ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 20-1060, 20-1061, & 20-1134

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Leggett & Platt, Inc.,
Petitioner/Cross-Respondent,
v.
National Labor Relations Board,
Respondent/Cross-Petitioner,

International Association of Machinists and Aerospace Workers, AFL-CIO,
Intervenor.

Keith Purvis,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

FINAL BRIEF OF PETITIONER KEITH PURVIS

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June 29, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner Keith Purvis ("Purvis") certifies the following:

(A) ***Parties and Amici***:

(1) The National Labor Relations Board is the Respondent in the consolidated Petitions for Review, and has filed a cross-Petition for Enforcement in Case No. 20-1134;

(2) Purvis is an employee who moved to intervene in the case below, but his motion was denied. He is the Petitioner in Case No. 20-1061;

(3) Leggett & Platt is an employer that was the Charged Party in the proceedings below, and is the Petitioner in Case No. 20-1060;

(4) The International Association of Machinists is the Charging Party below and is the Intervenor in Case No. 20-1060.

(B) ***Rulings under Review***: Purvis seeks review of the Board's decision in *Leggett & Platt, Inc.*, 367 NLRB No. 51 (Dec. 17, 2018), the Board's supplemental decision and order reported at 368 NLRB No. 132 (Dec. 9, 2019), and the Board's unpublished January 23, 2018 orders denying intervention and striking portions of Purvis' exceptions that did not concern intervention.

(C) ***Related Cases***: This case was previously before this Court on review (Case Nos. 19-1003 and 19-1005) and was remanded to the NLRB by an order dated August 7, 2019. Purvis is not aware of any other related cases.

Respectfully submitted,

/s/ Aaron Solem

Aaron Solem

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GLOSSARY OF ABBREVIATIONS

Administrative Law Judge	("ALJ")
Administrative Law Judge's Decision	("ALJ Dec.")
Collective Bargaining Agreement	("CBA")
Joint Appendix	("JA")
National Labor Relations Act	("NLRA" or "Act")
National Labor Relations Board	("NLRB" or "Board")
National Labor Relations Board Decision	("Board Dec.")
Transcript of the July 2017 hearing	("TR")
Unfair Labor Practice	("ULP")
International Association of Machinists	("IAM" or "Union")

APPELLATE JURISDICTION

The Court has jurisdiction over Keith Purvis' petition for review pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). On January 23, 2018, the National Labor Relations Board issued an interlocutory decision affirming the ALJ's denial of Purvis' Motion to Intervene. (J.A. 344). On that same day, the Board also issued an order striking portions of Purvis' exceptions that did not pertain to the denial of his intervention motion. (J.A. 343). The denial of a motion for intervention as of right is an appealable final order "'because it is conclusive with respect to the distinct interest asserted by the movant.'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003), citing *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001). On December 17, 2018, the Board issued a final order in this case, reported at 361 NLRB No. 51.

While this case was on review before this Court, the Board issued an intervening decision that changed the law. In *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), the Board announced a new framework for evaluating the lawfulness of an employer's withdrawal of recognition after the expiration of a collective bargaining agreement. On August 7, 2019, this Court granted the Board's motion to remand the case to the Board for further proceedings in light of the new legal standard for evaluating withdrawals of recognition. On December 9, 2019, the Board issued a final supplemental decision and order, reported at 368 NLRB No. 132. In that final

supplemental order, the Board declined to retroactively apply *Johnson Controls*. Purvis is a "person aggrieved" within the meaning of 29 U.S.C. § 160(f) because the Board denied his Motion to Intervene in the underlying case and thus prevented him from protecting the validity of his decertification petitions under the NLRA.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the NLRB err in denying Purvis' Motion to Intervene, given that the case directly concerned the validity of the two petitions he collected opposing union representation?

(2) In summarily denying Purvis' Motion to Intervene, has the NLRB once again failed to propound and apply "any sensible, consistent standard for granting and denying intervention in [its] agency proceedings" *Veritas Health Serv. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018) (Millet, J., concurring)?

(3) Did the NLRB err in imposing an affirmative bargaining order, even though the Union concealed evidence of its allegedly regained majority support?

(4) Did the NLRB err in imposing an affirmative bargaining order on the basis that the employer illegally tainted Purvis' second decertification effort by directing one bargaining unit employee to talk to him?

STATEMENT OF THE CASE

In December 2016, Keith Purvis collected signatures to decertify IAM Local Lodge 619 as his collective bargaining representative at Leggett & Platt ("Leggett"). After a majority of employees signed his petition, Purvis submitted it to Leggett. On January 11, 2017, Leggett announced to its employees and the IAM that it was withdrawing recognition on March 1, 2017, the day after the CBA expired. In response, the IAM filed unfair labor practice charges alleging the petition was not supported by a majority of employees. The NLRB Region dismissed those charges, finding "the Employer had in its possession evidence demonstrating that the Union had lost the support of a majority of bargaining unit members." (Leggett Ex. 8).

Based on Purvis' valid decertification petition, Leggett withdrew recognition from the Union on March 1, 2017. That same day, the IAM filed another unfair labor practice charge alleging that Leggett's withdrawal of recognition was unlawful.

Concerned that the IAM's unfair labor practice charge could undermine the validity of his decertification petition, Purvis collected a second decertification petition to request a secret-ballot election conducted by the NLRB. The IAM then filed a new charge, alleging that a single signature on Purvis' second petition was obtained through illegal employer aid. On June 15, 2017, the Board's General

Counsel issued a consolidated complaint and notice of hearing on the IAM's two unfair labor practice charges.[1]

On July 19, 2017, Purvis and several other employees filed a Motion to Intervene in the General Counsel's case against Leggett. (J.A. 106). On July 24, the hearing opened and ALJ Andrew Gollin denied the Motion to Intervene. (Tr. 34:5-13) (J.A. 11).

On October 2, 2017, the ALJ ruled that Leggett violated the NLRA by withdrawing recognition from the IAM based on Purvis' first petition, and that Leggett had impermissibly tainted the second petition by aiding in the collection of one signature. (J.A. 349). Both Leggett and Purvis filed exceptions to the ALJ's ruling. On November 20, the General Counsel filed a Motion to Strike Purvis' exceptions, arguing that unsuccessful intervenors have no right to file exceptions before the Board. On November 21, Purvis filed a response.

On January 23, 2018, the Board issued an order stating: "Assuming that Proposed-Intervenor's Exceptions . . . constitute a timely appeal from a ruling of an administrative law judge . . . we deny that appeal on the merits. We find that the judge did not act arbitrarily or capriciously or otherwise abuse his discretion in

[1] The General Counsel sought a preliminary injunction under Section 10(j) of the NLRA in the United States District Court for the Eastern District of Kentucky, which was denied on June 20, 2017. *See Lindsay v. Leggett & Platt*, 2017 WL 2655396 (E.D. Ky. June 20, 2017).

denying the Proposed-Intervenor's motion to intervene." (J.A. 344). The Board also issued a second order striking the portions of Purvis' exceptions that did not relate to the denial of his intervention motion. On December 17, 2018, the Board upheld the ALJ's ruling as to Leggett and imposed a bargaining order. 361 NLRB No. 51 (J.A. 345).

Both Leggett and Purvis petitioned this Court for review of the Board's December 2018 order. While the petitions for review were pending, however, the Board decided *Johnson Controls*, 368 NLRB No. 20. In *Johnson Controls*, the Board announced a new framework for evaluating the lawfulness of an employer's withdrawal of recognition after the expiration of a collective-bargaining agreement. The Board overruled portions of *Levitz Furniture Co.*, 333 NLRB 717 (2001), which the Board had relied upon in deciding this case. Accordingly, the Board asked that the case to be remanded for further proceedings. On August 7, 2019, this Court remanded the case in light of the Board's new legal standard.

