Case No. 16-60715

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CREATIVE VISION RESOURCES, LLC,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

Petition for Review from NLRB Order dated August 26, 2016
NLRB Case No. 15-CA-020067
364 NLRB No. 91

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER CROSS-RESPONDENT CREATIVE VISION RESOURCES, LLC.

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COUNSEL FOR *AMICUS CURIAE*

To the Honorable Court:

Pursuant to Federal Rule of Appellate Procedure 29(b) and Fifth Circuit Rule 29.1, the *Amicus Curiae* listed below respectfully requests leave to file the attached brief in support of the Petitioner Cross-Respondent Creative Vision Resources, LLC and would respectfully show the Court the following:

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community. The Chamber submits this *amicus* brief because the standard of the National Labor Relations Board (the "Board") for determining the collective bargaining obligations of successor employers under the National Labor Relations Act (the "Act") directly affects the businesses that the Chamber represents. Because the Chamber represents employers in nearly every industry covered by the Act, the Chamber is uniquely qualified to articulate the business community's concerns

with the Board's standard regarding union-bargaining obligations in employer-successorship situations.

RELEVANCE OF *AMICUS CURIAE* BRIEF

The Chamber is acutely interested in addressing the significant legal questions presented by the Board's splintered decision in this matter (NLRB Case No. 15-CA-020067). The Board's standard for requiring a successor employer to bargain with the incumbent union before beginning operations has great potential impact on the employer members of the Chamber. In *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272 (1972), the Supreme Court held that a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id.* at 294. In *Fall River Dyeing & Finishing Corporation v. N.L.R.B.*, 482 U.S. 27 (1987), the Supreme Court reiterated that successor employers generally have the right to unilaterally set different initial terms and conditions of employment without bargaining with the incumbent union. *Id.* at 40.

The only exception to this rule arises when "it is ***perfectly clear*** that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns*, 406 U.S. at 294-95 (emphasis added). The Board has previously stated that this perfectly-clear exception is

"restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

As set forth more fully in its accompanying brief, the Chamber respectfully submits that the Board majority misapplied the perfectly-clear exception in this case by concluding that a successor employer's bargaining obligation is triggered whenever "***it displays an intent*** to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Creative Vision Resources, LLC*, 364 NLRB No. 91, 2016 WL 4524111, at *3 (Aug. 26, 2016). This new standard contradicts decades of established Supreme Court and Board precedent, and it is at odds with fundamental policy considerations underlying the successorship doctrine in labor law.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant it leave to file the attached *amicus curiae* brief in support of Petitioner Cross-Respondent Creative Vision Resources, LLC. The Chamber further requests that

the Court deem the *amicus curiae* brief to be properly filed without the need for any further action on the part of the Chamber.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which caused a copy to be delivered to counsel of record.

/s/ Gavin S. Martinson
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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS*

As set forth in its contemporaneous and incorporated motion, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. Accordingly, the Chamber regularly files *amicus curiae* briefs in cases, such as this one, that raise issues of concern to the nation's business community. Many of the Chamber's members are directly affected by the decisions and policies of the National Labor Relations Board ("Board"), including the Board's standard for determining the collective bargaining obligations of successor employers under the National Labor Relations Act (the "Act").[1]

SUMMARY OF ARGUMENT

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), the Supreme Court held that a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id*. at 294. The Supreme

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned state that no party's counsel authored this brief in whole or in part. No party or its counsel or other person (other than the Chamber, its members and its counsel), contributed money intended to fund the preparation or submission of this brief.

Court reiterated this rule fifteen years later in *Fall River Dyeing & Finishing Corporation v. NLRB*, 482 U.S. 27 (1987), when it again held that successor employers generally have the right to unilaterally set different initial terms and conditions of employment without bargaining with the incumbent union. *Id*. at 40.

The only exception to this rule arises when "it is ***perfectly clear*** that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns*, 406 U.S. at 294-95 (emphasis added). The Board has previously stated that this "perfectly clear" exception is quite narrow:

> [The exception] should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up Corp., 209 NLRB 194, 195 (1974).

