UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN STEEL CONSTRUCTION, INC.,

and

Case 07-RC-269162

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

BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of over 12 million working men and women. The AFL-CIO's affiliate unions regularly file representation petitions with the Board and, therefore, have a strong interest in the question presented in this case concerning the standard for determining what constitutes an appropriate bargaining unit.

ARGUMENT

The Board has asked whether it should "adhere to the standard in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), as revised in *The Boeing Company*, 368 NLRB No. 67 (2019)" and, "[i]f not, what standard should replace it?" *American Steel Construction, Inc.*, 370 NLRB No. 41, slip op. 2 (2022). The Board should overrule *PCC* and *Boeing* and return to the standard for determining an appropriate bargaining unit set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). Unlike *PCC* and *Boeing*, the standard set forth in *Specialty Healthcare* is consistent with the Board's traditional approach to determining appropriate bargaining units, as every court of appeals to review *Specialty Healthcare* has concluded, and provides clear guidance to the parties and to the regional directors who make bargaining unit determinations.

1. Section 9(a) of the National Labor Relations Act states that the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive bargaining representative for all the employees in that unit. 29 U.S.C. § 159(a). As the Supreme Court has explained,

> This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"– not necessarily *the* single most appropriate unit. Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.

Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991) (emphasis in original; citations omitted). Indeed, Section 9(b) of the Act states explicitly that "the unit appropriate for the purposes of collective bargaining" may be "the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b).

Before *PCC* and *Boeing* altered the analysis, the D.C. Circuit explained that, within this statutory scheme, "[d]ecisions of the Board and of the courts in unit determination cases generally conform to a consistent analytic framework." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

First, the Board considers whether "employees in the proposed unit share a community of interest" based on a "weighing [of] all relevant factors on a case-by-case basis." *Blue Man Vegas*, 529 F.3d at 421. Although "[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider under the community-of-interest standard," the Board generally considers "whether, in distinction from other employees, the employees in the proposed unit have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit." *Ibid.* (citations, quotation marks, and brackets omitted). If, after consideration of these factors, the Board determines that "employees in the proposed unit," "in distinction from other employees," "share a community of interest, then the unit is *prima facie* appropriate." *Ibid.*

If the employer contests the proposed unit on the ground that additional employees should be included, "the employer must do more than show there is another appropriate unit because more than one appropriate bargaining unit logically can be defined in any particular factual setting." *Blue Man Vegas*, 529 F.3d at 421 (citation and quotation marks omitted). "Rather, . . . the employer's burden is to show the *prima facie* appropriate unit is 'truly inappropriate.'" *Ibid.* (citing circuit cases describing burden as "truly inappropriate" and "clearly inappropriate").

More precisely,

> A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it. That the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit. If, however, the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit.

Blue Man Vegas, 529 F.3d at 421.

In *Specialty Healthcare*, the Board adopted the D.C. Circuit's description of the Board's traditional analytic framework in unit determination cases as its own. As the Board explained,

> [] We hold that the traditional community of interest test – to which we adhere – will apply as the starting point for unit determinations in all cases[.]
>
> [] We set out a clear test – using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit [in *Blue Man Vegas*] – for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, the employer must show that the excluded employees share an "overwhelming community of interest" with the petitioned-for employees.

357 NLRB at 947. *See also id.* at 943-44 & n.25 (describing *Blue Man Vegas* in detail and endorsing that decision's formulation of the unit determination framework).

Between 2011 and the end of 2017, the Board and its regional directors applied *Specialty Healthcare* in a wide range of cases, concluding in many cases that the petitioned-for unit was appropriate. In other cases, the Board concluded that excluded employees "share an overwhelming community of interest" with employees in the proposed unit such that it is "not an appropriate unit," *Odwalla, Inc.*, 357 NLRB 1608, 1608 (2011), or that "the petitioned-for unit is not appropriate, inasmuch as the petitioned-for employees lack a community of interest," *Bergdorf-Goodman*, 361 NLRB 50, 53 (2014). *See also Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 101 (D.C. Cir. 2017) (citing "multiple decisions by Board regional directors since *Specialty Healthcare* [that] have rejected proposed units"); *PCC*, slip op. 19 nn.9-10 (Members Pearce and McFerran, dissenting) (same). Finally, in some cases, the Board concluded that, although not all employees the employer claimed should be included shared an overwhelming community of interest with employees in the proposed unit, a subset of those employees needed to be added in order for the unit to be appropriate. *See*, *e.g.*, *A.S.V., Inc.*, 360 NLRB 1252, 1256-57 (2014) (describing which specific employees needed to be added to constitute "the smallest appropriate unit").[1]

Given the provenance of the *Specialty Healthcare* framework and the clarity with which the Board stated its test, it is little surprise that every court of appeals to review *Specialty Healthcare* affirmed its approach. *See Rhino Northwest*, 867 F.3d at 100-01, 103; *Constellation Brands, U.S. Operations, Inc. v. NLRB, 842 F.3d 784 (2d Cir. 2016); NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489,

[1] The fact that *Specialty Healthcare* was consistent with the traditional approach is further evidenced by the fact that it led to no change in the size of units found to be appropriate. *PCC*, slip op. 21 n.14 (Members Pearce and McFerran, dissenting) (citing Board data showing that "*Specialty Healthcare* [did] not drive[] down the median size of bargaining units"). *See also* Report of Professor John-Paul Ferguson ("Ferguson Report"), Fig. 3 (attached as Exhibit A).

495 (4th Cir. 2016); *Macy's Inc. v. NLRB*, 824 F.3d 557, 568-569 (5th Cir. 2016); *Kindred Nursing*, 727 F.3d at 562-63; *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 637-38 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 525 (8th Cir. 2016).

As the D.C. Circuit explained, "*Specialty Healthcare* consciously adopted the 'overwhelming community of interest' standard from this Court's decision in *Blue Man Vegas,*" which itself "reaffirmed Board and judicial decisions establishing" the appropriate analytic framework to be utilized when an employer contends that a proposed unit is not appropriate because it excludes certain employees. *Rhino Northwest*, 867 F.3d at 100. "We thus join seven of our sister circuits in concluding that *Specialty Healthcare* worked no departure from prior Board decisions." *Id.* at 100-01.

