanding its continued presumption of majority support. In these circumstances, the Company has not demonstrated that the Board abused its discretion by determining that an affirmative bargaining order was necessary to remove the taint from that result.<sup>12</sup>

Finally, the Company suggests that without an immediate election, the Board unfairly prolongs the resolution of employee choice, exaggeratedly stating (Br. 26) that the employees have already been “cast into the abyss for a period of years.” This suggestion should be viewed with misgiving. The Board gives “a short leash” to an employer that seeks to withdraw recognition as a means of vindicating its employees’ organizational freedom. *Auciello Iron Works*, 517 U.S. at 790. The Supreme Court has approved of this approach, observing that “the Board is entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a

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<sup>12</sup> In its Statement of the Case (Br. 7), the Company notes that it attempted to present evidence of a second decertification petition purportedly dated November 2014. However, the Company does not challenge the Board’s rejection of such evidence in its argument, and thus has waived any such claim. *See* Fed. R. App. P. 28(a)(8)(A); *Sitka Sound Seafoods, Inc.*, 206 F.3d at 1181. In any event, as shown above, and as the Board found, such a petition is presumed tainted given that it followed the Company’s unlawful withdrawal of recognition. (JA 143 n. 3.)

decertification petition from the workers if they want to file one.” *Id.* See also *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1078 (8th Cir. 1992) (noting that the withdrawing employer is “an inherently biased party”). And as noted above, once the Company and the Union have bargained for a reasonable period of time, the employees can choose to file a decertification petition. See also JA 143 n.3 (Member Johnson) (employees are free to seek a decertification election once the parties have bargained for a reasonable amount of time). In sum, the Company has presented no basis for the Court to disturb the Board’s exercise of its broad remedial discretion in ordering an affirmative bargaining on the facts of this case.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

July 2016

## **ADDENDUM**

## STATUTORY ADDENDUM

**Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq.:**

**Section 7 of the Act (29 U.S.C. § 157):**

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Section 8(a)(1) and (5) of the Act (29 USC § 158(a)(1), (5)):**

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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

**Section 10(a) of the Act (29 USC § 160(a)):**

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

**Section 10(c) of the Act (29 USC § 160(c)):****(c) Reduction of testimony to writing; findings and orders of Board**

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

**Section 10(e) and (f) of the Act (29 USC § 160(e) & (f)):**

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged

before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## **REGULATIONS:**

### **Federal Rule of Appellate Procedure 28(a)(8)(A):**

Rule 28. Briefs:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

**Board Casehandling Manual, Part 2, Representation Proceedings, § 11023.1**

11023.1 Petitioner Interest

“A petitioner, in order to justify further proceedings, must demonstrate designation by at least 30 percent of the employees in the unit it claims appropriate. (A RC petition filed with respect to a residual unit of employees must be supported by at least 30 percent of the employees in the residual unit, not the overall unit.)”

**79 Fed. Reg. 74308, 74421 (Dec. 15, 2014)**

*Representation-Case Procedures*

“However, at this time, the Board has no intention of changing the size of the required showing of interest and the uncodified statement of the general course that follows states that the required showing remains 30 percent.”



**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SCOMAS OF SAUSALITO, LLC	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1412
	* 15-1476
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 20-CA-116766
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
UNITE HERE, LOCAL 2850	*
	*
Intervenor	*
	*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 7th day of July, 2016