

ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 20-1060
(Consolidated with Case Nos. 20-1061 and 20-1134)

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

LEGGETT & PLATT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF OF PETITIONER LEGGETT & PLATT

Arthur T. Carter
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201
T: (214) 880-8105
F: (214) 594-8601
atcarter@littler.com

A. John Harper III
1301 McKinney Street, Suite 1900
Houston, Texas 77010
T: (713) 652-4750
F: (713) 513-5978
ajharper@littler.com

Arrissa K. Meyer
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201
T: (214) 880-8180
F: (214) 889-6100
akmeyer@littler.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Leggett & Platt, Inc. (“Leggett”) states that it is a publicly held corporation, and that The Vanguard Group, Inc. and State Street Corporation are beneficial owners of over 10% of Leggett’s common stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. Leggett is the Petitioner in Case No. 20-1060.
2. Keith Purvis is the Petitioner in Case. No. 20-1061, consolidated with Case No. 20-1060.
3. The National Labor Relations Board (“NLRB” or “Board”) is the Respondent in Case Nos. 20-1060 and 20-1061 and the Cross-Petitioner in Case No. 20-1134, consolidated with Case No. 20-1060.
4. The International Association of Machinists and Aerospace Workers, AFL-CIO (the “Union”) was the charging party in the proceedings before the NLRB and is the Intervenor in Case No. 20-1060.

B. Ruling Under Review.

Leggett seeks review of the NLRB’s Decision and Orders (“Orders”) captioned as *Leggett & Platt, Inc. and International Association of Machinists and Aerospace Workers (IAM), AFL-CIO*, Case Nos. 09-CA-19457, 09-CA-196426 and

09-CA-196608, published at 367 NLRB No. 51, 368 NLRB No. 132, and an Order Denying Motion for Reconsideration dated February 19, 2020.

C. Related Cases.

The instant case was previously pending before this Court under Case Nos. 19-1003 and 19-1005, but was remanded to the NLRB by an order dated August 7, 2019. Leggett is not aware of any other case pending before this Court involving substantially the same or similar issues as the instant case.

STATEMENT REGARDING ORAL ARGUMENT

This case involves a withdrawal of recognition from a union. It presents important questions regarding the National Labor Relations Board's failure to apply its decision in *Johnson Controls*, 368 NLRB No. 20 (2019), retroactively to the facts of this case. It also involves questions regarding the Board's application of the rule it abandoned in *Johnson Controls*, whether the Board complied with its statutory mandate and with precedent, and whether the Board abused its discretion by imposing a bargaining order on Leggett & Platt, Inc., despite its decision in *Johnson Controls* and this Court's decision in *Scomas of Sausalito, LLC v. NLRB*, 847 F.3d 1147 (D.C. Cir. 2017). Oral argument will assist the Court in addressing these important issues.

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GLOSSARY OF ABBREVIATIONS

Administrative Law Judge	(“ALJ”)
Collective Bargaining Agreement	(“CBA”)
International Association of Machinists and its Local Lodge 619	(“IAM” or “Union”)
Joint Appendix	(“J.A.”)
National Labor Relations Act	(“NLRA” or “Act”)
National Labor Relations Board	(“NLRB” or “Board”)
Transcript of the July 2017 hearing	(“Tr.”)
Unfair Labor Practice	(“ULP”)

JURISDICTIONAL STATEMENT

This case is before the Court for a second time following a remand due to the Board's overruling the precedent on which it relied in initially deciding the case. This Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 160. The Board's Orders are final with respect to all parties. Leggett, as an aggrieved party, filed its petition for review in this Court on March 2, 2020, pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f).

STATEMENT OF ISSUES

1. Whether the NLRB erred by declining to apply *Johnson Controls*, 368 NLRB No. 20 (July 3, 2019), retroactively to the facts of this case.
2. Whether the NLRB's decision that Leggett improperly withdrew recognition from the Union is inconsistent with its statutory mandate and precedent.
3. Whether substantial evidence supports the NLRB's finding that the Union regained majority support before Leggett withdrew recognition.
4. Whether the NLRB erred in concluding that Leggett violated Sections 8(a)(5) and (1) of the Act by changing employees' terms and conditions of employment following its withdrawal of recognition.
5. In the alternative, whether the NLRB erred in imposing an affirmative bargaining order on Leggett and failing to follow *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017).

6. Whether the NLRB erred in concluding that Leggett violated Section 8(a)(1) of the Act by allegedly aiding a decertification petitioner because that conclusion is not supported by substantial evidence.

STATUTES AND REGULATIONS

Section 7 of the NLRA, 29 U.S.C. § 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 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 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 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 of the NLRA, 29 U.S.C. § 160:

(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 a 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. 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.

STATEMENT OF THE CASE

On January 11, 2017, following receipt and verification of a decertification petition signed by a majority of bargaining unit employees stating they no longer wanted representation by the International Association of Machinists Local Lodge 619 (“Union”), Leggett announced its anticipatory intent to withdraw recognition from the Union when the collective bargaining agreement (“CBA”) expired 48 days later. Leggett formally withdrew recognition on March 1, 2017 and thereafter changed employees’ employment terms. Between January 11 and March 1, however, the Union apparently gathered signatures on a counter-petition, but never disclosed the existence of that counter-petition to Leggett. Following Leggett’s announcement of its intent to withdraw recognition and again after its withdrawal, the Union filed unfair labor practice (“ULP”) charges alleging both the announcement and the actual withdrawal were unlawful. The ULP charges regarding the announcement were dismissed by NLRB Region 9. The Union alleged

the actual withdrawal was unlawful because 28 employees signed both the decertification petition and the Union's undisclosed counter-petition.

The General Counsel issued a Complaint and Notice of Hearing on April 11, 2017 regarding the withdrawal and change in employment terms, and later amended and consolidated that complaint with another. The Board also sought a preliminary injunction under Section 10(j) of the Act, which the District Court denied. *See Lindsay ex rel. NLRB v. Leggett & Platt, Inc.*, No. 5:17-198-KKC, 2017 U.S. Dist. LEXIS 94683, at *7 (E.D. Ky. June 20, 2017). Leggett answered the consolidated complaint on July 14, 2017. On July 19, decertification petitioner Keith Purvis and 10 other employees (the "Proposed Intervenors") moved to intervene, which was denied on July 20, 2017.

An Administrative Law Judge ("ALJ") conducted a hearing on July 24–26, 2017. During the hearing, the Proposed Intervenors moved again to intervene, which the ALJ denied. The parties and the Proposed Intervenors filed post-hearing briefs on September 8, 2017. The ALJ issued his decision on October 2, 2017.

Applying *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), *Parkwood Development Center*, 347 NLRB 974 (2006), and their progeny, which sanctioned the Union's ability to rely on an undisclosed counter-petition to pursue ULP charges and a bargaining order (the "*Levitz-Parkwood Rule*"), the ALJ found that Leggett violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition

and thereafter changing employment terms without bargaining.¹ The ALJ further found that Leggett violated Section 8(a)(1) when following withdrawal, Human Resources Manager Stephen Day directed a new employee, Cordell Roseberry, towards decertification petitioner Keith Purvis so Purvis could introduce Roseberry to Roseberry's supervisor. Among other remedies, the ALJ recommended an affirmative bargaining order requiring Leggett to recognize and bargain with the Union.

The Board affirmed the ALJ's rulings, findings, and conclusions and adopted the ALJ's recommended order, with only slight modifications. *Leggett & Platt, Inc.*, 367 NLRB No. 51, slip op. at 1 nn. 4 & 5 (2018) ("*Leggett I*"). The Board also reviewed the three considerations set forth in *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000), and held that the facts of this case justified an affirmative bargaining order, essentially copying the bargaining order analysis in *Anderson Lumber Co.*, 360 NLRB 538 (2014). *Id.* at 1.

