

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/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

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

FINAL REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE
GLOSSARY OF ABBREVIATIONS	iv
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
A. The Board Erred By Not Applying <i>Johnson Controls</i> Retroactively.	3
B. The NLRB’s Continued Defense of <i>Levitz</i> Is Nonsensical.....	7
C. The Board’s Credibility Determinations Meet the Standard of “Patently Insupportable.”	8
D. The NLRB Avoids Comparisons of Day’s Actions to Those of Past Violators Because They Do Not Show “More than Ministerial Aid.”.....	10
E. The NLRB Cannot Distinguish <i>Scomas</i>	13
CONCLUSION	17

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<i>Adair Standish Co. v. NLRB</i> , 912 F.2d 854 (6th Cir. 1990)	11
<i>American Train Dispatchers Ass’n v. ICC</i> , 26 F.3d 1157 (D.C. Cir. 1994).....	6
<i>Circus Circus Casinos, Inc. v. NLRB</i> , 961 F.3d 469 (D.C. Cir. 2020).....	2, 8, 9, 10
<i>Consolidated Freightways v. NLRB</i> , 669 F.2d 790 (D.C. Cir. 1981).....	3
<i>Johnson Controls</i> , 268 NLRB No. 20 (July 3, 2019)	1, 3, 5, 6, 7, 8, 13, 16
<i>Lee Lumber & Bldg. Material</i> , 306 NLRB 408 (1992)	11
<i>Leggett & Platt, Inc.</i> , 368 NLRB No. 132 (Dec. 9, 2019).....	1, 7, 13
<i>Leggett & Platt, Inc.</i> , Case No. 09-RD-200329.....	16
<i>Levitz Furniture Co.</i> , 333 NLRB 717 (2001)	1, 4, 7, 8, 14
<i>NLRB v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969).....	6
<i>Scomas of Sausalito, LLC v. NLRB</i> , 849 F.3d 1147 (D.C. Cir. 2017).....	2, 5, 6, 7, 8, 9, 13, 14, 15, 16
<i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012).....	10

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<i>Sociedad Espanola de Auxilio v. NLRB</i> , 414 F.3d 158 (1st Cir. 2005).....	11
<i>Treasure Island Food Store</i> , 205 NLRB 394 (1973).....	11
<i>Trump Plaza Associates v. NLRB</i> , 679 F.3d 822 (D.C. Cir. 2012).....	3, 4
<i>Utility Block Company, Inc.</i> , 2012 NLRB LEXIS 31 (NLRB Div. of Judges Jan. 25, 2012)	11
<i>Vic Koenig Chevrolet, Inc. v. NLRB</i> , 126 F.3d 947 (7th Cir. 1997)	11
STATUTES	
NLRA Section 10(e)	3
OTHER AUTHORITIES	
<i>Defining “Ministerial Aid”: Union Decertification Under the National Labor Relations Act</i> , 66 U.Chi L.Rev. 999, 999 (1999).....	11
NLRB Casehandling Manual, Pt. 2, Representation Proceedings § 11023.1 (Jan. 2017)	16

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”)

SUMMARY OF THE ARGUMENT

The NLRB's brief¹ fails to overcome the deficiencies in the Board's Decision and Order, Supplemental Decision and Order, and Order Denying Motion for Reconsideration. It still defies reason that, despite holding that retroactive application of *Johnson Controls*, 268 NLRB No. 20 (July 3, 2019), is appropriate, the Board failed to apply that decision to this case.² This represents a significant departure from the Board's usual practice, the Board failed to fully explain all its reasons for doing so, and the reasons it did explain do not withstand scrutiny.

Notwithstanding the NLRB's rationalizations for failing to apply *Johnson Controls* retroactively, it remains true that that rule stated in *Levitz Furniture Co.*, 333 NLRB 717 (2001), and applied in this case fails to comply with the Board's statutory mandate. The Company agrees with the NLRB that, at this point, it should not have to relitigate the flaws in the *Levitz* rule, which have been fully addressed by the current Board, past Board members, and a judge within this Circuit. But the NLRB's continued defense of a decision that does not comply with an admitted

¹ This Reply refers to the NLRB's responsive brief as the "NLRB's Brief," which it cites as (Bd. Br. ____).