The Board majority's decision misapplied the perfectly clear exception in this case by concluding that a successor employer's bargaining obligation is triggered whenever "***it displays an intent*** to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Creative Vision*, 364 NLRB No. 91, 2016 WL

4524111, at *3 (emphasis added). This new standard contradicts decades of established Supreme Court and Board precedent, and is at odds with fundamental policy considerations underlying the successorship doctrine in labor law.

ARGUMENT

I. THE BOARD'S DECISION VIOLATES SUPREME COURT AND BOARD PRECEDENT.

A. The Perfectly Clear Exception is an Extremely Narrow One.

Bargaining obligations under the National Labor Relations Act derive from various sections of the Act, including:

- Section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of the title." 29 U.S.C. § 158(a)(5) and

- Section 9(a), which provides, in relevant part, that "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes[] shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 159(a).

Through the operation of these provisions, a union representing a majority of the employees in an appropriate bargaining unit may, in some circumstances, demand that an employer negotiate with respect to the terms and conditions of employment applicable to that bargaining unit.

Where a change in the employer or change in the ownership of the employer occurs after a union has been certified as the employees' bargaining representative, questions often arise regarding if and when the bargaining obligation is triggered between the successor employer and the union and whether the successor employer can unilaterally set new terms and conditions of employment before commencing negotiations with the union.

In *Burns*, the Supreme Court rejected the Board's rule that a successor must in all circumstances bargain with an incumbent union before instituting different terms and conditions of employment from those in the predecessor's collective-bargaining agreement. 406 U.S. at 284. The Supreme Court observed that although a successor employer may eventually have an obligation to bargain with a union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id*. at 294. Indeed, the Supreme Court noted the express language and legislative history of the Act prohibit compelling a successor to accept the collective-bargaining agreement between its predecessor and the union, the terms of which the successor did not negotiate. *Id*. at 283-84. Prior Board precedent also established that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." *Id.* at 284 (citing *Rohlik, Inc.*, 145 NLRB

1236, 1242 n. 15 (1964); *General Extrusion Co.*, 121 NLRB 1165, 1168 (1958); *Jolly Giant Lumber Co.*, 114 NLRB 413, 414 (1955); *Slater System Maryland, Inc.*, 134 NLRB 865, 866 (1961); *Matter of ILWU (Juneau Spruce)*, 82 NLRB 650, 658-659 (1949)). The Supreme Court thus concluded that ordinarily a successor may deviate from substantive terms of the previously negotiated collective-bargaining agreement and set the initial terms and conditions of employment without bargaining. *See* 406 U.S. at 286.

In *Fall River*, the Supreme Court reiterated the rule that a successor employer generally has the right to unilaterally set different initial terms and conditions of employment without first bargaining with the incumbent union. *See* 482 U.S. at 40. The Supreme Court further stated that, in the ordinary case, the successor's subsequent obligation to bargain with the union accrues only when the successor has hired a "substantial and representative complement" of its work force and the union has made a demand for recognition or bargaining. *See id*. at 47, 52.

The exception to this general rule, stated in dictum in *Burns* and developed by the Board and federal courts of appeals thereafter, is that a successor employer may be required to bargain as to the initial terms and conditions of employment when the successor plans to hire all of the predecessor's work force under the existing terms established by the predecessor. This exception is reserved,

however, for those instances in "which it is ***perfectly clear*** that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-95 (emphasis added). "The 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities." *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009).

The Board's leading case on the "perfectly clear" exception, issued shortly after the Supreme Court's decision in *Burns*, is *Spruce Up Corporation*, 209 NLRB 194 (1974). There, the Board further narrowed the exception. In *Spruce Up*, the successor employer expressed a general interest in hiring its predecessor's employees, but also clarified that it would change commission rates. The Board concluded that the successor "made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent [employees] would depend upon their willingness to accept those terms." *Id*. at 195. The Board, in concluding that the "perfectly clear" exception did not apply, explained that the narrow exception must be "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into

believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id*. The *Spruce Up* decision underscored that the policy behind the "perfectly clear" exception is to "prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." *S&F Market*, 570 F.3d at 359.