On January 8, 2019, Leggett appealed the Board's decision to this Court. On July 3, 2019, the NLRB issued its decision *Johnson Controls*, 368 NLRB No. 20, which clarified the law regarding anticipatory withdrawals of recognition and overruled the *Levitz-Parkwood* Rule because it failed to comply with the Board's

¹ The ALJ dismissed an allegation that Leggett violated Sections 8(a)(5) and (1) by unilaterally changing the job-bidding procedure.

statutory mandate to balance employee free choice and labor relations stability. In doing so, the Board acknowledged this Court's criticism of the *Levitz-Parkwood* Rule in *Scomas*, 849 F.3d 1147. *Johnson Controls* implemented a new procedure whereby Unions have to seek an election within 45 days of an employer's lawful announcement of an anticipatory withdrawal. *Johnson Controls*, 368 NLRB No. 20, slip op. at 8. The Board also stated that it would apply *Johnson Controls* retroactively to all cases at whatever stage. *Id.* at 11-12.

On the NLRB's request, the Court remanded the case to the Board on August 7, 2019 for reconsideration in light of *Johnson Controls*. On December 9, 2019, the Board reaffirmed its original order and declined to apply *Johnson Controls* retroactively apparently only to this case. *Leggett & Platt*, 368 NLRB No. 132, slip op. at 2-3 (Dec. 9, 2019) ("*Leggett II*"). Leggett sought reconsideration by the Board, but the Board denied Leggett's motion on February 19, 2020, prompting this petition.

PRELIMINARY STATEMENT

This case involves a question about the Board's refusal to apply its decision in *Johnson Controls* to the facts of this case even though it held the *Johnson Controls* rule is retroactive. It also involves a question about whether the *Levitz-Parkwood* Rule as applied in this case is inconsistent with the Board's statutory mandate to balance employee free choice and ensure stable labor relations.

There is no dispute that Leggett properly announced its intent to withdraw recognition from the Union when the parties' CBA expired. But between the time of this announcement and Leggett's actual withdrawal, the Union allegedly gathered a counter-petition creating a question about whether it retained its majority status. Under the *Levitz-Parkwood* Rule, the Union was allowed to sit on its rights, hide the counter-petition from Leggett, let Leggett move forward with an unwitting withdrawal, and then reveal the petition in subsequent ULP proceedings. Had the Company or employees known about the Union's counter-petition, they could have taken steps to protect employees' right to choose whether or not to be represented by a union. As it stands now, however, the ULP proceedings resulted in a bargaining order that could preclude employees' ability to choose or reject unionization for years.

Recognizing this Court's criticism of the *Levitz-Parkwood* Rule in *Scomas*, 849 F.3d at 1157-58, *Johnson Controls* held that the Rule was inconsistent with the Board's statutory mandate because it failed to balance employee free choice and maintain stable labor relations. 368 NLRB No. 20, slip op. at 6-7. In its place, *Johnson Controls* held that when an employer lawfully announces an anticipatory withdrawal, the Union must file an election petition, or the employer may rely on the evidence before it to proceed with withdrawal. *Id.* at 7-8. Thus, *Johnson Controls* eliminates the ability of unions to engage in the sort of gamesmanship

criticized in *Scomas* and on full display here.

The Board should have applied *Johnson Controls* retroactively to this case and, in any event, the Board's application of the *Levitz-Parkwood* Rule is inconsistent with the Act. The Board's order should be denied enforcement.

STATEMENT OF FACTS

A. The Labor Relations Background at Winchester.

Leggett's Winchester plant, also known as Branch #0002, produces mattress parts. (J.A. 33-34). Winchester's production, maintenance, and warehouse employees had been represented by the International Association of Machinists Local Lodge 619 ("Union") since 1965. (J.A. 12, 35-36). Chuck Denisio manages the Winchester plant. (J.A. 33, 326). Leggett's most recent CBA with the Union was in effect from February 28, 2014 to February 28, 2017. (J.A. 36, 276-310).

B. Leggett Withdrew Recognition From the Union Based on Objective Evidence the Union Lost Majority Support.

1. Leggett Received an Employee Petition Signed by a Majority of the Bargaining Unit.

On December 19, 2016, Denisio received a petition from a bargaining unit employee, Keith Purvis, stating:

The undersigned employees of Leggett and Platt # 002 do not want to be represented by IAM Local 619 hereafter referred to as "union."

(J.A. 37, 38, 245-59). Denisio received more signature pages before January 1. (J.A. 18, 38, 42). He asked two Leggett employees, John Omohundro and Kurt Bruckner,

to review and verify the signatures on the petition. (J.A. 39, 47, 49). Omohundro and Bruckner compared the signatures on the petition to known exemplars of the employees' signatures in their personnel files. (J.A. 47, 48, 49-51, 327).

Based on their review, Omohundro and Bruckner discounted only two signatures—one that was a duplicate (Kelly Barnett) and one that could not be verified by personnel records (Fred Gross). (J.A. 40). They initially could not verify Donnie Butler's signature because he had printed his name instead of signing it. (J.A. 46). However, Butler subsequently signed the petition before the withdrawal, so the Company counted his signature. (J.A. 46). Bargaining unit employee George McIntosh testified that he saw Butler write his name on the petition. (J.A. 56). McIntosh also explained that he was the individual who asked Butler to go back and sign the petition the next day.² (*Id.*).

2. Leggett Announced It Would Withdraw Recognition Upon the CBA's Expiration.

As of January 11, 2017, 299 employees were in the bargaining unit. (J.A. 312-21). Thus, after verifying the 167 signatures it had received, the Company concluded that a majority of the bargaining unit employees had signed the petition. (J.A. 39, 41).

² The ALJ therefore incorrectly ruled only 138 rather than 139 employees supported the petition. *Leggett I*, 367 NLRB No. 51, slip op. at 8-9, n.12. Employees may print their names on a petition or authorization card. See *Flamingo Hilton-Laughlin*, 324 NLRB 72, 127 (1997) (ALJ Decision).

Accordingly, on January 11, Denisio wrote the Union stating that Leggett had evidence that the majority of the bargaining unit no longer desired to be represented by the Union. (J.A. 322). The letter also stated that Leggett would withdraw recognition from the Union when the parties' CBA expired on February 28 but that, in the meantime, it would continue to honor the CBA and recognize the Union. (*Id.*).

On January 12, the Company informed bargaining unit employees that a majority of them had notified the Company that they no longer desired union representation. (J.A. 323-25). The Company explained that it had told the Union it would withdraw recognition when the CBA expired. (*Id.*). The Company also told employees that, "assuming nothing changes with respect to [their] desire to no longer be represented by the Union after February 28, 2017," they would begin receiving the same benefits Leggett provided to its non-union employees after the contract expired. (*Id.*).

The Union filed its first set of ULP charges based on the Company's January 11 and 12 letters. (J.A. 41). It alleged that the Company violated the Act by anticipatorily withdrawing recognition, by refusing to bargain with the Union, and by directly dealing with employees. The Union also alleged the Company unlawfully assisted employees in obtaining signatures. (J.A. 41, 265-268). NLRB Region 9 dismissed these charges, affirming that the employees' decertification petition was valid, supported by a majority of employees, and not tainted by

employer interference. (J.A. 265-268). It concluded that “the Employer had in its possession evidence demonstrating that the Union had lost the support of a majority of bargaining unit members.” (J.A. 265-266).