On remand, however, the Board decided not to apply *Johnson Controls* retroactively to this case. Instead, the Board continued to apply the now-overturned *Levitz* rule and affirmed its prior bargaining order. 368 NLRB No. 132 (J.A. 363-65).

STATEMENT OF THE FACTS

A. The December 2016 Decertification Petition and Withdrawal

Leggett operates a box spring and mattress plant in Winchester, Kentucky. The IAM was the collective bargaining agent for the approximately 300 employees in Leggett's operations, warehouse, and maintenance departments. (Tr. 98:15-99:4) (J.A. 15). The most recent collective bargaining agreement between Leggett and the IAM ran from February 28, 2014 to February 28, 2017.

Aware that the CBA would soon expire, Purvis began circulating a petition in December 2016 to decertify the IAM. By December 19, Purvis had collected signatures from a majority of Leggett employees in the bargaining unit. (Leggett Ex. 7) (J.A. 245-64). He delivered the petition signatures (the "December petition") to Leggett with the hope it would withdraw recognition from the Union. Purvis continued collecting signatures and by January 23, 2017, he secured the signatures of 182 out of the approximately 300 employees in the bargaining unit. (Leggett Ex. 7) (J.A. 245-64). The December petition was conceived and collected solely by Purvis and his fellow employees. There is no claim Leggett supported or encouraged Purvis' December petition.

On January 11, 2017, after authenticating the signatures on the petition (Tr. 236:1-2, 242:20-24) (J.A. 39, 41), Leggett informed the Union it would withdraw recognition when the parties' collective bargaining agreement expired on February

28. Until March 1, Leggett would honor the collective bargaining agreement and recognize the Union as the exclusive bargaining representative. (Joint Ex. 4) (J.A. 322). On January 12, 2017, Leggett informed its bargaining unit employees that a majority of them had notified it they no longer desired to be represented by the Union. Leggett's letter to the employees said it would withdraw recognition from the Union when the CBA expired. Leggett also told employees that, "assuming nothing changes with respect to [their] desire to no longer be represented by the Union after February 28, 2017," it would begin implementing new terms and conditions of employment following withdrawal. (Joint Ex. 5) (J.A. 323).

In response to this letter, the IAM filed two unfair labor practice charges. The charges alleged that Leggett violated the Act by withdrawing recognition and refusing to bargain, and that Leggett provided unlawful assistance to Purvis and others as they obtained signatures. (Tr. 244:22-245:1; Leggett Exs. 8-9) (J.A. 41, 265-68). The NLRB Regional Director dismissed both charges, affirming that the December petition was valid and untainted by any unlawful support or interference. (Leggett Ex. 8-9) (J.A. 265-68). The Regional Director also found that Leggett "had in its possession evidence demonstrating that the Union had lost the support of a majority of bargaining unit members." (Leggett Ex. 8) (J.A. 265).

B. The IAM collects a counter-petition.

In response to Purvis' decertification petition, the IAM began its own counter-petition. On January 18, 2017, the IAM held an open house meeting inside Union President Elmer Tolson's office at the union hall. According to President Tolson, that meeting was for dual purposes, one of which was to gather signatures for the Union's counter-petition, and the other was to vote on strike benefits. (Tr. 650:19-651:5; G.C. Ex. 3).

The IAM continued to collect employee signatures up until February 28, 2017, the day before Leggett's withdrawal of recognition would take effect. In total, the Union collected twenty-eight "cross-over" signatures—signatures of employees who signed the December decertification petition but later signed the Union's counter-petition (Tr. 675:2-676:23) (J.A. 99). The IAM, however, never informed Leggett or Purvis that it had collected any of these counter-signatures. Nor did the IAM ever inform Leggett or Purvis that it was collecting a counter-petition that could demonstrate majority support for the Union.

Meanwhile, in its correspondence with employees and the IAM, Leggett consistently indicated it would withdraw recognition from the IAM at the end of the CBA *only* if a majority of its bargaining unit employees no longer supported the Union on that date. It stated this in its January 12 letter to employees (Joint Ex. 5) (J.A. 322), and in its February 22 letter to the Union. (Joint Ex. 7) (J.A. 327).

Despite those communications from Leggett, neither the IAM nor the NLRB Region provided Leggett with any notice or evidence that the IAM possessed a counter-petition. Rather, the IAM sent Leggett a letter on February 21 omitting any reference to its counter-petition and stating only that it did "not believe" Leggett's claims that the IAM no longer enjoyed majority support. (Joint Ex. 6) (J.A. 326).

C. Leggett withdraws recognition.

On March 1, 2017, Leggett had 295 employees. Although Purvis' December petition had 182 signatures on it, by March 1, fifteen of those employees were no longer employed at Leggett, leaving the signatures of 167 active employees. (182 - 15 = 167) (Joint Ex. 8; Tr. 252:17-253:1) (J.A. 328-37, 43). Based on the evidence it possessed, and with a good-faith belief that the IAM had lost majority support, Leggett formally withdrew recognition from the IAM on March 1. (Tr. 254:10-16; Joint Ex. 9) (J.A. 44, 338). In its letter to the IAM announcing its withdrawal, Leggett noted the IAM had not given it any counter evidence that it continued to enjoy majority support among bargaining unit employees. (Joint Ex. 9) (J.A. 338).

After Leggett withdrew recognition, the IAM filed another unfair labor practice charge based on the counter-petition it withheld from Leggett. Given IAM had collected twenty-eight crossover signatures on its counter-petition, allegedly only

139[2] employees supported Purvis' December petition. Given the 295 employees in the Leggett bargaining unit, it would have taken 148 signatures to garner the 50% necessary to support a withdrawal (295 x .5 = 147.5). However, the December petition was supported by well over 30% of the bargaining unit, the percentage necessary to call for a secret ballot election under NLRB rules. (139/295 = 47%).

D. The Second Decertification Petition

Knowing the IAM had challenged his December petition, Purvis began collecting signatures on a second decertification petition. On June 9, 2017, Purvis filed his second petition with the NLRB Regional office to seek an election. *See* NLRB Case No. 09-RD-200329.[3] The IAM then filed another unfair labor practice charge alleging that a single signature on the second petition was the result of unlawful employer taint. Based on this new charge and the previous charge dealing with the withdrawal of recognition and the IAM's concealed counter-petition, the Region

[2] The ALJ incorrectly ruled only 138 employees supported the petition because a signature from Donnie Butler "could not be verified, so it was not counted as supporting to the antiunion petition." ALJ Dec. at *9 n.12 (J.A. 353). The ALJ reached this decision in part because Butler's name is printed, not in cursive. *Id.* The ALJ is wrong because the company both verified the signature (Tr. 278:20-23) (J.A. 46), and because the individual employee who collected Butler's signature witnessed him print his name on the petition (Tr. 368:17-23; 375:17-25) (J.A. 56-57). The Board has long held that employees may print their names on a petition or authorization card. *See Flamingo Hilton-Laughlin*, 324 NLRB 72, 110 (1997); *McEwen Mfg. Co.*, 172 NLRB 990, 993 (1968).

[3] *Available at* https://www.nlrb.gov/case/09-RD-200329 (last visited June 22, 2020).

blocked the election from proceeding and is holding the second petition in abeyance pending the outcome of this case. (Leggett Ex. 12) (rejected) (J.A. 274-75).