B. The Board Improperly Attempts to Expand the Perfectly Clear Exception.

The Board claims, in the present case, that following its decision in *Spruce Up* it "clarified that the perfectly clear exception is not limited to situations where the successor fails to announce initial employment terms before it formally invites the predecessor's employees to accept employment." *Creative Vision*, 364 NLRB No. 91, 2016 WL 4524111 at *3. According to the Board majority, a successor employer's bargaining obligation is triggered "***when it displays an intent*** to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Id*. (emphasis added). The Board's purported expansion of the narrow "perfectly clear" exception by attaching the bargaining obligation at the point the successor "displays an intent" to hire the predecessor's employees as opposed to the point at

which the successor affirmatively makes offers of employment goes beyond the limits permitted by Supreme Court and prior Board precedent.

First, the precedent on which the Board majority relied in the present case does not support a broad reading of the exception. For example, the Board, relying on *Canteen Co.*, 317 NLRB 1052 (1995), incorrectly states that subsequent Board precedent broadened the *Spruce Up* standard, which turned on the timing of the announcement of new terms relative to the new employer manifesting an intent to hire the predecessor's employees, rather than the timing of the actual offers of employment. To the contrary, numerous Board cases—both before and after *Canteen Co.*—have consistently applied the narrow *Spruce Up* test, thus establishing a clear Board standard in this area. In *Henry M. Hald High School Association*, 213 NLRB 415 (1974), for example, the Board reversed the ALJ's finding of a "perfectly clear" successor where the new employer invited all former employees to apply for jobs but said that "nothing had been drawn up as yet about working conditions." The Board explained:

> [W]e find that, as we held in *Spruce Up Corporation*, . . .the successor-employer cannot be deemed to be within the *Burns caveat* because, however willing such employer may be to retain the predecessor's work force, the uncertainty as to how many employees will accept new and different terms of employment, once they have been clearly announced, in advance of the takeover, militates against a finding that there can be firm and reliable "plans to retain" within the meaning of *Burns*.

Id. at 415. Thus, a mere intent to employ all of the predecessor's employees is not sufficient to make a new employer a "perfectly clear" successor.

Similarly, in *Ridgewell's, Inc.*, 334 NLRB 37 (2001), the Board reversed the ALJ's finding of a "perfectly clear" successor where the new employer told the union that it intended to "utilize the previous catering employees on an independent contractor basis." *Id*. at 37. The Board found that this "announcement, made prior to hiring or finalization of the catering subcontract, clearly signaled that the Respondent's initial terms and conditions of employment would differ from those in the Union's previous collective-bargaining agreement with the prior contractor." *Id*. at 37. The Board reiterated:

> In *Spruce Up*, the Board held that a successor employer meets the "perfectly clear" exception if it "actively or, by tacit inference" misleads employees into believing at the time of hiring that employment conditions will not change, or if it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

Id. (quoting *Spruce Up*, 209 NLRB at 195). Because the new employer announced its plan to hire the predecessor's workers as independent contractors, as opposed to employees, "before any hiring, it is not a 'perfectly clear' successor under *Burns* and *Spruce Up*." *Id*. at 37-38.

Notably, because of the policy interests underlying the "perfectly clear" exception (discussed *infra*), and the intended narrowness of the doctrine, federal

circuit courts of appeal have closely monitored the Board's application of the exception, reversing decisions where the Board strayed outside established precedent. For example, in *S&F Market*, the D.C. Circuit reversed a Board decision and found that the "perfectly clear" exception did not apply. *S&F Market*, 570 F.3d 354. The ALJ made findings of fact that S&F informed employees that they would be employed only in a temporary or probationary status for 90 days, which the ALJ concluded "should have signaled to the applicants that terms and conditions of employment with [S&F] were not going to be identical with those of its predecessor." *See S&F Market*, 351 NLRB 975, 1001 (2007). The Board reversed the ALJ and applied the "perfectly clear" exception because it found that S&F failed to announce its intent to establish new terms and conditions of employment before it invited employees of the predecessor to accept employment. *See id*. at 981.