Denisio continued to receive more signed decertification petition pages in January. (J.A. 37-38, 245-264). Office Manager Cathy Spencer verified the additional signatures. (J.A. 40, 69-70). The employees who collected the signatures on the decertification petition also personally witnessed those signatures. (J.A. 52-56, 58-59, 78). As of January 23, 182 employees had signed the decertification petition. (Co. Ex. 7). (J.A. 245-264).

Leggett did not receive any correspondence from the Union regarding its anticipatory withdrawal until February 21, when the Union sent Denisio a letter stating that it “did not believe the Company’s claim.” (J.A. 41, 326). Leggett responded the next day, writing that it had no evidence that employees had changed their minds regarding decertification and that it intended to move forward with withdrawing recognition when the CBA expired. (J.A. 327). The Union never mentioned or offered to provide a counter-petition or anything else to show the Union had regained majority support, and it did not expressly respond to Leggett’s letter. (J.A. 42-43).

3. On March 1, 2017, Leggett Withdrew Recognition.

The most recent CBA between Leggett and the Union expired on February

28, 2017. (J.A. 305). Before withdrawing recognition, Denisio verified the current number of employees in the bargaining unit, accounting for any turnover. (J.A. 43). He determined that, as of March 1, there were 295 employees in the bargaining unit and that 15 who had signed the petition were no longer employed, leaving 167 “active” signatures. (J.A. 43, 328-337). Given that the majority of the then-current employees in the bargaining unit no longer wanted Union representation, Leggett formally withdrew recognition on March 1. (J.A. 44, 338). In communicating the withdrawal to the Union, Leggett expressly noted that the Union had not provided any evidence that it still enjoyed majority support among the bargaining unit employees. (J.A. 338).

C. After Withdrawing Recognition, Leggett Changed Employees’ Terms and Conditions of Employment.

After withdrawing recognition, Leggett made changes to bargaining unit employees’ wages and benefits. (J.A. 339-341). The Company notified employees of the changes on March 2. (J.A. 269). Human Resources Manager Stephen Day was responsible for implementing those changes. (J.A. 45). The Company also ceased deducting dues from employees’ pay checks. (J.A. 339-341). These changes were material, substantial, and significant, and the Company made these changes without bargaining with the Union. (*Id.*).

D. The Union Filed an Unfair Labor Practice Charge Based on a Counter-Petition It Withheld from Leggett.

On March 1, the Union filed a ULP charge regarding the withdrawal of recognition. (J.A. 221-222). The Union had apparently gathered signatures on a counter-petition, the existence of which it never disclosed to Leggett until after the withdrawal. (J.A. 223-230). In fact, Leggett did not receive a copy of the counter-petition until months later when the Region included it in its 10(j) filings.

Most of the signatures on the counter-petition were collected by Elmer Tolson at a January 18 union hall meeting. (J.A. 12, 13). Tolson, the Local Lodge President, stood to lose some of his compensation if the Union was decertified. (J.A. 15). Marvin Berry, Chief Committeeman, collected more signatures on February 27 and 28, canvassing in front of Leggett's New Street plant building. (J.A. 18, 19). Berry testified that on the night he collected signatures, it was dark and raining, and at least one person signed the counter-petition on his back, out of his sight. (J.A. 20, 21).

Twenty-eight employees signed both the petition and the counter-petition: Michael Bowman, Shane Caves, Terris Cesefski, Dustin Day, Glen Dixon, Reuben Elkins, Tina Freeman, Justin Gilvin, James Green, Fred Gross, Paul Haddix, Albert Hawkins, Timothy Keeton, Jack Keith, Christian McIntosh, Brian Patrick, Christopher Payne, Jose Pesina, Leopold Pesina, Charles Randall, Tommy Roberts, Ashley Rogers, Marvin Rogers, Frederick Sandefur, Paul Troy, Tyler Troy, James Wells, and James Wren. (J.A. 99).

Tolson testified that over 90% of the counter-petition signatures were obtained at the union hall on January 18. (J.A. 13). But his testimony establishes that the Union created an environment of confusion at the meeting that misled many of these dual-signers into signing the counter-petition by mistake. None of the Union leaders gave a presentation or a speech explaining to employees the meeting's purpose. (J.A. 16). There were multiple documents and signature sheets for employees to review that were not clearly marked. Tolson had three stacks of paper on his desk with handouts for employees as well as the counter-petition. (J.A. 94, 223-30, 235-237). On another table, there was a ballot box and a document for employees to sign for a strike sanction vote. (J.A. 94-95, 232-234).

It is undisputed that the strike sanction document had no language explaining its purpose. (J.A. 96-97). There is a dispute, however, regarding whether the counter-petition contained any statement explaining its purpose. Although Tolson and Berry claim that each page of the pro-union petition stated, "We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc.," several of the dual-signers testified that they could not recall that language when they signed the counter-petition. (J.A. 14, 18-19, 63, 67-68, 71-72, 73, 80, 82).

Thus, many of the dual-signers did not understand the significance of signing the counter-petition. Jack Keith testified he was told to sign the counter-petition to

receive strike benefits. (J.A. 60). Glen Dixon too testified that he signed the document so he would get paid in case there was a strike. (J.A. 63). Similarly, Tina Freeman testified that she signed the document “for insurance, to get an insurance paper. To see what was going to be offered with insurance.”³ (J.A. 79). Other employees, including Marvin Rogers, James R. Green, and Ashley Rogers, believed they were simply signing a sign-in sheet for the union meeting. (J.A. 67, 71, 88). Albert Hawkins signed the counter-petition because Tolson falsely told him that his insurance would double and he would lose his job if the Union was decertified.⁴ (J.A. 82-83).

E. Based on Their Testimony, Stephen Day Did Not Direct Employees to Meet With a Fellow Employee for the Purpose of Signing a Decertification Petition.

On April 5, well after Leggett withdrew recognition, Human Resources Manager Stephen Day met with employees in the plant conference room to distribute benefits packets and enroll their dependents in the new health insurance plan. (J.A.

³ Leggett made offers of proof that Brian Patrick and Timothy Keeton signed the counter-petition believing it was for the purpose of obtaining strike pay and benefits. (J.A. 65, 87).

⁴ Leggett also made offers of proof that 11 dual-signing employees, including Jack Keith, Glen Dixon, Timothy Keeton, Marvin Rogers, James R. Green, James Wells, Tina Freeman, Albert Hawkins, Brian Patrick, Ashley Rogers, and Justin Gilvin, remained opposed to Union representation on March 1, the date of withdrawal, and had not changed their minds regarding their lack of support for the Union, despite their signatures on the counter-petition. (J.A. 61, 64, 65, 68, 72, 74, 80, 81, 84, 86, 89, 90).

25, 45).

At 3:00 p.m., a new employee, Cordell Roseberry, met Day by the bulletin board near the plant conference room. (J.A. 27). It was Roseberry's second day, and Day had asked him to stop by the conference room so he could meet his supervisor.⁵ (J.A. 22, 27). When Roseberry arrived, Day pointed Roseberry toward another employee, Keith Purvis, and asked Roseberry to follow Purvis. (*Id.*). Day also asked another employee who had returned from leave, Aaron Shepherd, to follow Purvis as well. (J.A. 27-28). Earlier that day, when Purvis was completing his benefits paperwork, Day had asked Purvis to take Roseberry to meet his new supervisor. (J.A. 24). This occurred out of Roseberry's earshot, and Roseberry did not hear Day speak to Purvis or tell Purvis why he was asking Roseberry to go with Purvis. (J.A. 22, 24). After consulting his affidavit, however, Roseberry testified that he heard Purvis ask Day if there were "any more new hires in" but that he heard no other conversation between them. (J.A. 24). Day said nothing else to Roseberry, including anything about the Union or any decertification effort. (J.A. 24, 27).