2. In contrast to *Specialty Healthcare*, *PCC* and *Boeing* departed from the plain text of the Act as construed by the Supreme Court, interposing novel and incoherent steps into the appropriate unit analysis, and justified overruling *Specialty Healthcare* only by mischaracterizing its holding.

a. The novel requirement imposed in *Boeing* that differences between employees in the petitioned-for unit and those outside "outweigh" the similarities is contrary to the Supreme Court's instructions about the meaning of Section 9(a) as it improperly constricts the units the Board can find to be appropriate units, effectively altering the Act to require that employees petition only for the most appropriate unit. *Boeing*, slip. op at 4.

As a matter of simple logic, if the differences between employees in a petitioned-for unit and those outside the unit have to outweigh the similarities, then an employer can object to every unit but one and the Board must reject every unit except the most appropriate unit – the unit in relation to which the differences in terms and conditions of included employees and *any* group of

excluded employees outweigh the similarities. In other words, *PCC* and *Boeing* effectively hold that the most appropriate unit is the only appropriate unit in the workplace. But that logical result of the *PCC-Boeing* standard is inconsistent with clear Supreme Court instructions.

As we have explained, the Supreme Court has stated that the language of Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *Am. Hosp. Ass'n*, 499 U.S. at 610 (emphasis in original). *See also Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (the NLRB "need only select an appropriate unit, not the most appropriate unit"). In other words, as the D.C. Circuit has held, "[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979)). The only logical conclusion from this jurisprudence, stemming from the terms of Section 9(a) as construed by the Supreme Court, is that "it is not enough for the employer to suggest a more appropriate unit" – *i.e.*, that the differences between included and excluded employees do not outweigh the similarities – "it must 'show that the Board's unit is clearly inappropriate.'" *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (quoting *NLRB v. Aaron's Office Furniture*, 825 F.2d 1167, 1169 (7th Cir. 1987)).

Moreover, even if the *PCC-Boeing* standard were not inconsistent with the Supreme Court's reading of Section 9(a), the Board has no statutory or even conceptual tools with which to coherently "weigh" differences and similarities in terms and conditions of employment. Put simply, the Board has no scale with which to assess the weight of different terms and conditions of employment in the abstract, outside of the context of the specific interests expressed by the petitioning employees. Of course, the Act creates no hierarchy of terms and conditions of

employment and no metric with which to compare their weights. Two groups of employees may have the same health insurance but different supervision. How can the Board determine if the difference in supervision "outweighs" the similarity in health coverage? In one workplace, employees may be motivated to organize and seek representation specifically to address inadequate or abusive supervision and, in another workplace, employees may be motivated by a substandard health plan. As the Board explained in *Management Training Corp.*, 317 NLRB 1355, 1357 (1995):

> While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area.

The weight of differences and similarities in terms and condition of employment depends on employees' concerns and varies depending on circumstances. The Board simply cannot weigh them in the abstract.

Finally, for the Board to "weigh" the relative importance of particular differences and similarities in terms and conditions of employment to the process of collective bargaining is not only improper under the Act and analytically impossible, it is inconsistent with the clear limits the Supreme Court has imposed on the agency in respect to the regulation of collective bargaining. In *Management Training*, 317 NLRB at 1358, the Board reversed a similar error in its jurisprudence, holding that it could not assess whether the terms and conditions of employment controlled by an employer were sufficient to justify employees being permitted to vote on whether to be represented in collective bargaining. The Board observed that, in its prior

decisions, the agency "seems to have made a judgment, either directly or indirectly, that . . . certain contract terms [are] of higher priority than others." *Ibid.* And that is precisely parallel to determining that certain differences in terms and conditions outweigh certain similarities. But, the Board continued in *Management Training*, "This, we think, amounts to the Board's entrance into the substantive aspects of the bargaining process which is not permitted under the [Supreme Court's precedents]." *Ibid.*

The *Management Training* Board cited, *inter alia*, the Supreme Court decision in *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952), holding that "the Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements." *Id*. at 404. That form of impermissible judgment is inherent in weighing the economic weapons available to the parties, in judging whether employees should be able to vote on representation when the employer controls only some of their terms of employment, and in weighing the differences and similarities of terms of employment of employees included and excluded from a proposed unit. In *Management Training*, the Board held that "it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation." 317 NLRB at 1358. And it is similarly not proper for the Board to find a unit inappropriate based on the Board's assessment of the "quality and/or quantity" of differences and similarities of terms and conditions of employment of employees included and excluded from the unit. *Ibid.*

b. The Board in *PCC* and *Boeing* also arrogated to itself a duty to consider the interests of employees who are not included in the petitioned-for unit when determining if the petitioned-for unit is appropriate. In *PCC*, the Board stated that it had to "evaluate the interests of all employees – both those within and those outside the petitioned-for unit" and had to "attach. . .

weight to the interests of excluded employees." Slip op. at 7, 6. But nothing in the Act requires that, and the notion that the Board can evaluate and attach weight to the interests of employees outside the petitioned-for unit is incoherent for several reasons.

The Act provides no authority for the Board to embark on the standardless and amorphous inquiry into the "interests" of employees excluded from a petitioned-for unit.

Moreover, even if the Act could be construed to permit the Board to consider the interests of excluded employees, the Board has no coherent means of doing so for at least three reasons.

First, there is no representative of excluded employees before the Board in a representation case. The only party that might purport to speak for those employees is the employer. But an employer most certainly does not represent excluded employees and will likely assert what it purports to be their interests for its own strategic reasons and will do so whether or not what it asserts is actually consistent with what excluded employees want. The employer also will likely not have any factual basis for its assertions because gauging excluded employees' interests would likely involve unlawful polling. Finally, the Supreme Court has affirmed the Board's skepticism of such employer solicitude for employees' interests. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.").

Second, how does the Board purport to know what excluded employees want? At the most basic level, how does the Board know if they want to be included in the unit or not? How does the Board know if they wish to vote on that question or not? The Board in *PCC* and *Boeing* had no answer to those questions because the questions cannot be answered. In a representation case, the Board has before it no evidence of any kind concerning the interests of excluded employees.

