UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN STEEL CONSTRUCTION, INC.

Employer

and **Case 07-RC-269162**

LOCAL 25, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, AFL-CIO

Petitioner

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL FRANCHISE ASSOCIATION

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STATEMENT OF INTEREST

The International Franchise Association (IFA) is the world's oldest and largest organization representing franchising worldwide. Founded in 1960, IFA's mission is to protect, enhance, and promote franchising through advocacy, education and networking. IFA members include more than 1,100 franchisors from over 300 different business-format categories, thousands of local franchise owners, as well as the product and service suppliers who support them. For the hundreds of thousands of franchise business owners, franchising is a pathway to individual opportunity such that 32% responded to an Oxford Economics survey that they would not own a business without the franchise business format.[1] For the more than 8 million employees of franchise businesses, the Oxford Economics survey revealed that franchising offers workers higher wages and better benefits than its non-franchise business counterparts.

ARGUMENT

The Board has invited interested amici to submit briefs addressing the following questions:

1. Should the Board adhere to the standard in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), as revised in *The Boeing Company*, 368 NLRB No. 67 (2019)?

2. If not, what standard should replace it? Should the Board return to the standard in *Specialty Healthcare*, 357 NLRB 934 (2011), either in its entirety or with modifications?

Am. Steel Const., Inc., 370 NLRB No. 41, slip op. at 2 (Dec. 7, 2021). As set forth below, the Board should adhere to the standards for determining appropriate bargaining units articulated in *PCC Structurals* and *The Boeing Company.*

[1] The Value of Franchising (2021). Oxford Economics, https://openforopportunity.com/wp-content/uploads/2021/09/IFA_The-Value-of-Franchising_Sep2021.pdf (last accessed Jan. 21, 2022).

A. *PCC Structurals* and *Boeing* Are Consistent with Section 9 and the Board's Long-Standing Approach to Bargaining Unit Determinations.

The Board should adhere to its current approach to bargaining unit determinations as articulated in *PCC Structurals* and *Boeing*, because, as explained in *PCC Structurals*, 365 NLRB No. 160, slip op. at 3-5, this approach is consistent with Section 9 of the Act and the Board's long-standing approach to bargaining unit issues.

1. Section 9 Requires the Board to Consider the Community of Interests of Both Included and Excluded Employees in Each Case.

As the Board majority explained in *PCC Structurals*, Section 9 requires the Board to consider the community of interests of employees who are both included and excluded from a petitioned-for unit in each case. Section 9(a) states that employees have a right to be represented by a labor organization "selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a). Thus, the designated bargaining unit must be one that is appropriate to the purposes of collective bargaining.

Section 9(b) describes the Board's role in determining an appropriate bargaining unit. If there is a dispute as to the composition of a bargaining unit, Section 9(b) requires the Board to resolve the dispute "in each case." In doing so, it also requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act," by determining whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Thus, it is the Board's responsibility to decide the scope and composition of bargaining units based on the particular facts presented in each case; the decision is not left to employers, employees or unions alone. *See Am. Hosp. Assn. v. NLRB*, 499 U.S. 606, 611 (1991).

Indeed, the legislative history of Section 9 makes clear that because employers may want one bargaining unit and employees and unions may want another bargaining unit, the Board, acting

as "the *impartial* governmental agency" must make the determination. H.R. Rep. 74-969, at 20 (1935), reprinted in 2 NLRA Hist. 2930 (emphasis added). This is so to give effect to the majority rule by avoiding gerrymandering and breaking units into small groups of employees. As Chairman Biddle explained:

> The major problem connected with the majority rule is not the rule itself, but its application…Section 9(b) of the Wagner bill provides that *the Board* shall decide the unit appropriate for the purpose of collective bargaining…. To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the unit would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups could make it impossible for the employer to run his plant*.

Hearings on S. 1958 Before the S. Comm. on Educ. & Labor, 74th Cong. 82 (1935) (statement of Francis Biddle, Chairman, NLRB), *reprinted in 1935 Legislative History* 1458 (emphasis added).