The D.C. Circuit rejected the Board's expansive reading of *Burns*, noting that the Board not only "muffed its reading of the record," but that it also misread "*Burns* to require more from the successor employer than a portent of employment under different terms and conditions." *S&F Market*, 570 F.3d at 360. Critically, the D.C. Circuit emphasized that a proper reading of *Burns* and its progeny requires the Board to start from the presumption that a successor employer may set its own terms and conditions of employment, and that the "perfectly clear"

exception should apply only in the most narrow of cases where the successor employer has misled the predecessor's employees into thinking that their terms and conditions of employment would continue unchanged. *Id.* at 361.

The Supreme Court observed that this presumption finds its origin in the express language of the Act, which prohibits compelling a successor to accept the collective-bargaining agreement between its predecessor and the union—the terms of which the successor did not negotiate or agree to. *See Burns*, 406 U.S. at 282-84 (citing 29 U.S.C. § 158(d) and the legislative history of the Act). Thus, only after the new employer has hired a substantial and representative complement of employees, a majority of whom were employed by the predecessor, and the union has made a demand for recognition or bargaining, is the successor prohibited from setting new terms of employment without first bargaining with the union. *See Fall River*, 482 U.S. at 52 ("The successor's duty to bargain at the 'substantial and representative complement' date is triggered ***only*** when the union has made a bargaining demand.") (emphasis added).

Circuit courts of appeal and the Board have consistently and repeatedly applied this principle. *See, e.g., Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 n.6 (10th Cir. 1992) (determination of whether successor employer has duty to bargain requires analysis of whether successor has hired substantial and representative complement of employees at time of union's bargaining demand);

Williams Enters., Inc. v. NLRB, 956 F.2d 1226, 1232 (D.C. Cir. 1992) ("The presumption of majority support that creates a successor's duty to bargain arises . . . only when . . . the new employer has hired a 'substantial and representative complement' of its workforce and a majority of that workforce is composed of predecessor employees; and the incumbent union has, at some time, issued a valid bargaining demand to the new employer."); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989) ("The concurrence of two events is necessary to obligate the successor employer to bargain with the union: the successor's employment of a 'substantial and representative complement' of the predecessor's employees and the union's demand for recognition."); *see also St. Elizabeth Manor*, 329 NLRB 341, 344 n.8 (1999); *Capitol Steel & Iron Co.*, 299 NLRB 484, 496 (1990); *Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039, 1040 (1989).

When the Board has tried to turn this presumption on its head, the courts of appeal have held the Board in check:

> In this case, the Board presumed the predecessor's terms and conditions must remain in effect unless the successor employer specifically announces it will change "core" terms and conditions. Thus does the exception in *Burns* swallow the rule in *Burns*. Under the proper standard, S&F clearly comes within the protection of the rule rather than the straightjacket of the exception: It was never "perfectly clear that the new employer plan[ned] to retain all of the employees in the unit," *Burns*, 406 U.S. at 294–95, 92 S.Ct. 1571, let alone that it did so "with no notice that they would be expected to

> work under new and different terms," *Spruce Up*, 209 N.L.R.B. at 195 n.7.

S&F Market, 570 F.3d at 361-62.

Only where the successor employer has misled the predecessor's employees to believe their employment status would continue unchanged after accepting employment does the "perfectly clear" exception apply. *See, e.g.*, *Burns*, 406 U.S. at 294-95; *Spruce Up*, 209 NLRB at 195. "At bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." *S&F Market*, 570 F.3d at 359.