Third, the central provision of the Act renders the *PCC* Board's required inquiry incoherent. Of course, under Section 7, employees "have the right to . . . bargain collectively through representatives of their own choosing," but also "to refrain from any or all of such activities." 29 U.S.C. § 157. Given the contradictory force of that provision, the Board cannot possibly consider the interests of excluded employees who have not yet asserted either of the rights bestowed by Section 7.

c. The *PCC* Board overruled *Specialty Healthcare* and modified the traditional unit determination analysis as described above on the basis of two fundamental mischaracterizations of the decision.

First, the *PCC* Board created a straw man to knock down by inserting words into the *Specialty Healthcare* decision that do not actually appear and then emphasizing those nonexistent words: "*Specialty Healthcare* clearly held that '[w]hen the petitioned-for unit contains employees readily identified as a group who share a community of interest' *among themselves* . . . ." *PCC*, slip op. at 7 (emphasis in *PCC*). The italicized words do not appear in *Specialty Healthcare* and are in no way implied. In fact, *Specialty Healthcare* expressly held to the contrary as we explain below. *See infra*, at 12-14.[2]

Second, based in part on that mischaracterization of *Specialty Healthcare*, the *PCC* Board also wrongly claimed that "*Specialty Healthcare* effectively makes the extent of union organizing 'controlling'" contrary to the command of Section 9(c)(5). *PCC*, slip op. at 7. But *Specialty Healthcare* did no such thing, either expressly or effectively.[3] In *NLRB v.*

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[2] Of course, if *Specialty Healthcare* raised the bar for employers seeking to add employees to a unit, as the *PCC* majority contends, slip op. 7, it would, logically, have led to a decrease in the size of units. But it did not. *See supra* n. 1.

[3] As every court of appeals to review *Specialty Healthcare* has held. *See Rhino Northwest*, 867 F.3d at 101; *Constellation Brands*, 842 F.3d at 792-93; *FedEx Freight*, 832 F.3d at 444-45;

Metropolitan Life Insurance Co., 380 U.S. 438 (1965), the Court made clear that Congress intended Section 9(c)(5) to mean what it says: "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization." *Id*. at 441. Even if one considers the petitioned-for unit to be a proxy for the extent of organizing, *Specialty Healthcare* requires that the petitioned-for unit be the starting point, as expressly permitted by *Metropolitan Life*, 380 U.S. at 442, but requires further analysis and findings before the unit can be found appropriate. And the application of *Specialty Healthcare* amply demonstrated that it does not uniformly lead to approval of the petitioned-for unit. *See supra*, at 4 (citing examples).[4]

In sum, the Board in both *PCC* and *Boeing*, based on a mischaracterization of *Specialty Healthcare*, aggressively and in multiple respects asserts its own authority to more critically and expansively review the unit proposed by petitioning employees contrary to the Supreme Court's instructions and at the expense of employees' Section 7 rights. The Board repeatedly asserts it must "play a more active role," *PCC*, slip op. at 8, but without a clear, coherent and implementable standard, additional Board analysis will simply lead to arbitrary results and unnecessary litigation that frustrate the exercise of employee rights under Sections 7 and 9 of the Act. The Supreme Court's caution in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965), is equally applicable here. The Board may have "special competence in dealing with labor problems," but it may not "construe[] its functions too expansively" when Congress intended a more modest role. Just as the pre-*Management Training* assessment of which terms

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Nestle Dreyer's, 821 F.3d at 497; *Macy's*, 824 F.3d at 568; *Kindred Nursing*, 727 F.3d at 564-65; *FedEx Freight*, 839 F.3d at 638; *FedEx Freight*, 816 F.3d at 526.

[4] If *Specialty Healthcare* gave the extent of organizing controlling weight, it surely would have led to an increase in the percentage of elections resulting in certification of a representative, but it did not. *See* Ferguson Report, Fig. 2.

and conditions of employment an employer had to control to justify allowing employees to vote for representation, the *PCC-Boeing* approach "invites lengthy litigation and controversy which the parties and the Board can ill afford." 317 NLRB at 1358. The Board should not arrogate to itself a power inconsistent with the Act or profess to have an expertise it does not possess. The result will only be inconsistent results and increased litigation.[5]

3. One of the Board's primary justifications for its decision to overrule *Specialty Healthcare* was that it "believe[d] the Board's error in *Constellation Brands* (i.e., the failure to consider whether the interests of petitioned-for employees were sufficiently distinct from the interests of excluded employees) is inherent in the *Specialty Healthcare* standard itself" and, therefore, "the standard itself is the problem." *PCC*, slip op. 10 n.45. *See also Boeing*, slip op. 4 & n.4. The Board's conclusion in this regard is clearly incorrect. And, the Board's heavy reliance on *Constellation Brands* is badly misplaced – *Constellation Brands* upheld the *Specialty Healthcare* standard and casts no doubt on the lawfulness of that standard when correctly applied.

As an initial matter, it is beyond dispute that the Board in *Specialty Healthcare* embraced the traditional community-of-interest test, a test that requires the Board to consider the terms and conditions of employees both inside and outside the proposed unit when determining whether that unit is appropriate. The Board stated the factors of that test as follows:

> [W]hether the employees are organized into a *separate* department; have *distinct* skills and training; have *distinct* job functions and perform *distinct* work,

[5] Indeed, the evidence bears this out. In the several years since the Board replaced the *Specialty Healthcare* framework with the *PCC-Boeing* standard, the percentage of elections in which parties were unable to stipulate to an election agreement increased significantly. *See* Percentage of Directed Elections versus Agreed Elections (attached as Exhibit B) (showing an increase in the percentage of directed elections from approximately 10% under *Specialty Healthcare* to approximately 15% under *PCC* and *Boeing*). The less clear and more easily manipulated *PCC-Boeing* standard has led to greater litigation and more delay in representation proceedings.

> including inquiry into the amount and type of job *overlap* between classifications; are *functionally integrated* with the Employer's other employees; have *frequent contact with other employees*; *interchange with other employees*; have *distinct* terms and conditions of employment; and are *separately* supervised.