On June 9, 2017, Purvis filed a decertification petition requesting an election. *See* Case No. 09-RD-200329. (J.A. 270-73). The Region blocked an election pending the outcome of this case. (J.A. 274-75).

⁵ Roseberry had not met his supervisor because he spent his first day working on the first shift to become acclimated. (J.A. 27).

SUMMARY OF THE ARGUMENT

1. The Board erred by not applying *Johnson Controls* retroactively to this case. The Board found that applying *Johnson Controls* retroactively would work a manifest injustice due to “institutional reasons” and because it wanted to ensure prompt compliance with its bargaining orders. The Board did not specifically identify its “institutional reasons,” however, and thus violated its obligation to explain its decisions. *See Circus Circus Casinos, Inc. v. NLRB*, No. 18-1201, 2020 WL 3108276, at *3 (D.C. Cir. June 12, 2020).

The Board also refused to apply *Johnson Controls* retroactively to help ensure prompt compliance with its bargaining orders. But given the posture of this case, prompt compliance was a misplaced concern. Leggett had exercised its statutory right to appeal, 29 U.S.C. § 160(f), and thus was not in a position to promptly comply. The Board therefore effectively punished Leggett for exercising its right to appeal. Further, the Board continues to insist on imposing a bargaining order, despite admitting in *Johnson Controls* that a bargaining order on these facts is inconsistent with its statutory obligations and acknowledging this Court’s criticism of such remedy under similar facts in *Scomas*, 849 F.3d at 1155-56. Indeed, refusing to apply the reasoning of *Johnson Controls* retroactively here works a manifest injustice because it creates an absurd result—a decision that does not comply with an admitted statutory mandate and that prevents employees from choosing their

representatives. This Court should apply *Johnson Controls* and deny enforcement of the Board's order.

2. Regardless of whether *Johnson Controls* should have been applied retroactively, the Board should reject the Board's liability finding because the *Levitz-Parkwood* Rule as applied in this case fails to comply with the Board's statutory mandate and with precedent. The Board's decision gives no credence to employee free choice because the result of its liability finding is the imposition of a bargaining order blocking a decertification petition, and that could prevent employees from choosing or rejecting union representation for years. The decision also did not ensure stable labor relations. Rather, it placed Leggett in the position of unwittingly withdrawing recognition and disrupting the bargaining relationship at the very same time the Union was hiding evidence of its alleged reacquired majority status. The consequence is years of litigation.

Further, this Court's prior cases addressing the *Levitz-Parkwood* Rule in recognition withdrawal situations are no barrier to denying enforcement of the Board's liability finding here. In those prior cases, the employer either failed to prove a union had lost majority status or had evidence in its possession that a union had regained majority status prior to effectuating the withdrawal. Here, however, Leggett proved the Union lost majority status prior to withdrawal and had no evidence that the Union had reacquired that status before effectuating the withdrawal

because the Union was hiding it. The Board's decision therefore conflicts with precedent holding that an employer's liability cannot turn on information that it did not possess until after withdrawal. *See Scomas*, 849 F.3d at 1155 (citing cases).

3. The Board's determination that the Union regained majority status is not supported by substantial evidence. As the Board recognized in *Johnson Controls*, 368 NLRB No. 20, slip op. at 6, the mere fact that employees sign petitions both for and against a union does not establish that those employees continue to support that union. Moreover, in stark contrast to Leggett's careful approach, the evidence establishes that employees who signed both petitions did not know that they were signing a petition in support of the Union. Instead, employees testified to the confused atmosphere surrounding the Union's petition, which, in combination with the Union's withholding of the petition from Leggett, shows that the Union's alleged reacquisition of majority status is not supported by substantial evidence. *See Scomas*, 849 F.3d at 1160, n.2 (Henderson, J., concurring) (union organizer's "concealment of revocation signatures says a great deal about his forthrightness generally").

4. The Board erred in concluding that Leggett violated Section 8(a)(5) and (1) by changing employees' terms and conditions of employment. Because Leggett did not violate the Act by withdrawing recognition, it was thereafter privileged to make unilateral changes.

5. In the alternative, even if Leggett's withdrawal violated the Act, the Board abused its discretion by imposing a bargaining order. A bargaining order is an extreme and unwarranted remedy here where Leggett's alleged violations were neither deliberate nor calculated. Contrary to the Board's attempts to distinguish it, this Court's holding in *Scomas*, which also involved a union withholding evidence of its regained majority status until after an employer withdrew recognition, means enforcement of the Board's bargaining order should be denied.

6. The Board erred by finding that Leggett violated Section 8(a)(1) when Day directed Roseberry to Purvis. This conclusion is not supported by substantial evidence. The Board improperly affirmed the ALJ's decision to credit Roseberry over Day, despite no conflict in their testimony. It also erred by drawing an adverse inference against Leggett based on its failure to question Purvis regarding his exchange with Day, despite the General Counsel bearing the burden of proof on this issue. Further, Day's hand gesture to one employee, standing alone, does not rise to the level of unlawful aid of a "decertification" effort under existing Board precedent.

Therefore, Leggett respectfully requests that the Court grant its Petition for Review and deny enforcement of the Board's Order or, in the alternative, remand the case to the Board to conduct an election.

STANDING

Leggett has standing to seek review in this Court as an aggrieved party to a

final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

ARGUMENT

Leggett did not violate the Act by withdrawing recognition from the Union or by directing one employee to meet with another during the workday. Even if it did, the Board abused its discretion by imposing a bargaining order as a result of the withdrawal of recognition.

A. The Standard of Review.

The Board is subject to the Administrative Procedure Act's requirement of reasoned decision-making. *See Circus Circus*, 2020 WL 3108276, at *3. The Court "will uphold a decision of the Board unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so." *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). The Court reviews NLRB remedial orders for abuse of discretion. *See Scomas*, 849 F.3d at 1155. The standard is "deferential but not toothless" because the Court "must assure [itself] that the Board has considered the factors which are relevant to its choice of remedy" and chosen a remedy that effectuates the purposes of the Act. *Id.* at 1155-56 (quoting *Caterair Int'l*, 22 F.3d 1114, 1120 (D.C. Cir. 1994)). The Court should not "merely rubber-stamp NLRB decisions." *Tradesmen Int'l, Inc. v. NLRB*,

275 F.3d 1137, 1141 (D.C. Cir. 2002) (internal quotation marks and citations omitted).

B. The Board Erred By Not Applying *Johnson Controls* Retroactively.

This is an unusual case. Rather than arguing the Board should not have applied a new rule retroactively, Leggett contends that the Board erred by failing to apply the new rule announced in *Johnson Controls* retroactively. Instead, the Board adhered to its original liability finding and bargaining order that *Johnson Controls* had rejected. The Board's usual practice is to apply new policies and standards retroactively. *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). And it held *Johnson Controls* would apply retroactively to all cases at whatever stage. *See Johnson Controls*, 368 NLRB No. 20, slip op. at 11-12. Indeed, retroactive application of rules developed by adjudication "has governed '[j]udicial decisions . . . for near a thousand years.'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)); *see also Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

As explained above, *Johnson Controls* clarified the law regarding the procedure for anticipatory withdraws of recognition following this Court's criticism of the Board's prior procedure in *Scomas*. *See Quest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (finding agency erred in failing to apply presumption of

retroactivity). Despite holding that *Johnson Controls* would apply retroactively, the Board refused to apply it retroactively only in this case. It said applying *Johnson Controls* retroactively here would work a manifest injustice for “institutional reasons” and because it would “seriously undermine the Board’s expectation of prompt compliance with its bargaining orders.” *Leggett II*, 368 NLRB No. 132, slip op. at 2. The Board’s refusal to apply *Johnson Controls* retroactively here is inconsistent with the Act and is not reasonable or reasonably explained. *Circus Circus*, 2020 WL 3108276, at *3.⁶

1. No Deference to the Board’s Retroactivity Decision Is Warranted Because It Failed to Specify Its “Institutional Reasons.”