Section 9(c)(5) further limits the Board's role in determining an appropriate bargaining unit. Specifically, it states that in determining an appropriate unit, "the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). The legislative history with respect to Section 9(c)(5) recognized that the Board has wide discretion in making unit determinations. But Section 9(c)(5) put an important limit on that discretion, namely that although the Board can take into consideration the extent to which employees have organized (*i.e.* a union's petitioned-for bargaining unit), such evidence "should have little weight." H.R. Rep. 80-245 at 37 (1947), reprinted in 1 LMRA Hist. 328 (citing *Matter of New England Spun Silk Co*., 11 NLRB 852 (1939) and *Matter of Botany Worsted Mills*, 27 NLRB 687 (1940)); *see also NLRB v. Metropolitan Life Ins. Co*., 380 U.S. 438, 441-42 (1965); *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1580 (4th Cir. 1995); *May Dept. Stores Co. v. NLRB*, 454 F.2d 148, 150 (9th Cir. 1972).

Finally, Section 7 makes clear that employees have both a right to organize and select a

union for the purposes of collective bargaining, but they also have a right to *refrain* from doing so. The right to engage in Section 7 activities and the right to refrain from engaging in such activities are protected equally by the law. *Cf. Trans World Airlines, Inc. v. Indep. Fed. of Flight Attendants*, 489 U.S. 426, 439 (1989) (protecting the rights of employees who refused to strike).

When all of this is added together, it is clear that the Board must, in each case, determine not only whether the employees petitioned-for by a union share sufficient interests among themselves in order to be combined into their own bargaining unit, but also must consider whether employees excluded from the petitioned-for unit should be included based on the interests they share with the included employees. Stated another way, the Act requires the Board to determine whether the petitioned-for employees have interests that are sufficiently distinct from the excluded employees so as to justify their own unit. The Board so held for decades prior to its decision in *Specialty Healthcare* and returned to the statutorily mandated standard in *PCC Structurals*.

Indeed, meaningfully evaluating the interests of both included and excluded employees helps ensure that a stable relationship for collective bargaining is established. It also ensures that employees are given the "fullest freedom" to exercise their rights to engage or not engage in Section 7 activity because it takes account of those employees who the petitioning party unilaterally has decided to exclude. It comports with Section 9(b)'s command that the Board evaluate multiple different groupings of employees including whether an employer-wide unit, a craft unit, a plant-wide unit or some subdivision thereof is "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). Finally, while this approach accounts for the petitioned-for unit as one possibility, and thus allows the extent of organization to be a factor, it also complies with the Congressional command that this factor be given "little weight" and that the extent of organization not be controlling. 29 U.S.C. § 159(c)(5).

2. *PCC Structurals* as Revised by *Boeing* Complies with the Board's Statutory Mandates.

The Board's approach to bargaining unit determinations under *PCC Structurals* complies with the foregoing statutory mandates. Thus, before the Board decided *Specialty Healthcare*, and again with its decision in *PCC Structurals* and its progeny, the Board applies its traditional community of interests factors to determine

> whether the employees in a petitioned-for group share a community of interests sufficiently distinct from the interest of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.[2]

PCC Structurals, 365 NLRB No. 160, slip op. at 5 (emphasis added); *see also Cadillac Hotel*, 125 NLRB 258, 260 (1959) ("the employment interests of hotel maintenance employees are not, normally, sufficiently distinct from those of other employees as to compel their establishment in a separate bargaining unit"). As the Board reiterated in *Wheeling Island Gaming*, it

> never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.

355 NLRB 637, 637 n.2 (2010) (quoting *Newton-Wellesley Hosp.*, 250 NLRB 409, 411-12) (1980) (internal quotation marks omitted). As explained above, this approach is demanded by Sections 9(a), 9(b) and 9(c)(5) of the Act, and this is the approach that the Board has followed for most of

[2] The traditional community of interests factors include whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *See, e.g., United Operations, Inc*., 338 NLRB 123, 123 (2002).

its history.