357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)) (emphasis added).[6]

Further, the *Specialty Healthcare* Board stated explicitly that consideration of community-of-interest factors "'never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another.'" 357 NLRB at 944 (quoting *Wheeling Island Gaming*, 355 NLRB 637, 637 n.2 (2010)). Rather, "the inquiry must proceed to determine 'whether the interests of the group sought are sufficiently distinct from those of other employees.'" *Id.* at 945 (quoting *Wheeling Island Gaming*, 355 NLRB at 637 n.2).

The various courts of appeals that affirmed *Specialty Healthcare* did so based on an identical understanding of the Board's approach. *See*, *e.g.*, *Nestle Dreyer's*, 821 F.3d at 500 (explaining that the Board conducted "a proper application of the well-worn community-of-interest test" in so far as it "did not address, solely and in isolation, the question whether the employees in the unit sought have interests in common with each other[,]" but rather "proceeded to a further determination whether the interests of the group sought were sufficiently distinct from those of other employees to warrant the establishment of a separate unit") (citation, quotation marks, and brackets omitted); *FedEx Freight*, 816 F.3d at 523 (rejecting the argument "that *Specialty Healthcare* is a departure from precedent because it examines the proposed unit in isolation," on the ground that "the community of interest test does in fact compare the interests

[6] Notably, that is precisely the same test endorsed by the Board in *PCC* and *Boeing*. *See PCC*, slip op. 5 (quoting same community-of-interest test from *United Operations*); *Boeing*, slip op. 2 (same).

and characteristics of the workers in the proposed unit with those of other workers" since "[t]he factors listed by the Board question whether the employees in the proposed unit have characteristics that are 'distinct' and 'separate,' and compare the employees to 'other employees'").

Notably, the Second Circuit, in *Constellation Brands*, upheld the *Specialty Healthcare* approach on this same basis, explaining:

> Step one of *Specialty Healthcare* expressly requires the RD to evaluate several factors relevant to "whether the interests of the group sought were sufficiently distinct from those of other employees to warrant the establishment of a separate unit." For instance, the Board must consider "[w]hether the employees are organized into a *separate* department; have *distinct* skills and training; have *distinct* job functions and perform *distinct* work ... ; are functionally integrated with the Employer's other employees; ... have *distinct* terms and conditions of employment; and are *separately* supervised." Accordingly, it seems to us that *Specialty Healthcare* does not significantly redefine the showing required of a party seeking Board approval in establishing a bargaining unit.

842 F.3d at 792 (quoting *Specialty Healthcare*, 357 NLRB at 942) (emphasis in *Constellation Brands*; footnotes omitted).

The Second Circuit nevertheless remanded the Board's decision on the ground that "[t]he RD (whose decision the Board declined to review) did not make the step-one determination required by *Specialty Healthcare*." *Id.* at 793. "Although he appropriately recited the community of interest standard, and declared that employees in the petitioned-for unit share distinct characteristics, the RD did not explain *why* those employees had interests sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Ibid.* (citations, quotations, and footnotes omitted; emphasis in original). As the Court explained,

"[r]eciting the legal framework does not substitute for analysis of differences between unit-members and other employees, as required by *Specialty Healthcare*." *Id.* at 794.[7]

On remand, the Court instructed,

> [T]he Board must *analyze* at step one the facts presented to: (a) identify shared interests among members of the petitioned-for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion.

Constellation Brands, 842 F.3d at 794-95 (emphasis in original; footnote omitted).

In light of the Regional Director's failure to consider, as part of the community-of-interest analysis, whether the terms and conditions of employees within the proposed unit were distinct from those of excluded employees, the Second Circuit was requiring no more of the Board than the D.C. Circuit required in *Blue Man Vegas* – that the Board's determination that "the differences between [excluded employees] and the employees included in the bargaining unit were sufficiently substantial" was both "supported by substantial evidence" and "consistent with precedent." 529 F.3d at 423. *Compare Constellation Brands*, 842 F.3d at 793 ("the Board's determination that a bargaining unit is appropriate will stand unless arbitrary and unreasonable") (citation and quotation marks omitted). Put another way, the Court's use of the term "outweigh" should not be read in isolation to require the Board to undertake a form of

[7] More specifically, although "the RD made a number of *factual* findings that tend to show that [employees in the proposed unit] had interests distinct from other employees," "he never explained the weight or relevance of those findings" in step one of the *Specialty Healthcare* analysis, but rather only at "step two [of the *Specialty Healthcare* analysis], *i.e.*, only to rebut a heightened showing that the excluded employees share an '*overwhelming* community of interest' with the presumptively appropriate petitioned-for unit." *Constellation Brands*, 842 F.3d at 794 (emphasis in original). *See* Decision and Direction of Election, *Constellation Brands*, 32-RC-135779, 28-30 (Jan. 8, 2015) (RD did not discuss distinctness at all at step one of the *Specialty Healthcare* analysis).

analysis that, as we demonstrated above, is contrary to the Act's text and is not possible. In context, the Court used the term "outweigh" to make clear the Board must consider both differences and similarities and explain its conclusion that included employees have "meaningfully distinct interests." *Id.* at 794. In that way, the Court was simply reaffirming that, in each case, the Board must "analyze . . . the facts presented" and "[e]xplain[] why the excluded employees have distinct interests" by reference to the Board's traditional community-of-interest factors. *Id.* at 794-95.[8]

As we have explained in detail in the previous section, the *PCC* Board's interpretation of the Second Circuit's decision as suggesting that the error committed by the Board in that case was "inherent in the *Specialty Healthcare* standard itself," *PCC*, slip op. 10 n.45, is contrary to the Supreme Court's admonition that, because "the initiative in selecting an appropriate unit resides with the employees," "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *Am. Hosp. Ass'n*, 499 U.S. at 610.[9] Instead, the Second Circuit's statement that the Board must explain how it weighs "similarities or differences between employees" at step one of the *Specialty Healthcare* analysis is properly understood as an example of the familiar judicial admonition that administrative agencies must adequately explain their decisions, not that the Board must make its decisions in any particular manner. *See*

[8] To illustrate, in *Bergdorf Goodman*, a case decided under *Specialty Healthcare*, the Board explained that, "while some factors favor a finding of community of interest, they are ultimately outweighed, on these facts, by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer (such as departments, job classifications, or supervision), combined with the complete absence of any related factors that could have mitigated or offset that deficit." 361 NLRB at 53. All the *Constellation Brands* Court required was that the Board explain its reasoning in a similar manner.