² See 368 NLRB No. 20, slip op. at 11 ("Having considered these principles, we conclude that applying the rules adopted here retroactively and dismissing the complaint would not work a manifest injustice"); *Leggett & Platt, Inc.*, 368 NLRB No. 132 (Dec. 9, 2019) ("We emphasize that our decision in this regard is limited to the circumstances presented here, as explained above, and that it does not preclude retroactive application of any other Board decision to cases pending in the courts of appeals involving different facts and legal issues").

statutory mandate and prevents employees from choosing their representatives leaves Leggett little choice.

Further, the Board's decision in the case at bar rests heavily on "patently insupportable" credibility determinations and inferences. And although the NLRB emphasizes that a high burden is required before the Court may overturn these findings, the ALJ's "lack of evenhandedness" demands this outcome in the case at bar. *See Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 484 (D.C. Cir. 2020) (overruling factual findings of ALJ who inconsistently employed multiple flawed criteria to conclude that employee's witnesses were credible and employer's witnesses were not).

Stripped of these improper inferences, the evidence (at the very most) shows that a Human Resources Manager motioned for a new employee to go see another employee. Viewed against the backdrop of the Board's descriptions of unlawful assistance from prior cases—the only available measure of the "ministerial aid" standard—Day's behavior pales in comparison. Indeed, it appears that the Board has never previously found a violation based on so little evidence.

Finally, the NLRB fails to sufficiently distinguish *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). Rather, every material point relied upon by this Court in determining that the bargaining order was inappropriate in *Scomas* justifies the same conclusion here.

For these reasons, and those addressed in Petitioner's Brief, 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.

ARGUMENT

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

The NLRB fails to rebut Leggett's arguments that it erred by not applying *Johnson Controls* retroactively. The NLRB first claims that Section 10(e) bars the Court from considering the Company's argument that the Board failed to specify the "institutional reasons" it relied on for its decision because, in the NLRB's view, the Company never raised this assertion to the Board. (Bd. Br. at 31).

However, "when the issues implicated by an imprecisely drafted objection are made evident by the context in which it is raised, section 10(e) does not shield the Board's resolution of those issues from review." *See Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981); *see also Trump Plaza Associates v. NLRB*, 679 F.3d 822 (D.C. Cir. 2012) (finding objection that mock card check was adequately disseminated to affect election necessarily encompassed argument that Board's treatment of issue inexplicably departed from precedent). The critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal. *Id.*

Here, Leggett’s Motion for Reconsideration specifically identified the Board’s unjustified reliance on “institutional reasons,” which, given the Board’s lack of explanation, Leggett assumed must be part of a “new test” for determining retroactivity. (J.A. 371, 373 n. 6). Leggett criticized the Board’s failure to apply its traditional “manifest injustice” standard, and repeatedly referred to “institutional reasons” in quotes, as the phrase’s meaning was unclear to Leggett. Leggett further noted that the Board did not engage in the “required analysis” to support this departure from precedent. (J.A. 371). This context sufficiently encompasses an argument that the Board violated its obligation to fully explain the “institutional reasons” on which it based its decision. Despite having the opportunity to address the uncertainty surrounding these “institutional reasons” as a result of Leggett’s Motion for Consideration, the Board failed to do so.

Regardless of the NLRB’s attempt to explain its “institutional reasons” on appeal, neither the Board’s Supplemental Decision and Order nor the Board’s Order Denying Motion for Reconsideration identifies or describes them. Further, the NLRB’s proffered explanation in its Brief – that its “institutional reasons” include concern that retroactivity would undermine the Board’s expectation of prompt compliance and upend the Board’s deliberate determination to apply *Levitz* – is actually incongruous with the Board’s prior suggestion that the “institutional reasons” are *in addition to* its other articulated concerns. (J.A. 381 n. 2) (after listing

the fact that this case had already been decided, the disruption to parties' bargaining relationship, and the Board's expectation of prompt compliance as justifications, stating "We *also* observed that under the particular circumstances of this case, institutional reasons counseled against retroactive application...Those remain.") (emphasis added)).