The Board's approach in this case contradicts these precedents. The Board did not identify any evidence in the present case that Creative Vision attempted to mislead Berry III's employees about employment conditions. Moreover, the record indicates that Creative Vision clearly expressed its intent to hire hoppers under terms and conditions substantially different than those of its predecessor, Berry III. In May 2011, Alvin Richard III and Eldridge Flagge, one of Berry III's hoppers, began soliciting applicants for hopper positions with Creative Vision by passing out application packets. *See* Tr. 429-430, 437, 459, 467. The packets included a two-page application form, a federal W-4 form, a Louisiana tax form, and an I-9 immigration form. *See* Tr. 492, 547. These tax forms alone signaled to

potential applicants that, unlike the independent contractor status they enjoyed with Berry III, Creative Vision intended to hire them as employees. Richard also informed the potential hopper applicants that Creative Vision was going to pay $11.00 an hour, guarantee eight hours of work per day, pay overtime after 40 hours in a week, offer four paid holidays, and withhold federal and state taxes from their pay. *See* Tr. 459-60, 475-76; RX-8, p.5; *Creative Vision*, 364 NLRB No. 91, 2016 WL 4524111, at * 22. These terms were in stark contrast to the $103/day and $82/day rates, no overtime, no holiday pay and no deduction of taxes under which the Berry III hoppers worked. In addition to express conversations Richard had with potential applicants, the ALJ also found that a number of hoppers heard rumors that Creative Vision was going to pay $11.00 an hour. *Creative Vision*, 364 NLRB No. 91, 2016 WL 4524111, at *3.

The Board claims, however, that "a subsequent announcement of new terms, even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms." *Id*. Even if true, as set forth above, there is no evidence Creative Vision ever expressed a clear intent to retain all of Berry III's employees under the terms and conditions of Berry III's collective-bargaining agreement. To the contrary,

with regard to those applicants with whom Richard spoke, it was clear that Creative Vision would hire them on *substantially different* terms than those under which they worked for Berry III. The fact that some Berry III employees may have learned of Creative Vision's new terms and conditions immediately before it offered them employment and commenced operations does not make Creative Vision a "perfectly clear" successor because there is no evidence that Creative Vision attempted to mislead anyone into expecting continued employment without change. *See S&F Market*, 570 F.3d at 360-61 ("That some employees may have received the letter immediately after the Company took over the operation rather than immediately before cannot make the crucial difference under *Burns* unless the employees were misled into expecting the terms of employment to continue wholly without change.").

II. THE BOARD'S DECISION IS AT ODDS WITH FUNDAMENTAL AND IMPORTANT POLICY CONSIDERATIONS UNDERLYING THE SUCCESSORSHIP DOCTRINE IN LABOR LAW.

A. The Board Fails to Acknowledge the Entrepreneurial Flexibility Needed to Induce Successors to Enter the Marketplace and Survive There.

The Supreme Court in *Burns* held that binding a successor to the terms of its predecessor's collective-bargaining agreement would not only run afoul of Section 8(d) of the Act, it would discourage the purchase and rehabilitation of businesses and hamper the movement of capital for such purposes:

> A potential employer may be willing to take over a moribund business only if it can make changes in corporate structure, composition of the labor force, work, location, task assignment and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

Burns, 406 U.S. at 287-88.

The purchase and sale of small businesses plays an important role in facilitating service continuity and workforce stability. Policies that facilitate the free flow of capital necessary to fund such activity benefit both the general economy and the labor market. Those policies that would restrict the flow of capital have precisely the opposite effect. Ensuring that a potential purchaser has the necessary flexibility to re-order an existing business to make it more efficient is one of the more significant means of facilitating such necessary capital formation. *See* Phillip M. Schreiber, Comment, *Potential Liability of New Employers to Pre-Existing Collective-Bargaining Agreements and Pre-Existing Unions: A Comparison of Labor Law Successorship Doctrines in the United States and Canada*, 12 Nw. J. Int'l L. & Bus. 571 (1992).[2]