The facts concerning the allegation that the decertification petition was tainted because a supervisor directed one employee to meet with Purvis for the purpose of signing the petition are as follows. On April 4, 2017, Cordell Roseberry ("Roseberry") began working at Leggett. He testified that on April 5, after his first full working day, a supervisor, Stephen Day ("Day"), "pointed at me and then he pointed at [Keith] Purvis and then he more like motioned me to walk over to Purvis." (Tr. 143:6-8) (J.A. 22). Roseberry testified that, after he went to Purvis, Purvis "asked me if I signed anything. I told him, no, I hadn't, and then he told me to meet him at his truck after work." (Tr.143:9-10) (J.A. 22). Roseberry testified he "didn't hear Stephen Day speak to Purvis really at all." (Tr. 143:16-17) (J.A. 22). But later, after consulting his affidavit, he said he heard Purvis ask Day if there were "any more new hires in," but that he heard no other conversation between them. (Tr. 149:20-21) (J.A. 24). Roseberry testified that after speaking to Purvis he "went on about my day then." (Tr. 143:22) (J.A. 22). On cross-examination, Roseberry said that Day never mentioned anything about the Union or decertification to him. (Tr. 151:16-21) (J.A. 24).

Day testified that one of his responsibilities is to help employees get oriented during the first half of their day when they start at Leggett. (Tr. 154:19-20)

(J.A. 25). As part of this responsibility, Day ensures employees are introduced to their supervisors. (Tr. 155:5-13) (J.A. 25). He testified that when Roseberry was hired he was unusually busy overseeing the completion of employee paperwork for a new benefit package. (Tr. 156:9-17) (J.A. 25). Because of his backlog of work, Day asked Purvis, who was filling out paperwork in the conference room, to escort two new employees to see their supervisor, Jeff Fletcher. (Tr. 156:15-19) (J.A. 25). Day testified that he told Roseberry to meet him by a bulletin board outside the conference room at 3:00 p.m., after finishing his first full day of work, so he could introduce Roseberry to his second-shift supervisor. (Tr. 159:17,162:2-9) (J.A. 26-27). Roseberry had not met his supervisor because all new hires begin working during the first shift in order to become acclimated to their position. (Tr. 163:1-12) (J.A. 27). Day testified that when Roseberry came to the conference room he "pointed to Mr. Purvis and said could you please follow him" and said nothing else to Roseberry. (Tr. 163:22-25) (J.A. 27). Day testified he asked another employee, Aaron Shepherd, to also follow Purvis. (Tr. 164:16-20) (J.A. 27). Purvis was not asked about any of this during his testimony. ALJ Dec. at *12 (J.A. 356).

E. Purvis and other employees move to intervene to protect their petition.

On July 26-28, 2017, a hearing was held before ALJ Andrew Gollin to determine if Leggett violated the NLRA by withdrawing recognition from the IAM and whether it illegally tainted Purvis' second petition. Purvis, joined by a number of

other employees, filed a timely motion to intervene. Purvis was attempting to intervene to (1) authenticate the December decertification petition under *Levitz Furniture Co.*, 333 NLRB 717; (2) defend the validity of the second decertification petition; and (3) oppose any remedy that would impose a bargaining order and prevent an election in NLRB Case No. 09-RD-200329.

At the opening of the trial, the ALJ denied the motion to intervene, ruling Purvis had no interest in the unfair labor practice proceeding; and, to the extent he had an interest, it could be vindicated through the decertification process (Tr. 34:5-13) (J.A. 11). The ALJ also erroneously claimed that Purvis was seeking to intervene to explain why employees did not want the Union. (Tr. 35:1-3) (J.A. 11). In fact, Purvis and other employees were not attempting to explain their reasons for not wanting a union, but to demonstrate that as of March 1, 2017 the signatures on the December petition were authentic and the IAM lacked majority support.[4] They also wanted to oppose a bargaining order and seek, as a remedy for any employer violation, a secret-

[4] Under the Board's decision in *Levitz Furniture*, 333 NLRB at 725, a petition must be authenticated at trial to demonstrate actual loss of majority support. Signatures on the petition "may be authenticated by the testimony of the signer, a witness to the signature, delivery to the solicitor of the card, or by handwriting exemplars." *Ambassador Servs., Inc.*, 358 NLRB 1172 (2012), adopted by *Ambassador Servs., Inc.*, 361 NLRB 939 (2014). Purvis wanted to participate because it is not a forgone conclusion that an employer will attempt to meet this burden, or succeed in doing so.

ballot election. On exceptions, the Board affirmed the ALJ's denial of Purvis' Motion to Intervene. (J.A. 344).

STATUTES AND REGULATIONS

The statutes pertinent to this case are set forth in the body of this brief or in the separate Addendum at the end of this brief, pursuant to D.C. Circuit Rule 28(a)(5).

SUMMARY OF ARGUMENT

1. The Board summarily upheld the ALJ's decision denying intervention with no additional analysis, failed to explain its reasoning, and ignored uncontradicted facts. The Board's rubberstamping of an arbitrary ruling is entitled to no deference. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983) (agency will not be afforded deference unless it considers all relevant issues and factors); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).

As Judge Millet found in *Veritas Health Serv. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018), the Board has never articulated *any* standards by which intervention should be granted or denied in cases like this. This is an area of administrative law in which the need for uniformity and predictability demands coherent standards. Here, the Board did not consider Purvis' statutory interest in the case and how his interests diverge from Leggett's. The Board ignored its own pronouncements that an employer cannot serve as the vindicator of employee rights at the same time it is accused of violating those rights. The Board should have granted intervention.

2. Bargaining orders are disfavored. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–39 (D.C. Cir. 2000). This Court recently refused to enforce a bargaining order where a union purposefully withheld information about its counter-petition to entrap an employer into an unfair labor practice. *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). This is precisely what occurred here. A bargaining order would reward the IAM's identical gamesmanship in concealing its counter-petition, punish Leggett for acting in good faith, and "give no credence whatsoever to employee free choice." *Id.* at 1152. This is a compelling case for denying a bargaining order because, even after factoring in the counter-petition, Purvis' December petition was supported by 47% of the bargaining unit. As it only takes 30% of employees to call for a secret-ballot election, the proper remedy is to hold an election in Purvis' pending decertification case.

Similarly, even assuming Leggett aided Purvis' second decertification petition by directing one employee to speak to Purvis, a bargaining order based on that one isolated incident does not properly balance the Section 7 rights of the other 294 employees. Imposing a bargaining order would allow one invalid signature to cancel out the signatures of every other employee who signed both decertification petitions. A bargaining order is harsh medicine when there is no evidence that Leggett's alleged conduct coerced any other employee to sign the second petition.

Finally, there is a better remedy for Leggett's alleged taint: the Region can discount that single signature. Striking the allegedly tainted signature from the second petition properly balances the employees' Section 7 rights to call for an election while simultaneously curing any possible violation of the Act.

STANDING

Purvis is a "person aggrieved" under 29 U.S.C. § 160(f). *See Retail Clerks Union v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965) ("an adverse effect in fact" confers standing to appeal even to a non-party). Purvis suffered an adverse effect here. The NLRB affirmed the ALJ's denial of his Motion to Intervene, held his majority decertification/withdrawal petition ineffective to oust the IAM, and imposed a bargaining order that prevents an election from being held in his decertification case, No. 09-RD-200329. (Board Dec. at *1-3). That is sufficient injury-in-fact to confer standing within the meaning of NLRA Section 10(f), 29 U.S.C. § 160(f), and Article III of the U.S. Constitution. *Oil, Chem. & Atomic Workers Local 6-418 v. NLRB*, 694 F.2d 1289 (D.C. Cir. 1982); *compare Fund for Animals*, 322 F.3d at 732 (citation omitted) ("The denial of a motion for intervention as of right is an appealable final order 'because it is conclusive with respect to the distinct interest asserted by the movant.'"); *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286–87 (11th Cir. 2010) (injury-in-fact exists under Section 302 of the Labor Management Relations Act where employee is forced to be represented by a labor union he opposes).