[9] Of course, such an interpretation would also be contrary to the Second Circuit's holding that "the *Specialty Healthcare* framework" is "valid" and "consistent with this Court's precedent." *Constellation Brands*, 842 F.2d at 787.

SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("Courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.").

CONCLUSION

The Board should overrule *PCC* and *Boeing* and return to the standard set forth in *Specialty Healthcare*.

Dated: January 21, 2022

Respectfully submitted,

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EXHIBIT A

Report of Professor John-Paul Ferguson

My qualifications relevant to this report are set forth in my CV, which is attached hereto as Exhibit 1.

At the request of the AFL-CIO, I analyzed all representation-case filings with the NLRB between the start of 2001 and late 2017, using data obtained from the NLRB using a Freedom of Information Act request. The data and how it was obtained is more fully described in the report I provided to the AFL-CIO that was filed with the Board pursuant to its request for information about changes to its election rules. The data allowed me to analyze the approximately 10.5 years prior to the Specialty Healthcare decision and the approximately 5.5 years after the decision in order to analyze for trends.

In the first two figures below, I have plotted, for each month, the percentage of filings in which elections were ultimately held, as well as the percentage of elections which were won by the union. Through the data I have also plotted a LOWESS, or locally weighted regression estimate, line. This is one of the simpler ways to filter out the month-to-month noise and observe the longer-term trend, without imposing any assumption that that trend be linear. As is obvious from inspecting the figures, there is no change in the trend in either rate around the rule change. Both the share of petitions resulting in elections and the share of elections resulting in union victories continued an upward drift that they had maintained for the years prior to the decision.

In the third figure below, I similar plot the mean and median size of units before and after the Specialty Healthcare decision. There was no significant change in either that occurred after the decision.