The Board first stated that it was denying retroactive application of *Johnson Controls* for “institutional reasons.” *Leggett II*, 368 NLRB No. 132, slip op. at 2. It did not identify or explain those reasons, however. The Board’s failure to identify its “institutional reasons” prevents the parties from understanding the basis of the decision and deprives this Court of a basis for meaningful review. The Board’s order should be denied enforcement for this reason alone. *See DHL Express, Inc. v. NLRB*,

⁶ The Board will argue that its decision to apply a new case retroactively to all cases at whatever stage generally covers cases still pending in the administrative process and not necessarily cases pending in courts of appeal. *See, e.g., Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1059 (11th Cir. 1983). Importantly, the Board sought remand of this case, and in any event the Board’s decisions must be consistent with the Act, reasonable, and reasonably explained.

813 F.3d 365, 371 (D.C. Cir. 2016) (“[D]eference is not warranted where the Board fails to adequately explain its reasoning, where the Board leaves critical gaps in its reasoning, . . . or where the Board erred in applying law to facts”) (internal quotations and citations omitted).

2. The Board’s Refusal to Apply *Johnson Controls* Retroactively to Protect Its Bargaining Order Was Error.

The Board also refused to apply *Johnson Controls* retroactively because adhering to its original bargaining order would supposedly best effectuate the purposes of the Act by encouraging parties to comply with such orders promptly rather than awaiting a change in the law or presumably challenging them in court. *Leggett II*, 368 NLRB No. 132, slip op. at 2-3. This reasoning is flawed for at least three reasons.

First, NLRA Sections 10(e) (allowing the Board to seek enforcement of its orders in courts of appeal) and 10(f) (allowing any person aggrieved by a final Board order to obtain review of that order in appropriate courts of appeal) establish that Board remedial orders, including bargaining orders, are not self-enforcing and that aggrieved parties like Leggett have a right to appeal adverse decisions. 29 U.S.C. §§ 160(e), (f); *Circus Circus*, 2020 WL 3108276, at *3 (“Orders of the Board cannot be enforced without Article III approval.”). By declining retroactive application because it would “seriously undermine the Board’s expectation of prompt compliance with its bargaining orders,” 368 NLRB No. 132, slip op. at 2, the Board

effectively punishes Leggett for exercising its Section 10 right to appeal.

Second, the Board's reasoning is inconsistent. On the one hand, the Board recognized in *Johnson Controls* that the *Levitz-Parkwood* Rule applied here contradicts its statutory duties. 368 NLRB No. 20, slip op. at 6-7. In fact, *Johnson Controls* "overrule[d] *Levitz* . . . and its progeny" on this issue, *id.* at 2, and there can be no doubt that *Leggett I* is part of this overruled progeny. On the other hand, the Board says that preserving a bargaining order that is inconsistent with the Act somehow effectuates the policies of the Act. For the reasons discussed below, it does not. The Board's effort to have it both ways is contrary to the Act, not reasonable, and not reasonably explained.

Third, the Board's failure to apply *Johnson Controls* retroactively is inconsistent with this Court's decision in *Scomas*. The *Johnson Controls* Board recognized that *Scomas* questioned the *Levitz-Parkwood* Rule, and the *Scomas* Court unanimously refused to enforce the Board's bargaining order in a similar situation. *Scomas*, 849 F.3d at 1158; *Johnson Controls*, 368 NLRB No. 20, slip op. at 7. The Board also knew that this case had been appealed to this Court once and likely would be again. It nonetheless insists on upholding its infirm bargaining order even though it could fashion another remedy in compliance with *Scomas* and in accord with its recognition that the *Levitz-Parkwood* Rule contradicts the Act. *See Scomas*, 849 F.3d at 1158 (vacating bargaining order and remanding case "to the Board for the

determination of a new remedy”).

“Facts may be stubborn things, but the Board’s longstanding ‘nonacquiescence’ towards the law of any circuit diverging from the Board’s preferred national labor policy takes obduracy to a new level.” *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 18 (D.C. Cir. 2016). That obduracy is on full display in this case, where the Board did not follow *Scomas*. The Board is attempting to protect a bargaining order that (i) it has acknowledged is inconsistent with its statutory duties under the Act and that (ii) will prevent employees from having a say on whether to be represented by a union for years to come.

3. The Court Should Rely on *Johnson Controls* to Deny Enforcement of the Board’s Order.

Rather than giving the Board a third bite at the apple, this Court should apply *Johnson Controls*, reject the Board’s liability finding, and refuse to enforce the Board’s order. *Cf. Scomas*, 849 F.3d at 1156 (refusing to remand case back to Board for further explanation because its decision could not be justified). Applying *Johnson Controls*, Leggett gave notice to the Union that it intended to withdraw recognition 48 days before the CBA expired. (J.A. 322, 328-337). *See Johnson Controls*, 368 slip op. at 8 (stating that employers must give notice no more than 90 days before contract expiration). Upon receiving such notice, the Union had 45 days to file an election petition. *Id.* The Union did not do so.

If *no* post-anticipatory withdrawal election petition is timely filed, the

employer, at contract expiration, may rely on the disaffection evidence upon which it relied to effect anticipatory withdrawal; that evidence—assuming it does, in fact, establish loss of majority status at the time of anticipatory withdrawal—will be dispositive of the union’s loss of majority status at the time of actual withdrawal at contract expiration; and the withdrawal of recognition will be lawful if no other grounds exist to render it unlawful.

Johnson Controls, 368 NLRB No. 20, slip op. at 8. That is exactly what happened in this case⁷ and, therefore, Leggett cannot have violated the Act by withdrawing recognition from the Union.

C. Regardless of Retroactive Application of *Johnson Controls*, the Board’s Decision Is Inconsistent With Its Statutory Mandate and With Precedent.

Regardless of retroactive application of *Johnson Controls*, the Board’s finding that Leggett violated the Act by withdrawing recognition should be denied enforcement because it is inconsistent with the Board’s statutory mandate and applicable precedent. “‘The Act’s twin pillars’ are ‘freedom of choice and majority rule in employee selection of representatives.’” *Scomas*, 849 F.3d at 1151 (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983)). The Board has

⁷ There is no dispute that the first decertification petition was not tainted by prior, unremedied ULPs. It also constituted adequate, objective evidence of a loss of majority support because it was signed by at least fifty percent of the bargaining unit employees, and the language on the petition clearly demonstrated that the employees rejected union representation. See, e.g., *Wurland Nursing and Rehab. Ctr.*, 351 NLRB 817, 817-18 (2007); *KFMB Stations*, 349 NLRB 373, 377 (2007); *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1285-86 (2006). The NLRB dismissed charges alleging this anticipatory withdrawal was unlawful. (Co. Exs. 8-9). (J.A. 265-268).

repeatedly recognized its statutory duty to balance employee free choice and stable labor relations. *Johnson Controls*, 368 NLRB No. 20, slip op. at 6 (2019) (quoting *Silvan Indus.*, 367 NLRB No. 28, slip op. at 3 (2018)); *see also Shaw's Supermarkets*, 350 NLRB 585, 587 (2007) (noting the importance of finding the spot “where the policy goals of stability in labor relations and employee freedom of choice—which are sometimes competing objectives—can best be satisfied and reconciled”). Its failure to do so in this case means its decision is not rational or consistent with the Act. *NLRB v. Brown*, 380 U.S. 278, 291 (1965) (“Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.”); *Circus Circus*, 2020 WL 3108276, at *3.