The NLRB also argues that *Johnson Controls* is merely a lawful "policy shift" that does not undermine its rationale in this case. While agencies may change their existing policies with a reasoned explanation, there is no reasonable explanation for what happened here—announcing a policy shift based on a conclusion that the prior policy does not serve the Board's statutory goal, and then promptly shifting back to that prior policy in a subsequent decision.

The Board's position in the case at bar is a clear demonstration of the effect of its decision to ignore its own well-reasoned retroactive application policy, as it has bound itself to a framework it previously rejected in *Johnson Controls*, concluding that it failed to serve either of its statutory goals of promoting labor relations stability and giving effect to employees' wishes concerning representation, and was "analytically unsound." 368 NLRB No. 20, slip op. at 7-8.

The NLRB next argues that the Company reads *Scomas* too broadly because this Circuit's rejection of an affirmative bargaining order was limited to the specific facts of that case. In making its arguments regarding the viability of the bargaining

order, however, Leggett merely relied on the Board's own assessment of *Scomas's* impact in *Johnson Controls*. 368 NLRB No. 20, slip op. at 11 (“in light of the D.C. Circuit’s opinion in *Scomas*, the enforceability of an affirmative bargaining order issued under preexisting law is in serious doubt”). And as discussed in more detail below,³ this case is “an unusual case” for many of the same reasons that *Scomas* was—particularly because “the Union withheld information about its restored majority status.” 849 F.3d at 1156.

Finally, the NLRB argues that the Court should remand this case to the Board, that the Company’s request for this Court to decide the matter is “extraordinary,” and that to do so would “trample on the Board’s authority.” (Bd. Br. 33). But there is precedent for this Court to take such an action where remand is “an idle and useless formality.” *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n.6 (1969); *see also American Train Dispatchers Ass’n v. ICC*, 26 F.3d 1157, 1163 (D.C. Cir. 1994) (“A remand is unnecessary where, as here, the outcome of a new administrative proceeding is preordained.”). Between the Board’s decision in *Johnson Controls* and this Court’s decision in *Scomas*, there is no need to remand this case to the Board yet again, because the appropriate outcome is clear.

³ The NLRB’s failure to distinguish *Scomas* and unconvincing attempts to justify an affirmative bargaining order in this case are discussed *supra* Section E.

B. The NLRB's Continued Defense of *Levitz* Is Nonsensical.

The NLRB also criticizes Leggett for seeking “to relitigate *Levitz*.” But the Company does not want to relitigate *Levitz* any more than the NLRB, as *Levitz* was fully litigated and overruled in relevant part in *Johnson Controls*. It is the NLRB’s refusal to apply *Johnson Controls* retroactively in this case that has put *Leggett* in this unusual position—arguing that *Levitz* is flawed for the same reasons cited by the Board in *Johnson Controls*, while the NLRB somehow claims that the “Company is wrong on all counts.” (Bd. Br. at 25).

In support of this premise, the NLRB asserts that the Board’s decision in this case, which relied on *Levitz* and its progeny, “comports with the Act’s mandates.” (*Id.*). But “[t]he Act’s twin pillars’ are ‘freedom of choice and majority rule in employee selection of representatives,’” and the Board explicitly held in *Johnson Controls* that it did “not believe the existing [*Levitz*] framework effectively serves either goal.” 368 NLRB No. 20, slip op. at 6-7; *Scomas*, 849 F.3d at 1151 (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) regarding the Act’s twin pillars). These contradictions highlight the absurdity of the Board’s untenable position in the instant case: the very same motivations and concerns that led the Board to overrule *Levitz* in *Johnson Controls* are fully present in this case, and the Board asks this Court to ignore the Board’s most recent and well-reasoned pronouncement on the subjects at issue here.

In reality, the Company, the Board, and at least one judge within this Circuit all agree that “the union’s ability to gather its counter-evidence secretly, together with the ‘peril’ rule of *Levitz*, creates an opportunity, if not an actual incentive, for incumbent unions to take advantage of the ‘last in time’ rule to extend the bar against challenges to its representative status for years to come, to the detriment of employees’ Section 7 right to choose a different bargaining representative or to refrain from union representation all together.” *Johnson Controls*, 368 NLRB No. 20, slip op. at 2; *Scomas*, 849 F.3d at 1158-60 (Henderson, J.) (criticizing Board’s interpretation of *Levitz* because it rewards gamesmanship, fails to sow “peace and stability,” and neglects employee free choice).