Further, a critical component of applying any multi-factor test is setting forth the various factors being analyzed, the weight they should be given and why. *See LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). The Board provided such guidance in *The Boeing Co*, 368 NLRB No. 67, slip op. (Sept. 9, 2019). *Boeing* establishes three steps for analyzing a petitioned-for bargaining unit: whether (1) the members of the unit have sufficiently shared interests among themselves; (2) employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh their similarities with unit members; and (3) there are any applicable special rules or guidelines the Board has established for specific industries. *Boeing*, 368 NLRB No. 67, slip op at 3-4. With respect to the second step's requirement that excluded employees have meaningfully distinct interests that outweigh the similarities with unit members, *Boeing* correctly points out, again, that the Board has always required included employees to have a sufficiently distinct community of interests from excluded employees to justify a separate unit (which is simply another way of saying the separate interests must outweigh the common interests), and the standard it adopted was also expressed by the Second Circuit in *Constellation Brands v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016); *see also Cadillac Hotel*, 125 NLRB at 258. Indeed, the entire historical approach to bargaining unit determinations, and the legally required approach when multi-factor tests are involved, consists of weighing factors and determining which factors outweigh others and why. *Constellation Brands*, 842 F.3d at 793; *LeMoyne-Owen College*, 357 F.3d at 61. Thus, the import of *Boeing* is that it organizes the unit analysis—it does not change it, and *Boeing* is entirely consistent with the Board's legally required and traditional approach to unit determinations. As a result, the Board should continue to follow *PCC Structurals* and *Boeing*.

3. The Board's Current Approach Satisfies the Requirement to Establish Units Conducive to Stable Collective Bargaining Relationships.

Courts and prior Board decisions also require the Board to assure that the approved unit creates a situation where stable and efficient bargaining relationships can occur. *See Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the [NLRA]."); *NLRB v. Catherine McAuley Health Center*, 885 F.2d 341, 344 (6th Cir. 1989) ("In addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act's policy of efficient collective bargaining."). The Board has long held that part of its mission is to create efficient and stable collective bargaining relationships. *See Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962). This is another reason why Section 9(b) of the Act requires the Board to approve appropriate bargaining units "in each case" to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act. 29 U.S.C. § 159(b). This is also why the Board has long recognized that it must consider the realities of an employer's business in determining an appropriate bargaining unit. *See American Cyanamid Co.*, 131 NLRB 909, 911 (1961) (stating each unit determination must have a direct relevancy to the circumstances where collective bargaining is to take place); *International Paper Co.*, 96 NLRB 295, 298 n.7 (1951) (that the manner the employer organizes his or her employees has a direct bearing on the community of interests of employees within the plant). The Board recognized the necessary balance in *Kalamazoo Paper Box Corp.*:

> Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

136 NLRB at 137 (internal citations omitted). The Board seeks to avoid:

> . . .creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b).

Id. at 139-40.

The goal of employee free choice must be balanced with the need to assure a stable, efficient collective bargaining relationship. *See Allied Chem. Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 172-73 (1971) (citing *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941)); *Kalamazoo Paper Box Corp.*, 136 NLRB at 134). "As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining." *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. at 165. To do otherwise undermines, rather than promotes, efficient and stable collective bargaining. *See, e.g., Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1265, 1269-70; *see also Fraser Eng'g Co.*, 359 NLRB 681, 681 & n.2 (2013).

The statutory requirement of stable labor relations and effective collective bargaining is a prominent reason why the Board and courts have emphasized that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interests among various group of employees in the plant and is thus an important consideration in any unit determination." *Bentson*, 941 F.2d at 1270, n.9 (citing *Gustave Fisher*, 256 NLRB 1069, n.5 and quoting *International Paper Co*., 96 NLRB 295, 296 n.7 (1951)); *Catherine McAuley*, 885 F.2d at 345; *Fraser Eng'g*, 359 NLRB at 681 & n.2. As similarly observed in *NLRB v. Harry T. Campbell Sons' Corporation*:

> But winning an election is, in itself, insignificant unless followed by stable and successful negotiations which may be expected to culminate in satisfactory labor relations . . . . If the Board's selection of the appropriate bargaining unit . . . were

> to stand and bargaining is undertaken, neither party on the stage at the bargaining table could overlook the fact standing in the wings are more . . . [unrepresented] employees of the same employer, employees who cannot be separated in terms of labor relations from the small group of employees directly involved . . . . The Board here has created "a fictional mold within which the parties . . . [must] force their bargaining relationships." In the language of *Kalamazoo Paper Box Corp.* . . . such a determination "could only create a state of chaos rather than foster stable collective bargaining," because in the "fictional mold" the prospects of fruitful bargaining are overshadowed by the prospects of a breakdown in bargaining.