1. The Board’s Decision Does Not Balance Employee Free Choice and Stable Labor Relations.

The Board’s decision fails to comply with its statutory mandate to balance employee free choice and stable labor relations. Leggett’s employees presented it with a majority decertification petition, which Leggett verified before lawfully announcing it would withdraw recognition when the CBA expired. There is no claim or allegation that Leggett engaged in any other ULPs prior to withdrawing

recognition. Although the Union purportedly obtained signatures from 28 employees who signed both the decertification petition and the Union's counter-petition, the Union hid this fact from Leggett. Instead, it waited for Leggett to unwittingly withdraw recognition, pursued years of ULP litigation, and secured a bargaining order that prohibits employees from voting on union representation for at least a "reasonable period" and possibly up to three years if an agreement is reached. *See Scomas*, 849 F.3d at 1156.

Indeed, the only reason Leggett was found to have violated the Act by withdrawing recognition is because it did not know about the Union's counter-petition before acting. By punishing an otherwise innocent party due to Union subterfuge in withholding evidence that Leggett asked it to produce, the NLRB has allowed the Union to interfere with employees' ability to rid themselves of a union they told Leggett they do not want, possibly for years. It has also created a disruption in the bargaining relationship by allowing an unwitting withdrawal and years of litigation rather than creating a situation where the parties could have pursued an election or otherwise avoided the withdrawal.

As the Board recognized in *Johnson Controls*, 368 NLRB No. 20, slip op. at 6-7, this situation simultaneously eliminates the ability of employees to freely choose their bargaining representatives and destroys rather than ensures stable labor relations. *See also Scomas*, 849 F.3d at 1157. Although this Court has previously

upheld application of the *Levitz-Parkwood* Rule in other circumstances, *Scomas*, 849 F.3d at 1155 (citing cases), the Board's intervening *Johnson Controls* decision is an event that was not present in these prior cases. It is now abundantly clear that the *Levitz-Parkwood* Rule is inconsistent with the Act. Even though the Board erroneously declined to apply *Johnson Controls* retroactively here and continued to rely on the *Levitz-Parkwood* Rule, two wrongs do not make a right, and the Board's liability finding should be rejected as inconsistent with the Act.

2. The Board's Decision Is Inconsistent with the Act and With Precedent.

Moreover, this Court's prior cases upholding *Levitz* do not present a barrier to denying enforcement of the Board's liability finding in this case.⁸ Leggett proved that the Union actually lost its majority status before it withdrew recognition. The decertification petition was proper, it was supported by a majority of bargaining unit employees, and the withdrawal occurred in a context free of other ULPs. NLRB Region 9 so found. (J.A. 265-268). Evidence that the Union might have regained its majority status was not before Leggett at the time it withdrew recognition. Thus, this case presents different circumstances than the cases where the Court enforced unlawful withdrawal findings under *Levitz*.

⁸ Even if the Court considers itself bound by prior decisions applying *Levitz* in withdrawal of recognition situations, Leggett desires to preserve these points for *en banc* review if appropriate.

In *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 324, 328 (D.C. Cir. 2015), the employer did not give the Union advance notice of withdrawal, and the Court enforced a Board order finding some of the statements on which the employer relied were legally insufficient to establish a loss of support—evidence that was before the employer *before* it withdrew recognition. In *Highlands Hospital Corporation v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007), the Court enforced a Board order under *Levitz* where the employer knew *before* withdrawing recognition that one person who signed a decertification petition actually continued to support the union, thus depriving the petition of its majority status. *See also HQM of Bayside, LLC*, 348 NLRB 758, 758-61 (2006) (union sent employer letter before withdrawal that it had a petition signed by a majority of employees in favor of keeping union representation). In *Parkwood Development Center*, 347 NLRB 974, 974 (2006), *enforced*, 521 F.3d 404 (D.C. Cir. 2008), the union sent the employer evidence of majority support the day *before* the employer's withdrawal of recognition. And in *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181-82 (D.C. Cir. 2006), this Court upheld the Board's finding of unlawful recognition withdrawal under *Levitz* where the employer failed to verify the signatures on the disaffection petition and several signatures were found to be invalid or inauthentic—again, evidence the employer knew or should have known *before* it withdrew recognition.

Relatedly, in *Scomas*, the employer did not challenge the Board's conclusion

that it failed to prove loss of majority status. 849 F.3d at 1155. Moreover, to the extent that the employer was contending this Court's application of *Levitz* should be modified to require unions to produce evidence of a regained majority *after* withdrawal, the Court properly rejected this effort. It concluded that such a rule would run afoul of cases holding that ULP liability cannot turn on evidence that was not before the employer at the time it withdrew recognition. *Id.* (citing cases). Remarkably, however, that is exactly what the Board did here—it imposed liability on Leggett based on evidence that was not before Leggett at the time it withdrew recognition. Because the Board's liability decision runs afoul of this precedent, it should be denied enforcement. *Scomas*, 849 F.3d at 1155.

In short, the Board asks this Court to affirm its imposition of liability on Leggett based on evidence that the Union did not disclose until *after* Leggett withdrew recognition. It does not appear that this Court has ever enforced a Board order like this one. And it should not do so now given that such a conclusion is inconsistent with the Act. *Johnson Controls*, 368 NLRB No. 20, slip op. at 6.

D. The Conclusion That the Union Regained Majority Support Is Not Supported by Substantial Evidence.

Ultimately, even if this Court continues to apply the *Levitz* standard to this case, the conclusion that the Union reacquired majority status is not supported by substantial evidence. *See, e.g., Universal Camera Corp.*, 340 U.S. 474, 485-88 (1951) (analyzing how questions of fact must be supported by substantial evidence,

considering the record as a whole). While the Union's counter-petition may suggest that some employees who initially signed the petition showing a lack of majority support may have later changed their minds, there is not sufficient evidence of changed minds here.

As an initial matter, the "last in time" signature rule, whereby the last signature is controlling, is not definitive evidence of employee support for the Union. Rather, it is evidence that the employee has expressed support both for and against the Union, and it is possible that some employees did not know what they were signing or the impact of their signature on the later document. *See Johnson Controls*, 368 NLRB No. 20, slip op. at 6.

The record is replete with evidence that employees who signed the Union's counter-petition did not know what they were signing. The testimony of eleven employees established that the Union created an atmosphere of confusion to obtain their signatures or, at the very least, failed to accurately explain the purpose of the document they signed. None of the Union leaders gave a presentation or a speech to clearly inform employees of the purpose of the January 18th meeting, where most of the signatures were collected. (J.A. 16). There were multiple documents and signature sheets for employees to review that were not clearly marked.⁹ (J.A. 94,

⁹ The ALJ erred in finding that "[t]he prounion [sic] petition was at one desk, and the sign-in sheet for the strike sanction vote was on a separate desk." *Leggett I*, 367 No. 51, slip op. at 14. Several employees who signed both petitions testified to

94-95, 96, 223-230). The remaining signatures were collected on a dark and rainy night, and at least one person signed the petition on Berry's back, out of his sight. (J.A. 20, 20, 21).