FIGURE 1

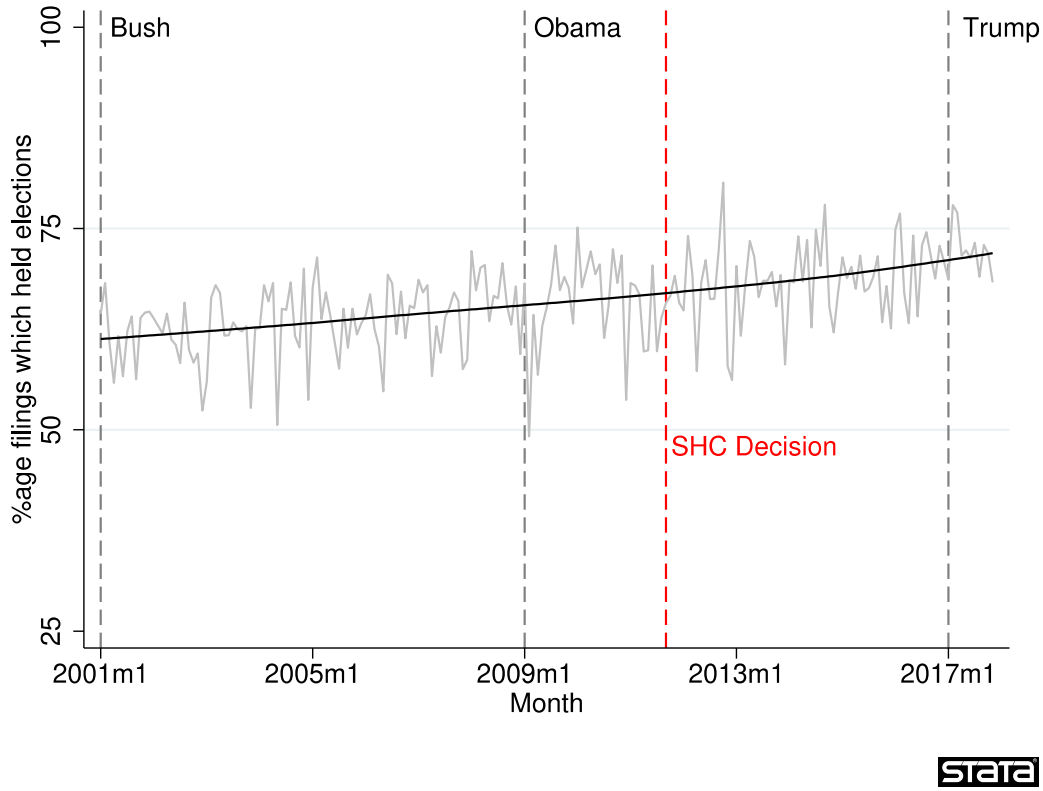

FIGURE 2

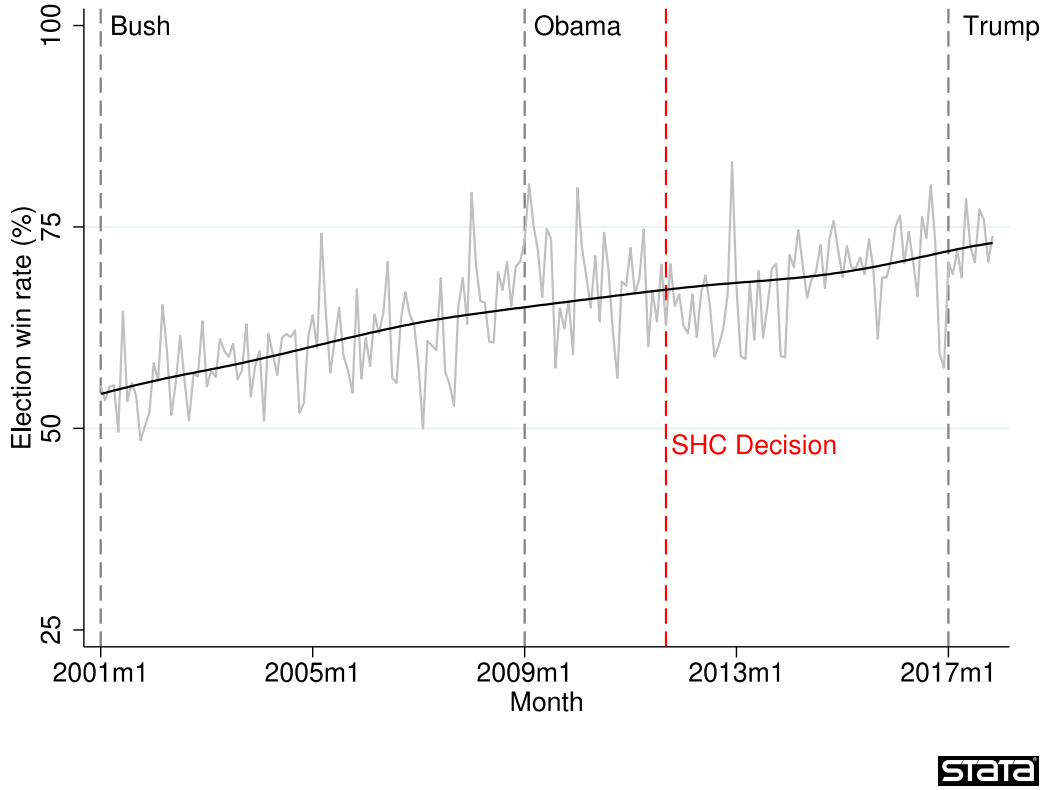

FIGURE 3

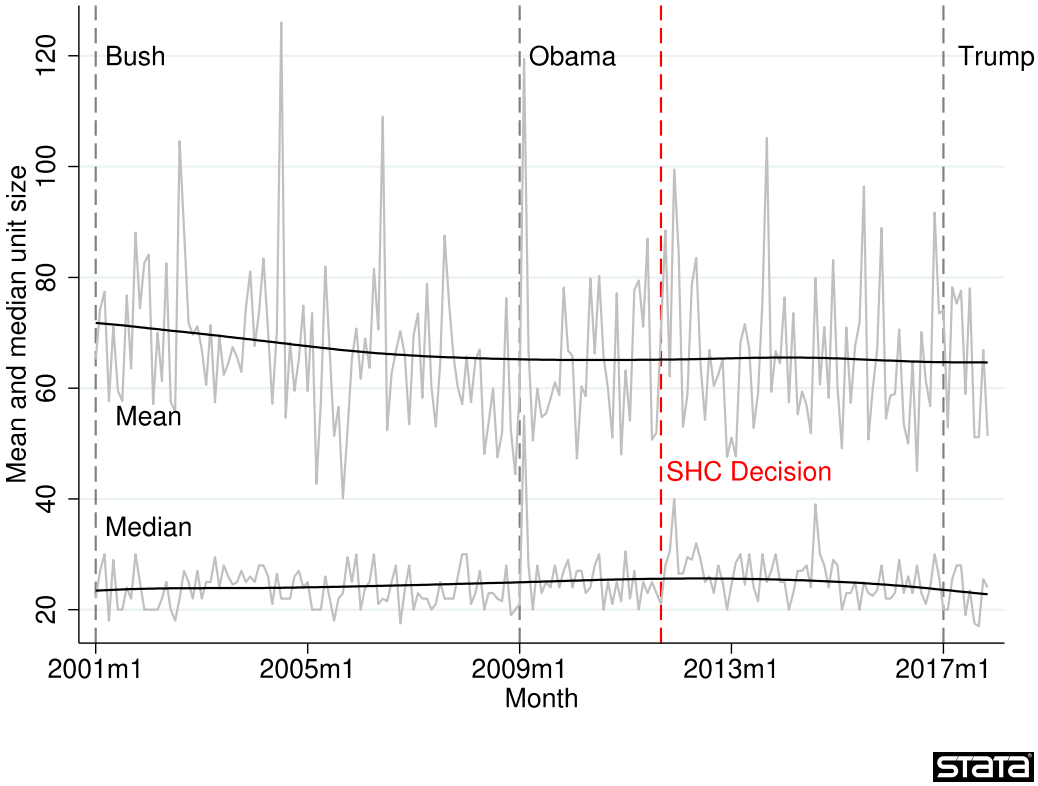
Bush
Obama
Trump
Mean
Median
SHC Decision
Mean and median unit size
20
40
60
80
100
120
2001m1
2005m1
2009m1
2013m1
2017m1
Month

EXHIBIT A
(Attachment 1)

John-Paul Ferguson
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20 June 2021

Employment

2020 –	Associate Professor of Organizational Behavior, Desautels Faculty of Management, McGill University
2018 – 2020	Assistant Professor of Organizational Behavior, Desautels Faculty of Management, McGill University
2018 –	Visiting Researcher, American Federation of Labor – Congress of Industrial Organizations
2009 – 2018	Assistant Professor of Organizational Behavior, Stanford Graduate School of Business

Education

2009	PhD in Management, MIT Sloan School of Management
2001	MA in International Relations, the Johns Hopkins University
1999	BAs in Political Science and History, the University of Oklahoma

Peer-Reviewed Publications

Koning, Rembrand and Sampsa Samila and John-Paul Ferguson. 2021. Who do We Invent for? Patents by Women Focus More on Women's Health, but Few Women Get to Invent. *Science* 372(6548): 1345 – 1348.

Sampsa, Samila and Rembrand Koning and John-Paul Ferguson. 2020. Inventor Gender and the Direction of Invention. *AEA Papers and Proceedings* 110: 250 – 254.

Ferguson, John-Paul and Rembrand Koning. 2018. Firm Turnover and the Return of Racial Establishment Segregation. *American Sociological Review* 83(3): 445 – 474.

Ferguson, John-Paul and Gianluca Carnabuci. 2017. Risky Recombinations: Institutional Gatekeeping in the Innovation Process. *Organization Science* 28(1): 133 – 151.