407 F.2d 969, 978 (4th Cir. 1969). Fruitful bargaining breaks down because both parties would be necessarily focused on the impact of their bargaining decisions on the larger, unrepresented group of employees with whom the unit employees clearly share a significant community of interests. *See also Szabo Food Servs., Inc. v. NLRB*, 550 F.2d 705, 709 (2d Cir. 1976)("In view of the high degree of integration of the employer's . . . business operation, the practical necessities of collective bargaining militate against the creation of a fractured bargaining unit, with its attendant distortion of the employer's business activities and labor relations . . . .").

The Board's traditional and current approach to bargaining unit issues, as articulated in *PCC Structurals* and *Boeing*, complies with the Board's statutory requirement to consider the context in which bargaining will take place. It allows the parties to present evidence and argument regarding which employees should be included and excluded from a proposed unit without putting a thumb on the scale in favor of the petitioned-for unit by imposing an impossibly high burden on the non-petitioning party. It allows a full assessment – as the Board has historically required – of how the petitioned-for group fits into an employer's overall operation, and whether the functions performed by the petitioned-for employees truly stand alone or are "only incidental to the broader and more prevailing community of interests which they share" with other employees. *Cadillac Hotel*, 125 NLRB at 259. In short, *PCC Structurals* and *Boeing* allow the Board to act as the impartial decision maker with respect to unit determinations that Congress required.

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For all of the foregoing reasons, the Board should continue to follow its current approach to unit determinations under *PCC Structurals* and *Boeing*. This approach complies with Section 9 of the Act, provides stability in the law, and complies with the Board's statutory mandate to establish bargaining units that are conducive to stable labor relations.

B. An Effort to Return to *Specialty Healthcare* or to Impose Some Other Approach to Bargaining Unit Determinations Would Be a Needless Detour and Fail to Comply with the Act.

Any effort by the Board to return to the *Specialty Healthcare* approach to bargaining unit determinations, or to impose a new approach that changes the Board's traditional analysis would be a needless detour from well-established Board authority and violate the Board's statutory mandate. Although the Board has a wide degree of discretion in unit determination matters, that discretion is not unbounded. *See, e.g., Constellation Brands*, 842 F.3d at 790; *National Federation of Fed. Employees, Local 1669 v. FLRA*, 745 F.2d 705 (D.C. Cir. 1984) (stating an agency is entitled to considerable but not unbounded deference when exercising discretion). Amici recognize that the Courts of Appeal that reviewed *Specialty Healthcare* upheld its general approach as consistent with Section 9. For the following reasons, however, the Board should not take this fact as an invitation to return to that standard, or to impose some other standard for bargaining unit determinations.

1. If *Specialty Healthcare* Meant What It Said, There is No Need to Abandon the Current Approach.

At the outset, the courts upholding *Specialty* made clear that they were doing so because the Board professed to be applying its traditional community of interests test at the first *Specialty* step. *See Constellation Brands*, 842 F.3d at 793 (stating that the court rejected the argument that *Specialty* "improperly rubber stamps a union's organizing efforts…precisely because *Specialty*

Healthcare indeed requires the Board to consider, at step one, whether members of a proposed unit have an interest that is 'separate and distinct' from all other employees."); *Fed Ex Freight, Inc. v. NLRB*, 839 F.3d 636, 637 (7th Cir. 2016) (stating, "The focus of the analysis should be on the similarity or dissimilarity in working conditions across different groups of workers…."); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 440, 442-43 (3d Cir. 2016) (noting that *Specialty* required application of traditional criteria, including distinctions between included and excluded employees, at its first step); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 499-500 (4th Cir. 2016) (noting that on the facts of the case before it, the Board properly applied the "well-worn" community of interests test); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 567-69 (5th Cir. 2016) (stating that in the case before it the Board applied its traditional community of interests factors under *Specialty Healthcare*); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 564 (6th Cir. 2013) (stating that in the case before it, the Board applied the traditional community of interests test from *American Cyanamid*).