STANDARD OF REVIEW

1. The Board rubber-stamped the ALJ's oral decision denying intervention with no additional analysis, failed to explain its "reasoning," and ignored critical facts. As such, no deference is warranted. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48-49 (agency will not be afforded deference unless it considers all relevant issues and factors). Moreover, the Board is entitled to no deference here because it has never articulated *any* standards by which intervention should be granted or denied in cases like this. "[C]laims for deference through paeans to agency precedent only work if a principled body of precedent actually exists." *Veritas Health*, 895 F.3d at 89 (Millet, J., concurring); *see also Encino Motorcars*, 136 S. Ct. at 2125 ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. . . . But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.").

2. As to the Board's choice of remedy, the Court will "disturb the Board's remedy only when it amounts to an abuse of discretion." *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991). "[T]he standard of review is deferential but not toothless." *Scomas*, 849 F.3d at 1155. The Court must be assured that the Board "has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy that

can be said to effectuate the purposes of the Act." *Id.* at 1155-56 (quotation & citation omitted). As to bargaining orders, the Court "views them with suspicion and requires special justification for them." *Id.* at 1156 (quotation omitted). No such justification can be found here.

ARGUMENT

I. The NLRB Had no Basis to Deny Purvis Intervention.

A. Introduction

The Board's decision to deny intervention is standardless and therefore arbitrary and capricious. The ALJ denied Purvis' motion to intervene orally, finding that he had no "interest" in the unfair labor practice proceeding, and to the extent he had an interest, it could be vindicated later though the decertification process (Tr. 34:5-13) (J.A. 11), which the ALJ's recommended bargaining order actually foreclosed. The Board's decision to rubber-stamp the ALJ and deny Purvis' motion and exceptions consists of a single paragraph, stating the ALJ did not abuse his discretion in denying intervention and citing two of its own cases and the Board's internal rules and procedures.

Section 102.29 of the Board's Rules and Regulations states: "The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper." NLRA Section 10(b) provides: "In the

discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." 29 U.S.C. § 160(b).

Despite almost eighty years in operation, the Board has taken no steps to "put any meat on the regulation's bare bones." *Veritas Health*, 895 F.3d at 89 (Millet, J., concurring). The Board has never announced any standards for determining when intervention is proper, and there is no rhyme or reason to its many intervention decisions. Intervention in cases like this is decided on an arbitrary and ad hoc basis by each ALJ. The current NLRB General Counsel recently recognized as much, issuing a guidance memo stating that "an individual who has filed a decertification petition with the Regional office . . . has a sufficiently direct interest in the outcome of related ULP litigation such that opposition to his/her motion to intervene is unwarranted." NLRB General Counsel Memorandum 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees*, 2018 WL 3703870 (Aug. 1, 2018), at *1.

B. The Board lacks discernable intervention standards.

Below, the Board denied intervention based upon two of its own *ipse dixit* decisions: *Veritas Health Serv., Inc.*, 363 NLRB No. 108, slip op. at 1 n.1 (Feb. 4, 2016), and *Latino Express, Inc.*, 360 NLRB 911 n.2 (2014). Both are devoid of reasoning.

In *Veritas Health*, the Board found an intervention motion predicated on defending a decertification petition had "no merit" and that the ALJ's intervention denials were "not an abuse of discretion" under "established precedent." 363 NLRB slip op. at 1 n.1. But, the Board never cited any established precedent to support that result, nor did it explain its reasoning.

The Board's decision in *Latino Express* is even more terse. There, the Board simply concluded that "we affirm, involving no abuse of discretion, the judge's denial of the motion of Ramiro Lopez, et al., employee petitioners in a decertification case, to intervene in this unfair labor practice case." *Latino Express*, 360 NLRB at 911 n.2.

This history of standardless rationales has not gone unnoticed. When *Veritas Health* reached this Court on review, Judge Millet wrote a concurring opinion to "express . . . concerns about the Board's continued failure to establish any sensible, consistent standard for granting and denying intervention in agency proceedings." 895 F.3d at 89. She noted that the "Board's persistent failure to put any meat on the regulation's bare bones leaves individual intervention decisions at the risk of arbitrary and inconsistent resolution." *Id.* She admonished the Board for its failure "to formulate objective and reliable standards for intervention in its proceedings," finding the Board's current intervention rule "generic," "amorphous," and "indeterminate." *Id.*

The Board's decision in this case proves Judge Millet's point: the Board denied Purvis' intervention petition without reference to any objective standard of how to interpret its intervention rules. Moreover, the Board's decision is in contravention of other Board precedent and common intervention standards, something the General Counsel is now trying to fix by issuing Memorandum 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees*, 2018 WL 3703870.

C. The NLRB regularly grants intervention to employees.

Despite the denial here, ALJs often grant intervention to employees, and the Board has upheld those grants. For example, in *Taylor Bros. Inc.*, 230 NLRB 861, 861 n.1 (1977), employees were permitted to intervene in unfair labor practice proceedings on a limited basis to protect their interest in any remedy that denied them a vote on whether to be represented by a union. In *New England Confectionary Co.*, 356 NLRB 432 (2010), an employee decertification petitioner was allowed to intervene in an unfair labor practice case that alleged his employer had unlawfully assisted with his petition. Similarly, in *Novelis Corp.*, 364 NLRB No. 101 (Aug. 26, 2016), the Board upheld an ALJ's limited grant of intervention to employees seeking to oppose a bargaining order being sought by the General Counsel for a minority

union.[5] *Novelis Corp.*, No. 03-CA-121293 (Sept. 12, 2014) (unpublished Board Order upholding ALJ decision granting employee intervention) (Addendum 3).[6]

Employees were also permitted to intervene in a case nearly identical to this one. In *Johnson Controls*, 368 NLRB No. 20, employees collected a decertification petition demonstrating that at least 50% of the bargaining unit no longer wished to be represented by the union. *Id.*, slip op. at *1. After the employer announced it would withdraw recognition, but before the withdrawal was effective, the union collected authorization cards from employees. *Id.*, slip op. at *3. Six employees who signed the decertification petition had subsequently signed the union's authorization cards. *Id.*, slip op. at *3. After the employer withdrew recognition, the union filed unfair labor practice charges alleging that the employer violated the Act. *Id.*

At the hearing, two employees who collected the decertification petition were granted intervention by the ALJ. *Id.*, slip op. at *23 (ALJD Feb. 16, 2016) ("At the hearing, I granted the petition of two of Respondent's employees, Brenda Lynch and

[5] The Second Circuit also allowed the employees' intervention when the case reached it on appeal. *Novelis Corp. v. NLRB*, 885 F.3d 100 (2d Cir. 2018).

[6] Other ALJs have allowed intervention in similar cases that have not come before the Board. *See Renaissance Hotel Operating Co. & Unite Here Local 631*, Case 28-CA-113793 (ALJ Order granting Motion to Intervene, July 18, 2014) (Addendum 5); *Ave. Dental*, Case 19-CA-236385 (ALJ Order granting Motion to Intervene, Sept. 30, 2019) (Addendum 7).

Anna Marie Grant, to intervene.”).[7] That intervention is both granted and denied in virtually identical cases shows the Board is operating without coherent standards.

Camay Drilling Co., 239 NLRB 997 (1978), is also instructive. There, the trustees of various union pension funds moved to intervene in an unfair labor practice case, claiming that the trusts they administered were entitled to receive increased fringe benefit contributions depending on the results of the underlying case. Relying on Section 554(c) of the Administrative Procedure Act, the Board held that the trustees had to be granted intervenor status at an early stage to challenge the remedy being sought. *Id*. at 998. Further, the Board noted that the interests of the trustees were not necessarily identical to those of the charging party union and, therefore, could not adequately be protected without the trustees’ actual participation. *Id.* at 998 n.10. The analysis of Section 554(c)[8] used in *Camay Drilling* to grant those trustees intervenor status applies here as well.