Ferguson, John-Paul and Thomas Dudley and Sarah A. Soule. 2017. Osmotic Mobilization and Union Support during the Long Protest Wave, 1960 – 1995. *Administrative Science Quarterly* 63(2): 441 – 477.

Ferguson, John-Paul. 2016. Racial Diversity and Union Organizing in the United States, 1999 – 2008. *Industrial and Labor Relations Review* 69(1): 53 – 83.

Hasan, Sharique and John-Paul Ferguson and Rembrand Koning. 2016. The Lives and Deaths of Jobs: Technical Interdependence and Survival in a Job Structure. *Organization Science* 26(6): 1665 – 1681.

Ferguson, John-Paul. 2015. The Control of Managerial Discretion: Evidence from Unionization's Impact on Employment Composition. *American Journal of Sociology* 121(3): 675 – 721.

Ferguson, John-Paul and Sharique Hasan. 2013. Specialization and Career Dynamics: Evidence from the Indian Administrative Service. *Administrative Science Quarterly* 58(2): 233-256.

Ferguson, John-Paul. 2008. The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004. *Industrial and Labor Relations Review* 62(1): 1-18.
Reprinted in *Labor and Employment Law Initiatives and Proposals Under the Obama Administration* (New York: Kluwer Law International, 2011)

Kochan, Thomas A. and John-Paul Ferguson and Joel Cutcher-Gershenfeld and Betty Barret. 2007. Collective Bargaining in the Twenty-First Century: A Negotiations Institution at Risk. *Negotiations Journal* 23(3): 249-265.

Douglas, William A. and Erin Klett and John-Paul Ferguson. 2004. An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions and NGOs. *Human Rights Quarterly* 26(2): 273-299.

Working Papers

Ferguson, John-Paul. 2020. "Same Planet, Different Worlds? Spatial Employment Segregation by Race in America."

Galperin, Roman and John-Paul Ferguson. 2020. "Occupational Licensure, Race, and Entrepreneurship."

Ferguson, John-Paul and Rembrand Koning. 2019. "Industry Contributions to Racial Establishment Segregation."

Koning, Rembrand and John-Paul Ferguson. 2019. "Does Public Ownership and Accountability Increase Diversity? Evidence from IPOs."

Other Research Projects

"The Uncertain Integration of European Science." With Sampsa Samila. Data analysis in progress.

"Separated but Equal? Outsourcing, Pay, and Race." With Kaisa Snellman. Data analysis in progress.

"Race and Outsourcing." With J. Adam Cobb and Rembrand Koning. Data collection in progress.

"Employee Sorting in the Absence of Managerial Discretion." With Christine Isakson. Data collection in progress.

Presentations

"Same Planet, Different Worlds? Spatial Employment Segregation by Race in America." Presented at the 19th Organizational Ecology Workshop, June 2020; the 36th Colloquium of the European Group for Organizational Studies, July 2020; and the Center for Population Dynamics Workshop, McGill University, October 2020.

"Occupational Licensure, Race, and Entrepreneurship." Presented at the 79th Meeting of the Academy of Management, Boston, August 2019; and the 12th People and Organizations Conference, the Wharton School, November 2019.

"Does Public Ownership and Accountability Increase Diversity? Evidence from IPOs." Presented at the Human and Social Capital Seminar, the Wharton School, Philadelphia, PA, February 2019; the Employment Relations Seminar, Queens University, Kingston, ON, March 2019; and the Organizational Behavior Seminar, School of Management, Yale University, New Haven, CT, April 2019.

"Firm Turnover and the Return of Racial Establishment Segregation." Presented at the 34th Colloquium of the European Group for Organizational Studies, Tallinn, Estonia, July 2018; and the 78th Meeting of the Academy of Management, Chicago, August 2018.

"Industry and Area Contributions to Racial Establishment Segregation." Presented at the 18th Organizational Ecology Workshop, Cambridge, United Kingdom, June 2018.

"Population Processes and Establishment-level Racial Employment Segregation." Presented at the 17th Organizational Ecology Workshop, Madrid, Spain, June 2017.

"Plant Relocation and Spatial Mismatch: Evidence from Natural Disasters." Presented at the 8th People and Organizations Conference, the Wharton School, November 2015; the INSEAD joint economics/organizational behavior seminar, May 2016; the 32nd Colloquium of the European Group for Organizational Studies, Naples, Italy, July 2016; and the Strategy Seminar at Harvard Business School, December 2016.

"Risky Recombinations: Institutional Gatekeeping in the Innovation Process." Presented at the London Business School strategy seminar, April 2016; and the Instituto de Empresa organizational behavior seminar, Madrid, April 2016.

"Employee Sorting in the Absence of Managerial Discretion." Presented at the joint IWER/OSG seminar, MIT-Sloan, March 2016.

"Movement Spillover and Union Support during the 'Long Protest Wave.'" Presented at the 2nd Junior Organization Theory Conference, Haas School of Business, November 2014; the 110th annual meeting of the American Sociological Association, Chicago, August 2015; and the Workshop on Social Movements and the Economy, Northwestern University, November 2015.

"The Control of Managerial Discretion: Evidence from Unionization's Impact on Workplace Composition." Presented at the INSEAD OB seminar, March 2014; the 30th Colloquium of the European Group for Organizational Studies, Rotterdam, Netherlands, July 2014; and the 109th annual meeting of the American Sociological Association, San Francisco, August 2014.

"Bureaucracy and Employment Segregation: Evidence from Labor-Union Elections." Presented at the Management of Organizations Seminar, Haas School of Business, UC-Berkeley, February 2013; the Economic Sociology Working Group at MIT-Sloan, June 2013; and the Junior Organization Theory Conference, Chicago Booth School of Business, October 2013.

"The Lives and Deaths of Jobs." Presented at the 2nd annual Strategy Conference, Fuqua School of Business, Duke University, October 2012; the Organizations & Markets Workshop, Chicago Booth School of Business, November 2012; the 13th annual meeting of the Nagymaros Group on Organizational Ecology, Budapest, Hungary, July 2013; and the 108th annual meeting of the American Sociological Association, New York, August 2013.