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[2] The comment notes that under U.S. law a business purchaser generally is not bound by the terms of an existing collective-bargaining agreement, while under Canadian law, a purchaser typically *is* bound by the provisions contained in the seller's existing collective-bargaining agreement. Thus, "the U.S. system offers much more flexibility. Because successor enterprises in the United States are not bound to the agreement, they are free to restructure the purchased entity, free to hire a new workforce, and free 'from contractual restrictions that may have played

These considerations have particular relevance in the factual context of this case. The present matter not only involves a small business and issues regarding the continuity of service and preservation of existing employment opportunity, it also involves an economically "moribund" predecessor employer. Had the successor lacked the flexibility necessary to take immediate steps to realign and rehabilitate the predecessor's business, there is little reason to believe it would have assumed the entrepreneurial risk of becoming a statutory employer.

In all respects, the present case illustrates why binding a successor to the terms of its predecessor's collective-bargaining agreement should only be a "rare exception," and why the policy choice of the *Burns* Court remains as timely as it is prudent.

B. The Board's Decision Also Ignores the Difficulties Inherent in the Hiring Process for Successor Companies.

In corporate successor situations, the hiring process is often fluid, not formulaic. The number and identity of the new employees is frequently in flux until the successor company begins operations and is able to determine which employees have accepted the new employment terms. The Board majority's

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a large part in the conditions leading to the sale of the business in question'." Schreiber, *supra*, at 597 (citing Fasman and Fischler, *Labor Relations Consequences of Mergers and Acquisitions,* 13 Employee Rel. L.J., 14, 29 (1986)).

decision in the present case creates policy implications that are at odds with this practical reality.

Creative Vision planned to begin operations on May 20, 2011, and sought employment applications from employees of the predecessor company, among other sources. Tr. 429-30, 437, 459, 467. While soliciting applications, Richard informed several predecessor employees of the new terms and conditions of employment. Tr. 459-60, 475-76; RX-8, p.5; *Creative Vision*, 364 NLRB No. 91, 2016 WL 4524111, at *22. Creative Vision was unable to begin operations on May 20, 2011, as planned because not enough employees of the predecessor company would agree to the new employment terms. Tr. 437-38, 494, 499. So Creative Vision continued soliciting applications. On June 2, 2011, Creative Vision began operations because it had secured approximately 70 applicants and it only needed 42 employees. Tr. 466-67, 546-47; GCX-55. Because Creative Vision was unsure how many applicants would ultimately accept employment under the new terms, it recruited more applicants than needed. Before beginning operations on June 2, Karen Jackson—a Creative Vision supervisor—informed the gathered applicants of the new terms and conditions of employment. Tr. 303, 462, 469. Some applicants rejected the terms and did not accept employment with Creative Vision. Tr. 466, 472, 485.

Creative Vision did not know until the day it began operations how many predecessor employees would accept the new employment terms, but before beginning operations, Creative Vison specifically ensured that all potential employees knew the new employment terms, thus complying with Board precedent. *See Spruce Up*, 209 NLRB at 195 (holding that the "perfectly clear" exception is inapplicable "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms").

Creative Vision's situation is not unique. Successor companies often must navigate a fluid hiring process up until the date operations begin before they know the final makeup of their new work force. The Board majority's decision in the present case creates a legal trap for successor companies. By holding successor employers liable under the Act for failure to bargain even when they notify potential employees of the new employment terms before operations begin, the Board has created a rule with dire policy implications. The Supreme Court recognized the practical problems with this kind of rule:

> [I]t may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the unit as required by section 9(a) of the Act, 29 U.S.C. § 159(a).

Burns, 406 U.S. at 295. The Board majority's decision will thus make potential successor companies reluctant to engage in mergers and acquisitions for fear that they will have to negotiate with a union over employment terms before the successor even knows who its new employees will be, or whether any of them will come from the predecessor company.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review and deny enforcement of the Board's Order.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 3, 2017

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CERTIFICATE OF SERVICE

I certify that on February 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which caused a copy to be delivered to counsel of record.

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