Critically, the courts upholding *Specialty* made clear that in order for a unit determination to pass muster, the Board must assess at the first step not only whether the employees in the petitioned-for unit share a sufficient community of interests among themselves, but also whether those interests are sufficiently distinct from excluded employees. *See, e.g., Constellation Brands*, 842 F.3d at 793; *Fed Ex Freight, Inc. v. NLRB*, 839 F.3d at 637; *NLRB v. FedEx Freight, Inc.*, 832 F.3d at 442-43; *Nestle Dreyer's Ice Cream Co.*, 821 F.3d at 499. Failure to properly consider whether the similarities between included and excluded groups outweighed the distinctions, reliance on insufficient differences between included and excluded groups, or failure to explain why some differences outweighed similarities has led courts to deny enforcement to the Board's unit determinations. *See Constellation Brands*, 842 F.3d at 794 (denying enforcement to unit

determination where the RD did not explain why differences such as separate work locations outweighed similarities such as job functions and duties); *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1580-81 (4th Cir. 1995) (stating the exclusion of certain employees based on "meager" differences not unique to the included employees was "to say the least, problematic under the 'community of interest' standard"). All of this is to say that if all the Board was trying to do in *Specialty* was clarify existing standards, there is no need to revive it since no one appears to dispute that those existing standards are embodied in *PCC Structurals*, *United Operations*, *Wheeling Island Gaming*, and *Newton-Wellesley Hospital* among other cases.

2. The Structure of the *Specialty Healthcare* Approach Betrays the Board's True Intention.

Despite the Board's protestations to the contrary, however, the structure of *Specialty Healthcare* itself, how the Board applied it, and the fact that the Board is considering reverting to it even though it allegedly did not change the law, all make clear that *Specialty* surreptitiously sets up a path to do what Congress told the Board it could not do in Sections 9(b) and 9(c)(5), namely, failing to consider in each case whether the appropriate unit is the petitioned-for unit or some other, broader unit, and instead "pretend[ing] to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate." H.R. Rep. 80-245, at 37.

Specialty's infirmity is demonstrated through the actual holding of the case:

> We therefore…make clear that, when employees or a labor organization petition for an election in a unit of employees *who are readily identifiable as a group* (based on job classifications, departments, functions, work locations, skills, or similar factors), *and* the Board finds that the *employees in the group share a community of interest after considering the traditional criteria*, the Board will find the petitioned-for unit to be an appropriate unit…*unless* the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Specialty, 357 NLRB at 945-46 (emphasis added). The first part of this test (*i.e.* everything before the "and") is not an application of the traditional community of interests criteria, but rather is solely

focused on whether the petitioned-for employees are readily identifiable as a group. Moreover, the only time this test mentions the inclusion of non-petitioned-for employees is when such employees share an overwhelming community of interests with the petitioned-for unit. Thus, this test sends a clear signal to Regional Directors that they should solely focus on the community of interests of the petitioned-for group and only consider adding other groups if such other groups share an overwhelming community of interests with the petitioned-for unit.

It also is a far different test that the Board's traditional community of interests test described above, and it is a far different test than what the Courts of Appeal upholding *Specialty* described. Rather, what this test provides for is a determination that any employees who share a department or job classification *ipso facto* share a community of interests among themselves, hence shifting the burden to the employer to prove that other employees interests overlap "almost completely" with the petitioned-for group, an impossible task given that no two groups of employees have interests that overlap almost completely. *Specialty Healthcare,* 357 NLRB at 944. Applied in this way, the *Specialty Healthcare* test is the exact test rejected in *Lundy Packing*, 68 F.3d at 1580-81.