This is exactly what has happened here, and unfortunately it is Leggett’s employees who bear the cost of the Board’s cognitive dissonance. The Board’s insistence that this Court should apply a long-criticized and now-overturned standard in this case should be rejected as inconsistent with the Act for the very reasons the Board articulated in *Johnson Controls*.

C. The Board’s Credibility Determinations Meet the Standard of “Patently Insupportable.”

The NLRB makes much of the Company’s high burden in challenging the Board’s factual findings and credibility determinations, but “ALJ witness credibility determinations are not immune from judicial scrutiny.” *Circus Circus*, 961 F.3d at 484. The Court will not condone arbitrary resolutions that “reflect a lack of

evenhandedness” or rest “explicitly on a mistaken notion.” *Id.*

In this case, the ALJ’s credibility determinations resulted in, among other things, findings that the Union regained majority support by the date of withdrawal, and that Human Resources Manager Stephen Day directed employee Cordell Roseberry to speak to Keith Purvis so that Purvis could persuade Roseberry to sign the decertification petition.

With respect to the first finding, to determine that there was no atmosphere of “confusion, coercion, and misrepresentations” surrounding the Union’s collection of signatures, the ALJ disregarded the testimony of eleven different employees on multiple points, including seven whose testimony called into question whether the language expressing support for the Union on the Union counter-petition was even there when they signed it, and one who testified that the Union President Elmer Tolson threatened him with job and insurance loss if he did not sign. As fully explained in Petitioner’s Brief, at every opportunity, the ALJ credited Tolson, whose “concealment of the revocation signatures says a great deal about his forthrightness generally.” *Scomas*, 849 F.3d at 1160 n2 (Henderson, J., concurring) (noting that *Scomas* is the rare case in which she would have voted to set aside an ALJ’s credibility findings as “patently insupportable”).

Similarly, with respect to the second finding, the ALJ credited Roseberry’s testimony over Day’s *even where they did not conflict*, disregarded Day’s un rebutted

testimony, and drew adverse inferences against the Company based on a lack of evidence on issues on which it did not have the burden of proof. This is the epitome of a lack of evenhandedness. *Circus Circus*, 961 F.3d at 485 (“Legitimate adjudication requires evenhanded assessment of testimony offered on behalf of the employer and the employee”).

Mindful that the Court does not lightly overrule factual determinations, under these circumstances, the Company respectfully submits that doing so in this case is uniquely warranted.

D. The NLRB Avoids Comparisons of Day’s Actions to Those of Past Violators Because They Do Not Show “More than Ministerial Aid.”

Properly separated from improper inferences and unsupported credibility determinations, the evidence at the very most shows that Day non-verbally “directed an interaction” between a single new employee and the employee leading the decertification effort. As discussed in Petitioner’s Brief, the cases the ALJ relied on to conclude that Day’s lone hand gesture constituted unlawful assistance are easily distinguishable, as are the additional cases cited by the NLRB in its Brief to further define conduct that constitutes something more than “ministerial aid.” *See SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012) (employer solicited employee’s signatures on antiunion petitions with threats or promised benefits, and threatened to fire an employee because she told a coworker not to sign a petition);

Adair Standish Co. v. NLRB, 912 F.2d 854, 860 (6th Cir. 1990); *Lee Lumber & Bldg. Material*, 306 NLRB 408, 418 (1992) (employer allowed employees to go to NLRB office to file decertification petition on working time with no loss of pay and reimbursed parking costs); *Treasure Island Food Store*, 205 NLRB 394, 397 (1973) (supervisor tendered union withdrawal letter for employee’s signature and asked employee to obtain additional signatures).