And the testimony of seven employees (all dismissed by the ALJ) called into question whether the language currently at the top of the Union's petition expressing support for the Union was even present when they signed the petition on January 18 and February 27. (J.A. 14, 18-19, 63, 67-68, 71-72, 73, 80, 82, 88). Contrary to the ALJ's findings, this testimony, when considered in conjunction with the Union's concealment of the counter-petition from Leggett, discredits Tolson's testimony that he told each employee they were signing a pro-union petition. *See Scomas*, 849 F.3d at 1159 n.2 (Henderson, J., concurring) (questioning ALJ's credibility findings because "concealment of the revocation signatures says a great deal about [the union official's] forthrightness generally"); *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (an ALJ's credibility determinations may be reversed if they "are hopelessly incredible, self-contradictory, or patently unsupportable") (quoting

seeing only one line to a desk to sign a document or only one document for signature. (J.A. 60 (Jack Keith), 62-63 (Glen Dixon), 66 (Marvin Rogers), 85 (Brian Patrick)). Moreover, while several dual-signers testified to seeing Union officials present in the office at the Union hall, the evidence does not establish that "[t]here was a union official at the strike sanction vote desk explaining what the sign-in sheet was for and to answer any questions." *Leggett I*, 367 No. 51, slip op. at 14. The consistent confusion expressed by the dual-signers regarding their understanding of the purposes of the two documents belies any such finding.

Federated Logistics & Operations v. NLRB, 400 F.3d 920, 924 (D.C. Cir. 2005)).¹⁰

Ultimately, the ALJ and the Board should not have allowed the Union to defeat Leggett's objective evidence with evidence the Union (1) withheld and (2) obtained under questionable circumstances. Under these unique facts, the Board's conclusion that the Union regained majority support as of March 1 is not supported by substantial evidence.

E. The Board Erred in Concluding That Leggett Violated Sections 8(a)(5) and (1) of the Act by Making Changes to Employees' Terms and Conditions of Employment.

After withdrawing recognition, Leggett changed employees' terms of employment, including wages, benefits, and job procedures. Leggett's right to make any unilateral changes ultimately flows from whether the withdrawal was proper. For all of the reasons stated above, regardless of the standard applied, Leggett did not violate the Act when it withdrew recognition from the Union on March 1, 2017. The Board's order in this regard should not be enforced. *See Brown & Root U.S.A.*,

¹⁰ The ALJ also erred in finding Tolson a credible witness given that his testimony is diametrically opposed to Hawkins's testimony about the subject of their conversation, whereas Hawkins's testimony is more consistent with the Union's own printed material. (J.A. 235-237). Hawkins testified that Tolson said his insurance would double and Hawkins would lose his job if the Union was decertified. (J.A. 82-83). The Union's printed material similarly states that without the Union, Leggett "can change or take away any or all of [employees'] benefits" and that the Union committee saved employees "a substantial amount of money by negotiating and reducing [their] insurance rates." (J.A. 235-237). It further emphasizes that without a union contract, "employers may discharge an employee without cause and for any reason." (*Id.*).

Inc., 308 NLRB 1206, 1206-07 (1992) (finding it is lawful to make unilateral changes after withdrawal of recognition); *Aero Eng'g Corp.*, 177 NLRB 176, 177 (1969) (finding that actions that would “constitute an inducement to ‘gamesmanship’ . . . would not effectuate the policies of the Act”).

F. In the Alternative, the Board Should Deny Enforcement of the Board’s Bargaining Order.

In the alternative, should the Court continue to apply the *Levitz-Parkwood* Rule here and affirm the Board’s finding of liability, it should deny enforcement of the Board’s bargaining order for all the reasons discussed above and in *Scomas*, 849 F.3d at 1155-58.¹¹ Because a bargaining order is so potent, this Court requires the Board to justify it “by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.”

¹¹ The Board claims “*Scomas* is easily distinguishable” because, there, the union had neglected its representational duties, had not requested bargaining for a year after the contract expired, and only sprung back into action after the employees withdrew their decertification petition after the employer withdrew recognition. *Leggett I*, 367 NLRB No. 51, slip op. at 3 n.8. But in both cases, the genesis of the decertification effort was the employees themselves, not the employer’s conduct, and it is the employees’ statutorily protected right to try to rid themselves of a union regardless of their reasons. *See Scomas*, 849 F.3d at 1155-58. Moreover, it is clear that the salient fact was that the union withheld information about its restored majority status, rendering the employer’s violation “unintentional” and unworthy of such a severe remedy. *Id.* at 1157.

Vincent Indus. Plastics, 209 F.3d at 738. The Board failed to properly consider these factors, and as this Court held in *Scomas*, the Board's chosen remedy fails to effectuate the purposes of the Act. 849 F.3d at 1155-56.

In this case, just as in *Scomas*, the Board's stated reasons for imposing a bargaining order were essentially a "cut and paste job" from *Anderson Lumber*, 360 NLRB 538, 538-39 (2014). They therefore do not suffice for the same reasons—*Anderson Lumber* did not involve a union withholding evidence. *Scomas*, 849 F.3d at 1156. In fact, the imposition of a bargaining order is even more unjustifiable in this case than in *Scomas*. *Id.* at 1156. In *Scomas*, there were only two days between when the employer received the decertification petition and actually withdrew recognition. *Id.* at 1152-53. Here, by contrast, Leggett announced its intent 48 days before formally withdrawing recognition and asked the Union at every turn to disclose any evidence of a reacquired majority. But the Union refused to do so.

“[A] bargaining order is not a snake-oil cure for whatever ails the workplace[.]’ . . . It therefore should be prescribed only when the employer has committed a ‘hallmark violation[.]’ of the Act.” *Id.* (quoting *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39, 934, 936 (D.C. Cir. 1991)). The evidence establishes that here, just as in *Scomas*, Leggett's alleged violations were far from deliberate or calculated. Leggett acted in good faith based on the only evidence before it—a verified, majority-supported decertification petition. At most, Leggett's conduct

was “incautious with respect to *Levitz* and insufficiently wary of Union gamesmanship.” *Id.* at 1157. Under these circumstances, as in *Scomas*, the Board’s bargaining order “rewards the Union for sitting on its hands. It punishes [Leggett] for acting unwarily but in good faith. And it ‘give[s] no credence whatsoever to employee free choice.’” *Id.* at 1151 (quoting *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996)).

Indeed, as discussed above, the Board’s bargaining order actually interferes with employee free choice because it prohibits employees from choosing or rejecting union representation for at least a reasonable period of time and possibly up to three years. This decertification bar “‘touch[es] at the very heart of employees’ rights’ by preventing them from ‘dislodge[ing] the union’ no matter ‘their sentiments about it.’” *Scomas*, 849 F.3d at 1156 (quoting *Caterair Int’l*, 22 F.3d at 1122).

Finally, the Board was free to fashion a remedy that addressed this Court’s concerns in *Scomas*, but it refused to do so; instead, it insisted on a bargaining order that is admittedly inconsistent with its statutory obligations. If any remedy is necessary, holding an election would best fulfill the Act’s purpose of protecting employees’ free choice. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1968) (noting the Board’s preference for elections as the best “method of ascertaining whether a union has majority support”). The Board so recognized in *Johnson Controls*, 368 NLRB No. 20, slip op. at 1, and the Board had discretion to effectuate

such a remedy here. *See Scomas*, 849 F.3d at 1156.

Even assuming 28 employees revoked their signatures, at least 47% of the unit employees still supported decertification, and the threshold for a decertification election is only 30%. *See* NLRB Casehandling Manual, Pt. 2, Representation Proceedings § 11023.1 (Jan. 2017). In fact, there is a petition for election currently held in abeyance pending the outcome of this proceeding, which is evidence that an election should be conducted. *See Leggett & Platt, Inc.*, Case No. 09-RD-200329.¹² (Co. Exs. 11-12, Rejected Exhibits File). As in *Scomas*, 849 F.3d at 1157-58, the Board's position that an election is not appropriate "makes no sense."¹³ Leggett's employees should not be handcuffed to a union they do not want for any longer than

¹² The Court can take judicial notice that this decertification petition is on file and blocked by the Board. *See* FED. R. EVID. 201 (noting that courts may take notice of adjudicative facts, versus legislative facts, when they are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

¹³ The Union and Board may rely on the Board's finding that Day improperly assisted the decertification effort as a further reason that an election is not appropriate. For all of the reasons discussed *infra* at 41-45, this finding is not supported by substantial evidence and therefore cannot block a decertification election. Moreover, this allegation does not relate to the petition on which Leggett relied to withdraw recognition. Roseberry did not work at Leggett at the time of the December 2016 petition, and the second decertification petition to which this allegation relates was legally unnecessary since petition signatures are valid for up to a year. *See Blade-Tribune Publ'g Co.*, 161 NLRB 1512, 1523 (1966). Finally, even if Leggett did violate the Act in this regard, a bargaining order is not an appropriate remedy. *Vincent Indus. Plastics*, 209 F.3d at 738. Rather, the appropriate remedy would be to discount Roseberry's signature on the second decertification petition. *See, e.g.*, Casehandling Manual, Section 11730.3(a).

they already have been.