The Board’s denial of Purvis’ intervention motion also ignored many other Board cases that support intervention. *See, e.g.*, *Gary Steel Prods. Corp.*, 144 NLRB 1160,

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[7] Although the General Counsel filed exceptions arguing that the ALJ erred in granting intervention, the Board found it “unnecessary to pass on this exception” because it dismissed the charges against the employer. *Johnson Controls*, 369 NLRB No. 20, slip op. at *1 n.1.

[8] Section 554(c) of the Administrative Procedure Act provides: “[t]he agency shall give all interested parties opportunity for- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.” 5 U.S.C. § 554(c).

1160 n.1, 1162 (1963) (Board permitted an employee to intervene for himself and sixty-two other employees in a case concerning a union representative's misrepresentations to employees during an organizing campaign); *J.P. Stevens & Co.*, 179 NLRB 254, 255 (1969) (ALJ permitted employees who had signed authorization cards to intervene during the course of the trial, where the complaint claimed that the employer had unlawfully interfered with a union organizing campaign); *Wash. Gas Light Co.*, 302 NLRB 425, 425 n.1 (1991) (ALJ allowed employee to intervene to represent his own interests and help defend his employer in a dues checkoff revocation dispute); *Sagamore Shirt Co.*, 153 NLRB 309 (1965) (sixty-four employees intervened to establish a claim that they constituted a majority of the employees and did not wish union representation).

There is no principled way to reconcile these numerous cases where intervention was granted versus the arbitrary and erroneous denial that occurred in this case. On balance, these many cases suggest the Board gives ALJs nearly total discretion to grant or deny intervention at their whim.

This standardless deferral of authority to ALJs has led to inconsistent and arbitrary results, something recognized by Judge Millet in *Veritas Health*, 895 F.3d at 89. Employees are sometimes granted intervention by ALJs and sometimes denied. But simply granting ALJs arbitrary authority to determine intervention is not a defensible standard. The Board's decision in this case deserves no deference

because it is not "the product of reasoned decision making," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. at 52. Rather, it is a product of inertia and buck passing.

D. Intervention is proper because the Act protects Purvis' statutory right to be free of a minority union.

As Judge Millet noted in *Veritas Health*, the Board has never promulgated any standards for analyzing employees' motions to intervene. It has sometimes parroted (but never outright adopted) the standards set forth in Rule 24(a) of the Federal Rules of Civil Procedure. *See e.g. DirectSat USA*, 366 NLRB No. 141 (July 25, 2018) (order denying motion to intervene on the basis of timeliness and shared interest with representative party). Motions to intervene as of right are governed by a four-part test under Rule 24(a).

> (1) the motion to intervene is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the movant's interest is not adequately represented by existing parties.

Fund for Animals, 322 F.3d at 731 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)); *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72 (D.C. Cir. 1988).[9]

[9] The Board will no doubt rely on this Court's decision in *DirectSat USA LLC v. NLRB*, 925 F.3d 1272 (D.C. Cir. 2019), which held the Board does not have to adhere

In this case, the ALJ denied Purvis' motion to intervene on the puzzling basis that he lacked any interest in the proceedings and, inconsistently, that any interest he held could be vindicated through the Board's completely separate representation procedures. (Tr. 34:5-13) (J.A. 11). This was a back-door application of the second and third standards of Rule 24(a). Regardless, Purvis clearly has an interest in the proceedings and a bargaining order will prevent him from using the representation procedures to protect that interest.

1. The Act protects Purvis' right to be free of a minority union, and a bargaining order mandating representation by such a union impairs or impedes that interest.

The ALJ's assertion that Purvis lacked *any* interest in this proceeding is alarmingly flawed. The decertification petition was created by Purvis, and the denial of intervention prevented him from protecting the validity of that petition. More importantly, Purvis is the only party in this case with a direct Section 7 right to utilize the NLRA's established procedures to oust an unwanted union. The trial here concerned: (1) whether *Purvis'* December petition was valid; (2) whether *he* was impermissibly aided in the collection of his second petition; and (3) whether a

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to Rule 24 in deciding motions to intervene. But that case is readily distinguishable because the Board properly ruled that under any standard, the punitive intervenor's motion was untimely. *Id.* at 1278. Moreover, Purvis is not arguing the Board is bound to follow Rule 24—merely that the Board has parroted these standards in the past and the ALJ seemed to apply something akin to the second and third parts of the Rule 24 test in this case. Even if the Board is free to apply standards different than what Rule 24 requires, it still must promulgate *some* standards.

bargaining order is a proper remedy covering *his* workplace if his employer committed an unfair labor practice. It is hard to fathom how his interest in these proceedings could be any greater.

As to the third point, the General Counsel sought, and the Board ordered, a bargaining order that prevents the election *he* seeks from being held at Leggett for at least six months and up to one year. *Leggett & Platt*, 367 NLRB No. 51, slip op. at *1-3. (J.A. 345-47). If the Board's decision in this case is upheld, Purvis' pending decertification election will be dismissed and he cannot refile for an election until at least the six-months of bargaining has elapsed. How can it be said that Purvis has "no interest" in that outcome when this proceeding will determine whether he will get his requested election?

It is also irrelevant that Purvis can file for a decertification election, as he did in Case No. 09-RD-200329, because the availability of a different process in a different case does not lessen the need for intervention in *this* case. *Fund for Animals*, 322 F.3d at 735 (noting that an interest in a proceeding is not lessened by intervenor's ability to "reverse an unfavorable ruling by bringing a separate lawsuit") (citations omitted). Moreover, Purvis' Section 7 rights cannot be "vindicated" through the established decertification process because the petition he filed was blocked by the unfair labor practice proceedings *in this case*. *See Scomas*, 849 F.3d at 1159 (noting that a "call for an election . . . is no cure-all" because of the Board's blocking charge

policy) (Henderson, J., concurring); *T-Mobile v. NLRB*, 717 Fed. Appx. 1, 2018 WL 1599407 (D.C. Cir. Mar. 27, 2018) (Sentelle, J., dissenting) (noting that application of the blocking charge policy causes "unfair prejudice"). Moreover, if the bargaining order is enforced and Leggett and the IAM negotiate a collective bargaining agreement, the Board's contract bar rule could preclude a secret-ballot election for up to three additional years. *See Gen. Cable Corp.*, 139 NLRB 1123 (1962).

Unlike the Board, the current NLRB General Counsel has recognized that employees have significant rights at stake in cases like this, and that intervention should not be opposed by the NLRB litigation staff. *See* General Counsel Memorandum 18-06, 2018 WL 3703870, at *1 ("The General Counsel has determined that an individual who has filed a decertification petition . . . has a sufficiently direct interest in the outcome of related ULP litigation such that opposition to his/her motion to intervene is unwarranted."). The General Counsel properly found that decertification petitioners have a right to participate in such proceedings because "the outcome of the ULP could result in the petition being dismissed or not being reinstated." *Id.*

Purvis possesses more than just a tangential "interest" in the proceeding; he is attempting to vindicate his *rights* under the Act, rights possessed by no other party. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531–32 (1992) (referring to NLRA Sections 7 and 8, the Court states that "[b]y its plain terms, thus, the NLRA confers rights

only on *employees*, not on unions or their nonemployee organizers") (emphasis in original). Contrary to what Board seems to believe, NLRA Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001); *Lee Lumber v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("employee free choice . . . is a core principle of the . . . Act"); *Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989) ("employees' Section 7 rights to decide whether and by whom to be represented" outweigh other Board policies); *Johnson Controls*, 368 NLRB No. 20, slip op. at *13 ("Section 7 of the Act . . . creates a right for employees to refrain from [union] representation.").