Critically, in each of these cases, the employer engaged in direct—and often multiple—acts of solicitation and promotion in support of decertification. Unsurprisingly, the NLRB attempts to avoid any comparison of Day’s behavior to the employers’ behaviors deemed unlawful in prior cases. (Bd. Br. at 39 (“The proper inquiry is not whether Day’s conduct mirrors that of another violator in a different case’’)). But given the “lack of clarity in the Board’s [ministerial aid] standard,” this is a necessary approach to determine whether employers acted unlawfully and one taken often by the Board’s own ALJs. *See Vic Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947, 950 (7th Cir. 1997) (“we are unclear just what the Board’s rule is’’)⁴; *see, e.g., Utility Block Company, Inc.*, 2012 NLRB LEXIS 31,

⁴ *See also Sociedad Espanola de Auxilio v. NLRB*, 414 F.3d 158, 164 (1st Cir. 2005) (noting that the parameters of the Board’s ministerial aid standard “are not entirely clear’’); Catherine Meeker, *Defining “Ministerial Aid”: Union Decertification Under the National Labor Relations Act*, 66 U. Chi. L.Rev. 999, 999 (1999) (“The prohibition against substantial employer aid imposes strict limits on the employer’s actions, and yet the legal standards used to apply the prohibition are uncertain and

*23-24 (NLRB Div. of Judges Jan. 25, 2012) (comparing employer’s behavior to that described in other cases, concluding, “On the basis of these cases, I find that the Respondent did not cross the line established therein by the Board”).

The simple fact is that there do not appear to be any prior cases finding unlawful assistance in a case analogous to this one – likely because the Board’s decision represents a significant expansion of the meaning of “more than ministerial aid.” Recognizing that this case involves only a single gesture seen by a single employee, the NLRB nevertheless argues that this action was coercive when considered in reference to the “totality of the circumstances.” (Bd. Br. at 39). But unlike any of the cases cited by Board, there literally are no other circumstances beyond the single gesture by Day that support the Board’s view that Leggett is guilty of unlawful assistance or coercion. Thus, there is no “totality” to consider in addition to the lone hand gesture.

Upholding the Board’s decision here would mean that employers would have to exercise an extreme degree of caution when issuing even routine work instructions to its employees during a decertification campaign. Indeed, employers would be required to think twice before instructing employees to talk or to work together where one employee is “a known antiunion leader.” Further, employers would have

vague”).

to take into account whether employees were exercising their Section 7 rights when issuing work instructions—something they cannot and should not do.

E. The NLRB Cannot Distinguish *Scomas*.

Finally, contrary to the NLRB’s contentions, the Board’s bargaining order in this case has been on shaky legal ground since its inception. Prior to the ALJ’s decision in *Leggett*, in a case also involving an employer’s withdrawal of recognition and a union’s intentional nondisclosure of its restored majority status, this Court “unanimously refused to enforce the Board’s affirmative bargaining order, citing the unintentional nature of the employer’s violation and the union’s having withheld the evidence of its restored majority status.” 368 NLRB No. 20 (the Board’s summary of the *Scomas* decision). Instead, the Court “indicated that in these circumstances, the question concerning representation should be resolved through an election.” *Id.*⁵

Thus, as the Board has recognized, “in light of the D.C. Circuit’s opinion in *Scomas*, the enforceability of an affirmative bargaining order issued under preexisting law [was] in serious doubt.” 368 NLRB No. 20, slip op. at 11. The Board further hypothesized that, even under the more “flagrant” facts of *Johnson Controls*, where the employer withdrew recognition after the union affirmatively notified the employer it had reacquired majority status and offered to compare

⁵ As discussed above, the Board went on to indicate its full agreement with the *Scomas* decision. *Id.* (“We agree...a Board-conducted secret ballot election...is the preferred means of resolving questions concerning representation”).

evidence, this Circuit “would likely call for the representation issue to be resolved by an election.” 368 NLRB No. 20, slip op. at 11.

Despite these admissions regarding the impact of *Scomas* and its stated agreement with the Court’s reasoning, the NLRB maintains that *Scomas* is “easily distinguishable” from this case, and thus, it was proper for the Board to issue an affirmative bargaining order. But the Board cannot escape *Scomas*’s application so easily. Indeed, on all salient points raised by this Circuit, Leggett and the employer in *Scomas* are indistinguishable.