G. The Board's Conclusion That Leggett Violated Section 8(a)(1) of the Act When Day Directed Roseberry to Purvis Is Not Supported by Substantial Evidence.

The Board further erred in finding that Day directed Roseberry to Purvis to discuss the decertification petition without substantial evidence. To the contrary, it rests on flawed credibility determinations, speculation, improperly drawn adverse inferences, and an ambiguous single hand gesture.

First, the Board incorrectly credited Roseberry's testimony over Day's even though they did not conflict. *Leggett I*, 367 NLRB No. 51, slip op. at 12. Day testified that he directed Roseberry to Purvis so Purvis could take Roseberry to meet Roseberry's new supervisor, as Day had previously discussed with Purvis. (Tr. 163:19-25, 164:6-11) (J.A. 27). Roseberry testified that he was not privy to any conversations Day had with Purvis as to why Day asked him to meet with Purvis, and the only thing he heard was Purvis ask Day about new hires, which is entirely consistent with Day asking Purvis to escort new hires to meet their supervisors. (Tr. 143:14-17, 151:22-152:2). (J.A. 22, 24). Therefore, even if the ALJ credited Roseberry's testimony, it does not follow that Day's testimony had to be disregarded. Because the General Counsel presented no evidence contradicting Day's undisputed testimony, it should have been credited. *See, e.g., CPL (Linwood) LLC*, 364 NLRB No. 154, slip op. at 4, n.5 (2016) (ALJ Decision). The ALJ's

contrary credibility determination should be set aside as “patently insupportable.” *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1061 (D.C. Cir. 2001) (noting that an ALJ’s credibility determinations, once adopted by the Board, are due deference “unless they are patently insupportable”) (quoting *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996)).

Second, although the General Counsel bore the burden of proving this allegation, the Board adopted the ALJ’s flawed finding that Leggett’s failure to question Purvis regarding his exchange with Roseberry or Day was “a telling omission that undermines Day’s credibility regarding his motive for directing Roseberry over to meet with Purvis on the day in question.” *Leggett I*, 367 NLRB No. 51, slip op. at 12. On that basis alone, with no testimony from either witness in support, the ALJ concluded that Day directed Roseberry to talk to Purvis “for the purpose of having Purvis talk to Roseberry about the decertification effort and to get him to sign the decertification petition.” *Id.* at 16. But this was pure conjecture based on an adverse inference drawn against Leggett on an issue where Leggett did *not* have the burden of proof. Purvis was equally available as a witness to Counsel for the General Counsel; indeed, she had subpoenaed numerous other employee witnesses, including Roseberry. A violation simply cannot be found based on Leggett’s failure to address an absence of evidence resulting from opposing counsel’s failure to call a witness on an issue where she had the burden of proof. *See*

Urooj v. Holder, 734 F.3d 1075, 1078 (9th Cir. 2013) (“if the ‘burden’ of proof were satisfied by a respondent’s silence alone, it would be practically no burden at all”) (quoting *Matter of Guevara*, 20 I. & N. Dec. 238, 244 (BIA 1990)); *Hitchiner Mfg. Co.*, 243 NLRB 927, 927 (1979), *enforced*, 634 F.2d 1110 (8th Cir. 1980) (concluding that no adverse inference should be drawn where a witness is “equally available” to both parties); *see also Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (improper for judge to rely on “adverse inference to fill [an] evidentiary gap” in General Counsel’s case).

Without this improper adverse inference, the evidence at most shows that, out of Roseberry’s earshot, Day asked Purvis to escort Roseberry to his supervisor and then motioned Roseberry over to Purvis so Purvis could carry out the instruction. There is no evidence suggesting Day knew Purvis planned to speak to Roseberry about decertification or that Day knowingly participated in any such plan. *See, e.g., Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998) (employer did not violate NLRA where General Counsel failed to prove that employer knowingly permitted employees to solicit signatures for petition to certify union during work time).¹⁴

Finally, Day’s hand gesture alone, pointing Roseberry to Purvis, does not

¹⁴ Moreover, the evidence establishes that Purvis asked Roseberry to meet Purvis at Purvis’s truck after work. (J.A. 23). Thus, there is no evidence that Purvis solicited Roseberry to sign the decertification petition on work time or in a work area.

evidence unlawful aid of a decertification effort. Rather, the cases the ALJ relied on demonstrate that the employer has to do much more to violate the Act. In *Dentech Corporation*, 294 NLRB 924, 925 (1989), the company supervisor permitted an employee to extend his anti-union employee meetings into worktime, delivered company handbooks during one of the anti-union employee meetings, was present while the anti-union employee solicited signatures for a petition renouncing union support, and failed to assure an employee who asked if she would be fired if she did not sign the petition. This type of aid far exceeds Day's gesture.

Community Cash Stores, 238 NLRB 265 (1978), is equally distinguishable. There, after being pressured by his supervisor, an employee agreed to sign a statement repudiating the union, and he was escorted to an office and instructed by another supervisor to go to a meeting room where an anti-union employee met him with a sample statement. *Id.* at 265-66. Similarly, in *Scherer & Sons, Inc.*, 147 NLRB 1442, 1445-49 (1964), company officers explicitly asked employees to sign a complaint to stop union picketing.

Here, in contrast, Roseberry testified that Day never spoke to Roseberry about the union or decertification or his purpose in directing Roseberry to Purvis. (Tr. 151:16-21) (J.A. 24). In any event, this "evidence" of Day's alleged unlawful assistance is not indicative of any assistance rendered to the entire decertification effort; rather, at most it relates to the signature of a single employee. Thus, absent

improper credibility findings, inferences, and conjecture substituting for actual evidence of a violation, there is simply no substantial evidence to support the Board's holding that Day directed Roseberry to Purvis to sign the decertification petition or that such action constituted more than ministerial aid.

CONCLUSION

For the reasons set forth above, Leggett's Petition for Review should be granted, and the Board's Order should be denied enforcement.

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Respectfully submitted,

/s/ Arthur T. Carter

Arthur Tracy Carter
Texas Bar No. 00792936
Arrissa K. Meyer
Texas Bar No. 24060954
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201
T: (214) 880-8105
F: (214) 594-8601
atcarter@littler.com

A. John Harper III
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, TX 77010
T: (713) 652-4750
F: (713) 513-5978
ajharper@littler.com

ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,063 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman Font 14.

Respectfully submitted,

/s/ Arthur T. Carter

Arthur T. Carter
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201
T: (214) 880-8105
F: (214) 594-8601
atcarter@littler.com

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2020, 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 using the CM/ECF, thereby sending notification of such filing to all counsel of record.

Respectfully submitted,

/s/ Arthur T. Carter

Arthur T. Carter
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201
T: (214) 880-8105
F: (214) 594-8601
atcarter@littler.com

Attorney for Petitioner

4843-2458-2844.10 076785.1017