The Board's denial of intervention allows it to impose upon Purvis and his co-workers an unwanted minority agent, a result contrary to the fundamental purpose of the NLRA. "There could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to grant exclusive representation status to a minority union. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

Imposing the IAM upon Purvis and his co-workers restricts their right to bargain with their employer. *See Mulhall*, 618 F.3d at 1286–87 (injury-in-fact exists where employee is forced to be represented by a labor union he opposes). In *Johnson*

Controls, the Board recognized the substantial interest that employee petitioners possess: "We also cannot ignore the interests of the unit employees, a majority of whom signed a valid, uncoerced petition that they did not want the Union to represent them." 368 NLRB No. 20, slip op. at *11. Despite that recognition of the vital interests Purvis possesses, the Board still wrongfully denied intervention here while making no effort to reconcile its many conflicting intervention precedents.

2. Leggett and Purvis possess different interests, making Leggett an inadequate representative of Purvis.

One of the traditional factors in deciding a motion to intervene is whether any existing party will represent the intervenor's interests. Although the ALJ did not address this intervention factor, the Board has used it as a standard in other intervention cases. *See DirectSat USA*, 366 NLRB No. 141, slip op. at *3.

To show that representation by a present party is inadequate, an applicant in intervention need not show that the existing parties will engage in conduct detrimental to his interests. To the contrary, the requirement of inadequacy of representation "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (citation omitted); *see also Dimond v. D.C.*, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing the intervenor's burden as "not onerous"). Thus, a showing that there *may* be inadequate representation can be based on potentially divergent interests, rather than a

representative party colluding with the opposing party or not diligently prosecuting the suit.

Here, Purvis' statutory interests differ significantly from his employer's pecuniary interests. Purvis is attempting to vindicate his Section 7 rights. *See Levitz*, 333 NLRB at 728 ("it is the employees' Section 7 right to choose their bargaining representatives;" an employer's only interest in representational matters is to ensure they do not violate employee rights) (emphasis in original). The employer does not possess any Section 7 rights. *See Lechmere, Inc.*, 502 U.S. at 532 ("[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers") (emphasis in original).

Moreover, Leggett cannot represent Purvis' interests because "[t]he Act was premised on the view that there is a fundamental conflict between the interests of the employers and employees engaged in collective-bargaining . . . ." *Brown Univ.*, 342 NLRB 483, 487–88 (2004); *see also Bos. Med. Ctr. Corp.*, 330 NLRB 152, 178 (1999) (the NLRA is "largely predicated upon conflicting interests" of employees and employers). Applying these principles, both the Board and the federal courts have rejected the notion of an employer serving as the "'vindicator of its employees' organizational freedom.'" *Corrections Corp. of Am.*, 347 NLRB 632, 638 n.3 (2006) (citing *Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 790 (1996)). By definition, "the employer has its self-interest to watch over and those interests are not

necessarily aligned with those of its employees." *Corrections Corp.*, 347 NLRB at 638 n.3. Accordingly, "[t]he Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union . . . ." *Id.*, citing *Auciello Iron Works*, 517 U.S. at 790.

This case amply illustrates those principles. Here, the NLRB contends that Leggett *violated* the Section 7 rights of Purvis and other employees by withdrawing recognition from the Union, but intervention was unnecessary because Leggett could simultaneously serve as the *vindicator* of those rights. This logical inconsistency is both startling and belied by the history and text of the NLRA. Even where Purvis' interests overlap with Leggett's, the defense of those interests will necessarily be undertaken from each party's unique perspective. Although Leggett may desire the same result, it cannot adequately assert Purvis' Section 7 rights on his behalf.

An analogy can be made to governmental bodies protecting private parties' rights. For example, in *Dimond*, 792 F.2d at 193, this Court found that intervention by a private party on the government's side was necessary because the government represented interests different from a private litigant. The government represents the public interest, but a private party has a more "narrow and parochial" interest best represented by an intervenor. *Id.* (quotation removed)*; see also Fund for Animals*, 322 F.3d at 736. Just as this court "look[s] skeptically on government entities serving as adequate advocates for private parties," *Crossroads Grassroots Policy Strategies*

v. FEC, 788 F.3d 312, 317 (D.C. Cir. 2015), the Board has never appointed an employer as "vindicator of its employees' organizational freedom." *Corrections Corp.*, 347 NLRB at 655 n.3.

In short, the Board should have granted Purvis intervention to protect his Section 7 rights, something Leggett cannot properly do for its employees, especially when it stands accused of violating those rights. The Board has failed—once again—to establish and apply objective standards for when intervention should be granted. This is a complete violation of the APA and the Board's own rules, and the Board's denial of intervention to Purvis must be reversed.

II. The Board's Bargaining Order Should Not Be Enforced Because of the Detrimental Effect It Has on Employees' Section 7 Rights.

A. Introduction

The Board erred in imposing a bargaining order on Leggett.[10] Leggett withdrew recognition based upon a good faith belief that the IAM no longer enjoyed majority support. But the IAM purposefully withheld from Leggett its counter-petition that invalidated twenty-eight signatures on Purvis' December petition. The December

[10] For the purposes of this appeal, Purvis assumes that the Board's intervening decision in *Johnson Controls* is not retroactive. Purvis is agnostic concerning Leggett's strong argument that the Board's decision in *Johnson Controls* is retroactive and thus the unfair labor practice charge should be dismissed. Purvis' position is that in "dual-card" situations, an election is the preferable means to resolve the dispute. Whether an election is held because this Court applies *Scomas* and refuses to enforce the bargaining order, or because the Union will move for an election under *Johnson Controls* makes no difference to the outcome Purvis seeks.

petition, however, was still supported by 47% of the bargaining unit, well over the 30% threshold required for a secret-ballot election. The IAM's gamesmanship in hiding its counter-petition for over a month cannot be rewarded with a bargaining order. This Court should reject the Board's bargaining order and order a secret-ballot election based on the uncontested showing of interest in the December petition.

B. A bargaining order conflicts with this Circuit's decision in *Scomas*.

"[A] bargaining order is not a snake-oil cure for whatever ails the workplace[.]" *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991). It therefore should be prescribed only when an employer has committed a "[h]allmark violation[ ]" of the Act. *Id.* at 934, 936. Bargaining should not be ordered if the violation is "far from serious." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996). The severity of the employer's violation depends on whether the unfair labor practice was "the genesis of [the] employees' desire to rid themselves of" the union, *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 502 (5th Cir. 1972), and whether it was so "flagrant" that an election cannot fairly be held, *id.* at 503 (internal quotation omitted). That is most certainly not the case here.

In an identical case, *Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), this Court denied enforcement of a bargaining order. There, employees collected a majority decertification petition, filed it with the NLRB Region for an election, and gave a copy of the petition to their employer, asking it to withdraw

recognition. *Id*. Before the employer withdrew recognition, the union persuaded six employees to sign a form stating they revoked their decertification signatures. *Id.* at 1153. Without those six signatures, the decertification petition lost majority support, but was still supported by well over 30% of the bargaining unit. *Id.* at 1158. The union concealed the employees' revocations from the employer (and from the employee who filed for an election). The employer eventually withdrew recognition based on what it believed to be a majority petition and the petitioner withdrew his election petition. *Id.* Six days later, the union filed unfair labor practice charges claiming the employer withdrew recognition unlawfully because the union still maintained majority support. The Board found that the employer violated the Act and imposed a bargaining order. *Id.* at 1154.

This Court reversed the bargaining order, noting that an "affirmative bargaining order is an extreme remedy, because according to the time-honored board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least a reasonable period." *Id.* at 1156 (citation omitted). The employer did not engage in a "deliberate or calculated" but an "unintentional" unfair labor practice, because it had "acted in good faith on a facially valid petition." *Id.* at 1157. Rather, the union had engaged in "gamesmanship," because it withheld both its counter-petition and its intent to "persuade the petitioners to revoke their signature." *Id.*

A bargaining order would not help the employer "benefit from its own wrongs," because "the genesis of employees' discontent was not [the employer's] conduct." *Id.* Moreover, the Board could not ignore the impact of a bargaining order on employee free choice. Because the petition was still supported by 42% of the unit, an election, not a bargaining order, was the appropriate remedy. The Court noted the Board's opposition to an election made "no sense." *Id.* at 1158.