Moreover, the Board cannot have it both ways with respect to the consideration of excluded groups. If the question of shared interests between included and excluded groups is considered under the *Specialty* test before the overwhelming community of interests test is applied, then the overwhelming community of interests test is a legal and factual redundancy and there is no need to revert back to it. Specifically, if the Board already found that the petitioned-for unit's or some other unit's interests were "sufficiently distinct" from those of excluded groups at the first *Specialty* step, then an employer simply cannot demonstrate as a factual or legal matter that the excluded group interests "overlap almost completely" with the otherwise appropriate unit. No

group of employees can be both sufficiently distinct from other employees and share an overwhelming community of interests with those same employees to justify their own separate unit at the same time.

Finally, by allowing reduction of the community of interests analysis to whether employees share a job classification or job title (and make no mistake, the "reasonably identifiable as a group" factors listed in *Specialty* were separated by an "or", hence any one of them is sufficient) the *Specialty* test completely fails to take account of how such positions fit into an employer's operations. It thus pays no attention to how bargaining would actually work given the realities of an employer's workplace. *Compare, e.g., Cadillac Hotel*, 125 NLRB at 259-60; *see Kalamazoo Paper Box Corp*., 136 NLRB at 137.

In sum, rather than fully analyzing a petitioned-for unit in conformity with Sections 9(b), 9(c)(5) and *Kalamazoo Paper Box*, *Specialty* created a situation in which Regional Directors could and did identify common job classifications or departments as a sufficient community of interests, and reject all other, contrary arguments under the overwhelming community of interests standard. This not only violated the Act, but also failed to give employees their "fullest freedom" to exercise their rights by not allowing clearly integrated and impacted employees to have a say on unionization in a secret ballot election.

3. *Specialty's* Infirmities Were Confirmed in its Application.

These problems were borne out by the actual experience of the Board applying *Specialty*. The *Specialty Healthcare* standard fostered results that were, to put it mildly, puzzling and illogical. The Board approved "micro units" under *Specialty Healthcare* even when a broader unit was clearly compelled under the Board's traditional standards. For example, in *Macy's*, 361 NLRB 12 (2015), *enf'd*, 824 F.3d 557 (5th Cir. 2016), the Board found appropriate a unit limited to employees in the store's cosmetics and fragrances department—one of 11 sales departments in

Macy's Saugus, Massachusetts store—notwithstanding the Board's longstanding rule favoring storewide units in the retail industry. In *DPI Secuprint*, 362 NLRB 1407 (2015), the Board found appropriate a unit consisting of prepress, digital press, offset bindery, digital bindery, and shipping and receiving employees—excluding the press operators and feeder-tenders at the heart of the employer's functionally integrated production process—even though the smaller unit contravened the Board's "traditional" rule that press and prepress employees should ordinarily be included in the same "lithographic unit." The only time the Board addressed the relationship between included and excluded employees was in finding they did not share a overwhelming community of interests. *Id*. at 1411. These examples illustrate how the *Specialty Healthcare* "overwhelming community of interest" standard effectively superseded the Board's traditional rules governing appropriate unit determinations.

The standard even produced inconsistent results within the same case. In *Davidson Hotel Company, LLC*, Case No. 13-RC-217487 (Sept. 11, 2018), the Board approved separate units of housekeeping and food and beverage employees at a small hotel, both units which excluded front desk employees, after the Regional Director had initially declined to approve the combined unit, due to the omission of the front desk employees. On review, the Court of Appeals for the D.C. Circuit declined to enforce the Board's unit certification, because the Board failed to explain why a combined unit of housekeepers of food service employees (which excluded front desk employees) was inappropriate, but separate units (which likewise excluded front desk employees) somehow was. *Davidson Hotel Co. v. NLRB*, 977 F.3d 1289, 1293 (D.C. Cir. 2020).[3]

In short, the fact that the Board is asking about reverting to *Specialty Healthcare* at all

[3] *See also Yale University*, Case No. 01-RC-183014 et seq., Decision and Direction of Election at 30 (Jan. 25, 2017) (RD looked "solely and in isolation" at the petitioned-for units").

when it allegedly did not change the law, the *Specialty Healthcare* guidance to Regional Directors to focus solely on the petitioned-for unit unless an excluded group shares an overwhelming community of interests with the petitioned-for group, and the actual history of how *Specialty Healthcare* was applied to approve bargaining units that have absolutely no relationship to how an employer has structured its business make clear that the Board's true intent is to approve a union's petitioned-for bargaining unit in all but the most extraordinary of circumstances. Even those courts that upheld *Specialty Healthcare* based on the facts and arguments presented to them do not countenance such results since they require the Board to conduct a meaningful and rigorous analysis of whether the petitioned-for unit is sufficiently distinct from excluded groups and explain which factors are given more or less weight and why *before* applying the overwhelming community of interests analysis.