It is undisputed that, in both cases, the unions withheld information about their restored majority status. While this may be permissible union behavior under *Levitz*, it caused the *Scomas* Court to conclude that the employer’s violation was “unintentional.” 849 F.3d at 1157. Leggett acted in similar good faith on a facially-valid decertification petition. It verified the employee signatures and notified the Union it would be withdrawing recognition upon expiration of the contract. Because the Union withheld evidence of its restored majority status, Leggett withdrew recognition as promised. As the *Scomas* Court found, such conduct may be “incautious,” but is in no way “flagrant.” *Id.*

Next, neither Leggett nor *Scomas* engaged in any gamesmanship. *Id.* Like the employer in *Scomas*, Leggett did not ignore employee calls for an election or its own option to request an election. The employee petition it received only stated that

the undersigned employees did not want to be represented by the Union. (J.A. 245-264). Because Leggett had no reason to doubt that a majority of unit employees supported the petition, it had no reason to call for an election. Moreover, Leggett left the door open for the Union to provide evidence of reacquired majority status to prevent it from withdrawing recognition, which it did not do.⁶ In its notice of anticipatory withdrawal to employees, Leggett conditioned its future withdrawal on the assumption that “nothing changes with respect to [employees’] desire to no longer be represented by the Union.” (J.A. 323-25). And in response to the Union’s February 21 letter stating that it did not believe the Company’s claim that it had lost majority support, Leggett explained that the Company had no evidence that employees had changed their minds regarding decertification. (J.A. 327). Thus, any “gamesmanship” was solely on the part of the Union.

Additionally, in both cases, the genesis of the decertification effort was

⁶ General Manager Chuck Denisio testified that the Union did not provide its counter-petition or any other evidence indicating it had reacquired majority support, and thus, believing that a majority of employees no longer wanted to be represented, the Company “did what [it] thought was legal,” indicating that Leggett would not have withdrawn recognition otherwise. (J.A. 43-44). An employer should not be found to have violated the Act when, in good faith, it withdrew recognition from a union as a result of the union’s intentional nondisclosure of its restored majority status. *See Scomas*, 849 F.3d at 1160 (Henderson, J.) (noting that Scomas’s conduct would have fit that description had Scomas established that, fully informed, it would not have withdrawn recognition). All the more reason why a bargaining order is inappropriate here.

unrelated to the employer's conduct. In *Scomas*, the employees' discontent was due to "an extended period of Union neglect." 849 F.3d at 1157. Although the record in this case does not reflect Leggett's employees' reasons for seeking decertification, NLRB Region 9 determined that the petition Leggett relied upon to withdraw recognition was not tainted by employer interference. (J.A. 265-68). While the NLRB argues that this factor "does not matter for purposes of imposing a bargaining order," this Court, to the contrary, found that it was relevant in *Scomas* because it meant there was "no 'taint' to 'dissipate,'" and an election could be fairly held without a bargaining order. 849 F.3d at 1157.

Finally, in both cases, the petitions easily met the 30% threshold for a decertification election, even without the signatures of the dual-signers. *See* NLRB Casehandling Manual, Pt. 2, Representation Proceedings § 11023.1 (Jan. 2017). In *Scomas*, after excluding the six dual-signers, 42% of unit employees still supported an election. Likewise, here, assuming 28 employees revoked their signatures, at least 47% of the unit employees still supported an election. Thus, any claim that an election is not appropriate because Leggett failed to show actual loss of majority support simply "makes no sense."⁷ 849 F.3d at 1158.

⁷ Indeed, this is a case of compounded error that has only served to frustrate employees' exercise of their rights. There is a petition for a decertification election currently held in abeyance pending the outcome of this proceeding, which is additional evidence that an election should be conducted. The Board's failure to

In short, the NLRB's continued defense of its bargaining order defies all reason. Because this Court's on-point decision in *Scomas* and the Board's reasoning in *Johnson Controls* dictate only one result—the Court should deny enforcement of the Board's bargaining order.

CONCLUSION

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

apply *Johnson Controls* not only leads to an absurd result with respect to Leggett's withdrawal of recognition, but also means that the subsequent decertification petition is blocked by a violation premised on a now-invalidated rule. *See Leggett & Platt, Inc.*, Case No. 09-RD-200329.

Dated: September 18, 2020

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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 4,561 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.

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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.

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