A bargaining order cannot be imposed here for the same reasons. First, like the employer in *Scomas*, it is undisputed that Leggett in no way encouraged or promoted the December petition. Purvis and other employees, on their own accord, collected the December petition without any encouragement or aid from Leggett.

Second, rather than inform Leggett it retained majority support, the IAM deliberately withheld information about its counter-petition. On January 11, 2017, Leggett sent out a letter stating it had received evidence that the majority of the bargaining unit employees no longer desired union representation and that it would withdraw recognition on March 1. (Joint Ex. 4) (J.A. 322). By January 23, 182 employees had signed Purvis' December petition. (Leggett Ex. 7) (J.A. 245-64).

On January 18, the IAM held a meeting at its union hall and collected a counter-petition. Even after collecting its counter-petition, the IAM never alerted the company that it possessed a counter-petition, or that it was persuading employees to sign a pro-union petition to degrade Purvis' majority showing. The most the IAM

did was send Leggett a letter on February 21 stating: "we do not believe your claim." (Joint Ex. 6) (J.A. 326).

In response, Leggett sent a letter stating that it "has not received any evidence indicating that any employees have changed their minds" about decertification (Joint Ex. 9) (J.A. 338). The IAM did not respond to that letter. Leggett gave the IAM every opportunity to present evidence of its counter-petition. Instead, the IAM decided to conceal that information from Leggett and treated this process as one that "rewards gamesmanship at the expense of transparency," *Scomas*, 849 F.3d at 1158 (Henderson, J., concurring).

The bargaining order here is especially flawed, as it rewards the IAM's gamesmanship by allowing it to avoid the crucible of an election. If the IAM had revealed its counter-petition, Purvis (or Leggett) could have filed for an election because the December petition was still supported by 47% of the bargaining unit. Instead, the IAM filed unfair labor practice charges after-the-fact, precisely to prevent any election from being held pursuant to the Board's blocking charge policy. Sadly, the Board and the IAM have been blocking Purvis' subsequent decertification petition on the basis of these proceedings. (Leggett Ex. 12) (rejected) (J.A. 274-75).[11] If there is prejudice in this case, it is caused by the Board and the IAM, and Purvis is the victim.

[11] *See* NLRB Case No. 09-RD-200329.

Third, the remedy of an election would be more in line with the Act's purpose. The ultimate principle at issue in this case is the employees' right to be represented by an organization of their own choosing. "The fundamental policies of the Act are to protect employees' rights to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships." *HTH Corp.*, 356 NLRB 1397, 1428 (2011) (citing *Levitz*, 333 NLRB at 723). The bargaining order blocks an election, despite the fact that the employees—through no fault of their own—were denied the opportunity to have an election because of the IAM's attempt to entrap Leggett into committing an unfair labor practice. The proper remedy is to order a secret-ballot election.

C. The Board's half-hearted attempts to distinguish *Scomas* fall flat.

The Board claimed *Scomas* is "easily distinguishable." 367 NLRB No. 366 NLRB No. 14151, slip op. at *3 n.8 (J.A. 347). The Board claims the union in that case: (1) "had neglected its representational duties;" (2) "said nothing to the employer about its intention to persuade employees to revoke their signatures from the decertification petition and withheld information about its restored majority status;" and (3) did not file unfair labor practice charges until after the petitioners withdrew their decertification petition. *Id.* The Board's attempts to distinguish *Scomas* are either factually incorrect or legally irrelevant.

First, in *Scomas*, the union's neglect of the employees it represented was only relevant as to whether the initial petition was tainted by unlawful employer support. This Court stated: "This is not a case in which, absent a bargaining order, Scomas would benefit by its own wrongs. As far as the record reflects, the genesis of the employees' discontent was not Scomas's conduct, but an extended period of Union neglect." *Scomas*, 849 F.3d at 1157 (citation & quotation omitted). Thus, a bargaining order would be unnecessary because "there is no 'taint' to dissipate." *Id.* Similarly here, Leggett did not aid Purvis' December petition in any way. Leggett would not benefit by its own wrongs without a bargaining order, and there is no "taint" to dissipate. Purvis and his colleagues are simply free-thinking individuals, who no longer wanted the IAM's representation.

Second, just as in *Scomas*, the IAM withheld information about its purported regained majority support. Leggett told the IAM well in advance that it was planning on withdrawing recognition on March 1. It gave the IAM multiple opportunities to show Leggett that it had regained majority support or at least tell Leggett it had collected a counter-petition. The IAM's only response was a belated letter stating that it did "not believe" Leggett's claims about loss of majority support. (Joint Ex. 6) (J.A. 326). But, that letter is just gamesmanship—it is merely a claim that it "thinks" the employer is bluffing. *Scomas*, 849 F.3d at 1158 (Henderson, J., concurring) (noting labor relations are not "a poker game in which players enjoy an

absolute right to always conceal their cards until played"); *Johnson Controls*, 368 NLRB No. 20, slip op. at *28-29 (ALJ condemns union playing a game of "gotcha").

Besides being factually wrong, the Board's position is troubling in other respects. The underlying premise of the Board's decision is that a union's stated "disbelief" about the veracity of a majority decertification petition is enough to prevent an employer from lawfully withdrawing recognition in good faith based upon the objective evidence it actually possesses. Rewarding this type of union gamesmanship with a bargaining order, and the attendant decertification bar, will give "a union free rein to withhold information about restored majority status" and "sow tension and distrust, not peace and stability." *Scomas*, 849 F.3d at 1158 (Henderson, J., concurring).

Third, that no petition for a secret-ballot election had been filed with the NLRB Region when the IAM filed its unfair labor practice charge is legally irrelevant because the IAM's charge still accomplished its goal of blocking any subsequent election, *i.e.*, Purvis' petition in Case No. 09-RD-200329. This Court in *Scomas* admonished the Board because a bargaining order "gives no credence to employee free choice" and "handcuffs" the employees by "unduly delaying an election to determine majority status." 849 F.3d at 1147, 1158. That is exactly what happened here. Purvis' request for an election has been blocked for nearly three years due to the IAM's unfair labor practice charges.

Finally, the Board's desultory narrowing of *Scomas* is contradicted by its later reasoning in *Johnson Controls*. In *Johnson Controls*, the Board recognized that this Court had already "questioned in *Scomas*" "the Board's current treatment of dual signers." 368 NLRB No. 20, slip op. at *7. The Board acknowledged that consequently "the enforceability of an affirmative bargaining order issued under preexisting law would be in serious doubt." *Id.*, slip op. at *11. Indeed, the case against a bargaining order is much stronger here than in *Johnson Controls*. In *Johnson Controls*, the union sent a letter to the employer prior to withdrawal stating that it "ha[d] credible evidence that it retained majority support and was happy to meet to compare evidence." *Id.*, slip op. at *3. Here, the Union completely concealed that it had collected a counter-petition.

D. Even assuming Leggett unlawfully aided the second decertification petition with regard to one signature, the proper remedy is to exclude that single employee's name from the petition.

The Board also imposed a bargaining order on the basis that Leggett had an "unlawful role in the decertification effort." 367 NLRB No. 51, slip op. at *2 (J.A. 346). The Board found that a company agent directed a single employee to speak with Purvis about signing Purvis' second petition. There is no allegation that Leggett aided the original December petition (which was the sole basis for withdrawal), or that Leggett aided the second petition in any other way.