C. Confusion over the Source and Meaning of the *Specialty's* Overwhelming Community of Interests Test Is a Further Reason Not to Revert to That Test.

The well-documented confusion regarding the source and meaning of *Specialty's* overwhelming community of interests test is a further reason not to revert to it. In *Specialty*, 357 NLRB at 944-45, the Board purported to follow the D.C. Circuit Court of Appeals' decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). But the *Blue Man Vegas* decision is inapposite to initial bargaining unit determinations. First, *Blue Man Vegas* involved a pre-existing bargaining unit to which an employer was attempting to add a new group of employees, and neither the Board nor the D.C. Circuit adopted an "overwhelming community of interest test" as a rule generally applicable to initial unit determinations.[4] Thus, *Blue Man Vegas* was much closer to an accretion case, where employees are sought to be added to a unit without an election,

[4] In fact, the word "overwhelming" never appears in the General Counsel's brief to the D.C. Circuit in *Blue Man Vegas*.

and the burden on the party seeking to change a historical unit is, and should be, higher than in an initial unit determination case. *See, e.g., Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) ("In most cases, a historical unit will be found appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time."); *Safeway Stores, Inc.*, 256 NLRB 918 (1981).

In addition, the Board statements quoted by the *Blue Man Vegas* Court were not reflective of Board law, but the Board's description of the employer's position. *See Jewish Hospital Association,* 223 NLRB 614, 617 (1976). In *Jewish Hospital,* the Board actually concluded there was no basis to fragment employees into the smaller bargaining units sought by three competing unions. The Board found that the smaller units did not "comprise a homogeneous grouping of employees possessed of interests sufficiently distinct from the other employees to constitute a separate unit." *Id.* at 617.

Finally, the overwhelming community of interests standard is vague, ambiguous, and amorphous, and it fails to provide clear guidance to the parties. Quite simply, as Member Johnson recognized in his *DPI Secuprint* dissent, the Board failed to set forth any clear standards as to what does and does not constitute an overwhelming community of interests. *Compare DPI Secuprint,* 362 NLRB No. 172, slip op. at 5 (community of interests factors such as common supervision, functional integration, same benefits and similar pay rates does not establish an overwhelming community of interests) with *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9 (stating that the Board examines traditional community of interests factors such as skills, job functions, job overlap, functional integration, frequent contact, interchange, distinct terms and conditions of employment and separate supervision). How much integration or overlap in job functions is required? How much interchange between employees is required? *See Americold Logistics*,

NLRB Case No. 04-RC-134233, 2015 WL 3827939, at *1 n.1 (2015) (holding that community of interests factors do not "overlap almost completely" due to purported limited interchange between included and excluded employees among other things, even though both included and excluded employees performed warehouse work); *FedEx Freight, Inc*., NLRB Case No. 13-RC-147997, 2015 WL 2127336, at *1 n.1 (2015) (no overwhelming community of interests where the evidence was insufficient to demonstrate "significant interchange" between petitioned-for and excluded employees). What factors will be weighed more heavily and what factors are entitled to comparatively less weight?[5] Even Judge Posner recognized the question of what exactly the Board means by "overwhelming" when he stated that it "appears to be treated by the NLRB as a synonym for 'inappropriate,'…for 'truly inappropriate,' and for 'clearly inappropriate,'…." *FedEx Freight v. NLRB*, 839 F.3d at 638 (internal citations omitted).