Assuming for the sake of argument the Board is correct that Leggett committed an unfair labor practice by verbally directing a new hire to speak to Purvis,[12] a bargaining order is not the proper remedy for this minor violation. In imposing a bargaining order, the Board is required to balance three considerations:

> (1) the employees' § 7 rights [of self-organization and collective bargaining]; (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.

Vincent Indus. Plastics, 209 F.3d at 738.

The allegedly improper collection of this single signature occurred long after 47% of the bargaining unit expressed dissatisfaction with the IAM.[13] Imposing a bargaining order based on this after-the-fact and isolated incident does not properly balance the Section 7 rights of the other Leggett employees. Imposing a bargaining order allows the collection of one invalid signature to cancel out the signatures of hundreds of other employees—including those who signed both decertification

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[12] Purvis does not concede that Leggett directed an employee to speak with him regarding the decertification petition. In fact, neither party asked Purvis about this when he testified. *See* NLRB No. 51, slip op. at *12 (J.A. 356). This point could have been resolved if Purvis had been allowed to intervene and his own counsel could have questioned him about this conversation.

[13] Purvis' collection of signatures for a second election was legally unnecessary. At the time, Purvis was acting without legal counsel and did not know his December petition could have been used as a sufficient showing of interest to file for a secret-ballot election, because petition signatures are valid for up to one year. *See Blade-Tribune Publ'g Co.*, 161 NLRB 1512, 1523 (1966).

petitions. There is no evidence that this isolated incident coerced any other employee or impacted any other signature on the petition.

A far more appropriate remedy exists: the Board should have ordered the Region to discount this single signature from the second petition. This is consistent with Board practice. *See, e.g.*, *Case Handling Manual*, Section 11730.3(a) (noting that when there is a finding of merit to a Section 8(a)(1) charge that alleges an employer was involved in the support of a decertification petition, a petition is only dismissed if the showing is "reduced below 30 percent after the tainted showing is subtracted."). Striking the sole signature from the petition properly balances Section 7 rights of the employees to have an election while acknowledging that one signature may have been improperly gathered.

CONCLUSION

The Board's decision denying Purvis' intervention is arbitrary and capricious, and it is time for the Board to promulgate objective standards for when intervention will be granted or denied. Moreover, the Board's bargaining order is erroneous under this Court's decision in *Scomas*. The Board's Decision and Order must be reversed, Purvis' Petition for Review granted, and the case remanded for Purvis' intervention to be granted and a prompt secret-ballot election held.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system, as they are registered users.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 10,504 words in accordance with the MS Word count, is typed in 14-point Times New Roman typeface and is in compliance with the type-volume limitations of FRAP 32(a)(7)(B) and (C) and this Court's briefing order.

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Addendum

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STATUTORY ADDENDUM

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.

* * *

Addendum A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NOVELIS CORPORATION

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS, INTERNATIONAL UNION, AFL-CIO

Cases 03-CA-121293
03-CA-121579
03-CA-122766
03-CA-123346
03-CA-123526
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NOVELIS CORPORATION

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS, INTERNATIONAL UNION, AFL-CIO

03-RC-120447

ORDER[1]

The General Counsel's Request for Special Permission to Appeal from Administrative Law Judge Michael Rosas's ruling granting the motion to intervene filed by employees John Tesoriero, Michael Malone, Richard Farrands and Andrew Duschen, is denied. We find that the judge's limited grant of the motion to intervene was not an abuse of discretion.

Dated, Washington, D.C., September 12, 2014.

PHILIP A. MISCIMARRA, MEMBER

KENT Y. HIROZAWA, MEMBER

HARRY I. JOHNSON, III, MEMBER

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Addendum B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO BRANCH

RENAISSANCE HOTEL OPERATING COMPANY

and

Cases 28-CA-113793
28-CA-115712
28-CA-128643

UNITE HERE LOCAL 631, AFL-CIO

ORDER GRANTING MOTION TO INTERVENE

On July 3, 2014, counsel for Suzanne Cohen and Erubey Quintero, Petitioners in the representation cases involving these parties, filed a Motion to Intervene (Motion) in this matter. The Regional Director, Cornele A. Overstreet, by order dated June 19, 2014, denied the motion to intervene. On July 3, 2014, counsel renewed the motion. On July 14, 2014, the matter was referred to the Associate Chief Administrative Law Judge.

After carefully considering the motion, and the brief in opposition filed by the counsel for the General Counsel, the Motion to Intervene is hereby **GRANTED**. As conceded by the Regional Director in his Order, the matters presented in this case "may be of import and interest to the Petitioners." I concur and find these matters to be of "import and interest" sufficient to warrant intervention.

Pursuant to Board Rule 102.29, the scope of the Interveners participation in the proceedings will be determined at the start of trial after all parties have been given an opportunity to be heard on the matter. The trial in the captioned matter is presently scheduled to commence in Phoenix, Arizona, on July 22, 2014, **and will continue day to day until completion**. The duration of the trial is expected to be eight to ten days.

IT IS ORDERED

Dated at San Francisco, California, this 18th day of July, 2014.

Dickie Montemayor
Administrative Law Judge

Served via facsimile and/or email upon the following:

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Addendum C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AVENUE DENTAL CARE

and **Case 19-CA-236385**

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 21

ORDER GRANTING MOTION TO INTERVENE

On July 10, 2019, counsel for Janey Wahl, an employee of Avenue Dental (the Respondent) who was engaged in circulating a decertification petition pertaining to the above-captioned complaint, filed a motion to intervene as a full party. The matter was referred to the Division of Judges for a ruling on July 16, 2019. On July 29, 2019, Associate Chief Administrative Law Judge Gerald M. Etchingham issued an order to show cause as to why Wahl's motion to intervene should not be granted. The parties were provided until noon on August 2, 2019 to file a response. The United Food and Commercial Workers, Local 21 (the Union) was inadvertently not served with the order to show cause.

On July 30, 2019, the General Counsel filed a response not fully opposing Wahl's intervention, but advocating for certain parameters to be placed on it. On August 2, 2019, Wahl filed a reply. On August 8, 2019, the General Counsel withdrew any previously asserted qualifications to it non-opposition to Wahl's motion to intervene.

The case was subsequently assigned to me to conduct the hearing and to rule on prehearing matters. I conducted a prehearing conference on September 24, 2019, at which time I learned the Union had not been served with the July 29, 2019 order to show cause. I therefore issued a second order to show cause, providing the Union until noon on September 27 to file a response. The Union filed a timely response opposing the motion to intervene, asserting the intervention is for an improper purpose and arguing the Respondent and the proposed intervenor share the same legal positions and interests.

Under Section 102.29 of the Board's Rules and Regulations, any person may file a motion to intervene. The administrative law judge may "permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper." Id. The Board reviews the judge's ruling on motions to intervene for abuse of discretion. See Arlington Metals Corp., 368 NLRB No. 74, at fn. 1 (2019)(Finding the judge's denial of the motion to intervene was not an abuse of discretion, as it fell "within established precedent concerning decertification petitioners' requests to intervene in unfair labor practice proceedings.").

After careful consideration, I have decided to grant Wahl's motion to intervene. As noted, the General Counsel does not oppose intervention. As to the Union's concern that the intervenor will attempt to lead the proceedings astray from established Board law, this can be addressed if necessary through objections at the hearing. Simply put, this hearing will be conducted like every other unfair labor practice hearing I adjudicate, i.e., I will apply extant Board law and permit evidence relevant to the parties' respective burdens of proof under that law. As to the Union's concern that the Respondent and the proposed intervenor's alignment of interests will result in redundant evidence, this too can be addressed at the hearing. As with any other hearing, proffered evidence that is in fact cumulative or redundant may be objected to and, if warranted, will be excluded.

Janey Wahl's motion to intervene is hereby GRANTED.

Dated: San Francisco, California
September 30, 2019.

Eleanor Laws ,
Administrative Law Judge

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