Ultimately, just as the cases applying *Specialty* revealed myopic focus on the petitioned-for unit as opposed to application of the Board's traditional analysis of whether the petitioned-for unit was sufficiently distinct from excluded groups, the infirmities of the definitional aspects of *Specialty* were also laid bare by subsequent cases, which read like a "doctrinal obstacle course" that failed to provide clear guidance to either unions or employers that would allow for "some certainty beforehand as to appropriate bargaining units." *See DPI Secuprint*, 362 NLRB No. 172, slip op. at 9 (Johnson, dissenting). The Board owes it to its customers—employees, unions and

[5] Furthermore, the Board did not even require application of the *Specialty Healthcare* standard in all cases. *See Lily Transportation Corp*., NLRB Case No. 01-CA-118372, 2014 WL 7432526 (2014), *aff'd*, 363 NLRB No. 15 (2015) (the ALJ expressly did not rely on *Specialty Healthcare* in the unit analysis and the Board affirmed, also without discussing *Specialty Healthcare*); *Northrop Grumman*¸357 NLRB No. 163 (2011) (the Board reiterated that "to the extent that the Board has developed special rules applicable to" a particular industry or type of employee—as it indisputably has in the retail context—those existing "rules remain applicable" after *Specialty Healthcare*). However, as cases like *Macy's*, *DPI Secuprint*, and *Davidson Hotel* make clear, this was not the case in practice, post *Specialty Healthcare*.

employers—to provide some predictability in the law so they can order their affairs appropriately. But in the context of multi-factor tests, predictability can only occur if the Board explains which factors are significant, which are less so, and why. *LeMoyne-Owen College*, 357 F.3d at 61; *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 519-20 (D.C. Cir. 1999) (requiring Board to adequately explain its unit determination). The Board's long-standing, traditional community of interests test provides the requisite stability and predictability and should be retained.[6]

D. There Are Strong Policy Reasons Not to Return to the *Specialty Healthcare* Standard.

Finally, there are strong policy reasons not to return to the *Specialty Healthcare* standard. The *Specialty* rule encourages unions to file for fragmented and micro-units in all employment settings. The resulting proliferation of bargaining units would cripple employers with endless negotiations, conflicting union demands and contract obligations, and burdensome administrative duties. Effective collective bargaining and industrial peace are undermined, not enhanced, in such a regime. This is why the Board has historically discouraged department-by-department organizing—the very thing *Specialty Healthcare* or any similar standard encourages. *Airco, Inc.*, 273 NLRB 348, 349 (1984).

Further, where multiple unions representing different departments or segments of a business, especially an integrated operation, competing unions and work rules would impede an employer's ability to cross train employees to perform jobs in a different bargaining unit, to

[6] The *Specialty Healthcare* test also violates constitutional principles of due process and equal protection. On the one hand, the test allows unions to easily meet a very lax standard for showing a community of interests; while at the same time employers who oppose petitioned-for "micro-units" must meet a burden which is virtually impossible to satisfy. Notions of fundamental fairness dictate that similarly situated parties should be held to similar standards of proof, consistent with Section 9(b) and the Constitution. *See City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

flexibly assign employees to multiple tasks throughout the operation, and to provide employees with multiple sets of skills that inure not only to the benefit of the employer, but also to the benefit of employees. Such arrangements are a hallmark of the modern economy and necessary for employers to effectively compete, and having to administer conflicting work rules, pay scales, benefits, schedules, vacations and holidays, grievance processes, and layoff and recall procedures could overwhelm businesses to the point of paralysis.

Finally, multiple unions representing multiple bargaining units in a single facility could lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages or other job actions, creating a situation where a union representing only a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

In sum, *Specialty* fosters the gerrymandering and splitting of bargaining units into small groups that Congress discouraged decades ago when it incorporated the concept of majority rule in the Wagner Act. If the Board reverts to *Specialty Healthcare* or a similar rule, it will unnecessarily and improperly affect every employer in the United the industries represented by *Amici* to the detriment of both employers and employees.

CONCLUSION

For all of the foregoing reasons, the Board should adhere to its traditional standards for determining appropriate bargaining units, as articulated in *PCC Structurals* and *The Boeing Co*. *Specialty Healthcare* was an ill-advised, unwarranted, and short-lived detour from those standards and should remain confined to the dustbin of history.

Respectfully submitted this 21st day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to the Board's "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing amicus brief in Case 07-RC-269162 was electronically filed via the NLRB e-filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 21st day of January, 2022.

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