"Specialization and Career Dynamics: Evidence from the Indian Administrative Service." Presented at the annual meetings of the American Sociological Association, Denver, CO, August 2012.

"The Examiner's Dilemma: Differential Selection and Patent Impact." Poster at the 12th annual meeting of the Nagymaros Group on Organizational Ecology, Copenhagen, Denmark, July 2012.

"Organizational Diversity as a Demographic Process." Presented at the annual meetings of the Academy of Management, San Antonio, TX, August 2011; and the Human and Social Capital Seminar, the Wharton School of Business, University of Pennsylvania, April 2012.

"Categorization in Labor Markets: Evidence from the Indian Administrative Service." Presented at the IWER Seminar, MIT-Sloan, May 2011; the 11th annual meeting of the Nagymaros Group on Organizational Ecology, Lugano, Switzerland, July 2011; and the 4th annual People and Organizations Conference, the Wharton School of Business, University of Pennsylvania, October 2011.

"Corrosion of Conformity: Resource Partitioning Among Trade Unions." Presented at the 10th annual meeting of the Nagymaros Group on Organizational Ecology, Helsinki, Finland, June 2010.

"Space Invaders: Categories, Valuation and Union Organizing Drives, 1961 – 1999." Presented at the Harvard-MIT Economic Sociology Seminar, Cambridge, MA, October 2008; the annual meetings of the American Sociological Association, San Francisco, CA, August 2009; the Institute for Labor and Industrial Relations Seminar, Urbana-Champaign, IL, April 2010; and the SCANCOR Seminar, Stanford, CA, May 2010.

"Whither Redistribution? The Death and Curious Rebirth of Social Concertation in Western Europe." Roundtable presentation at the annual meetings of the American Sociological Association, Boston, MA, August 2008.

"Sequential Failures in Worker Attempts to Organize." Briefings for the AFL-CIO and National Labor Relations Board, Washington, DC, May 2008

"Unfair Labor Practices and Union First Contracts." Presented at the Collective Bargaining Roundtable, School of Industrial and Labor Relations, Cornell University, October 2005.

Grants Received

2020	"Racial Employment Segregation and the Boundary of the Firm." Insight Grant, Canadian Social Sciences and Humanities Research Council. $215,986.
2019	"Studying Employment, not Employers: a Respondent-Driven Sampling Survey of Gig-Economy Workers." Insight Development Grant, Canadian Social Sciences and Humanities Research Council. $69,500.

University Service

2020 –	Masters Programs Coordinator, McGill Desautels
2020 –	Academic Director, MBA program, McGill Desautels
2014 – 2016	Faculty Liaison, OB PhD program, Stanford GSB

Teaching

2021 –	Real-time Decisions, McGill Desautels (Core MBA course)

2020 – Managing Organizational Behaviour, McGill Desautels (Core MBA course)
2019 Managing Resources, McGill Desautels (Core MBA course)
2018 – Introduction to Organizational Behaviour, McGill Desautels (Core undergraduate course)
2018 – Meso-Organizational Behaviour, McGill Desautels (PhD course)
2009 – 2017 Strategic Leadership, Stanford GSB (Core MBA course)
2016 Doctoral Proseminar on Theory Development (PhD course)
2014 Stratification in Organizations, Stanford GSB (PhD course)
2014 Work and Employment in Organizations, Stanford GSB (PhD course)
2013 Introduction to Organizational Behavior, Stanford Law School
2012 Social and Political Processes in Organizations, Stanford GSB (PhD course)

2004 – 2009 TA at the MIT Sloan School. Courses included Managerial Psychology and People & Organizations (undergraduate); Strategic Human Resource Management, Power & Negotiations, and Organizational Processes (MBA); and Communicating with Statistical Data (Sloan Fellows)
2000 – 2001 TA at the Johns Hopkins University. Courses included International Trade Theory and Intermediate Microeconomics (MA courses)

Academic Memberships and Service

American Sociological Association
Academy of Management
Labor and Employment Relations Association

2021 – Associate Editor, *Organization Science*
2021 Research Committee, Organization and Management Theory Division, Academy of Management
2020 – Consulting Editor, *Sociological Science*
2019 – Associate Editor, *Industrial Relations*
2018 – Editorial board, *American Sociological Review*
2018 – Senior Consulting Editor, *American Journal of Sociology*
2019 – 2021 U.S. National Science Foundation Panelist
2013, 2015 Granovettor Award Committee (Best peer-reviewed article in Economic Sociology), American Sociological Association
2010, 2012 Ron Burt Award Committee (Best PhD dissertation in Economic Sociology), American Sociological Association
Ad Hoc Reviewer for *American Journal of Sociology*, *American Sociological Review*, *American Political Science Review, Quarterly Journal of Political Science, Organization Science*, *Management Science*, *Administrative Science Quarterly*, *British Journal of Industrial Relations, Journal of Labor Research*, *Industrial & Labor Relations Review*, *Sociological Compass*, *Sociological Forum*, *Industrial and Corporate Change*, *Industrial Relations* and *Research in the Sociology of Organizations*

Fellowships and Honors

2019	Recognition for outstanding service to the editorial board, *Organization Science*
2016	Shanahan Family Faculty Scholar, Stanford GSB
2015	John T. Dunlop Outstanding Scholar, Labor and Employment Relations Association (Given for outstanding contributions to work and employment research by faculty out less than ten years)
2015	Distinguished Faculty Service Award, Stanford GSB (Given for excellence in teaching and advising in the PhD program)
2010	Fletcher Jones Faculty Scholar, Stanford GSB (Given for contributions to MBA teaching)
2009	James D. Thompson Award for Best Graduate Student Work, ASA's Organizations, Occupations and Work section
	Ronald W. Burt Award for Best Graduate Student Work, ASA's Economic Sociology Section
2006 – 2007	MIT Presidential Research Fellowship
2003 – 2006	Alumni Doctoral Studies Fellowship
1999 – 2000	Andrew W. Mellon Fellow in Humanistic Studies
1998	Cortez A.M. Ewing Congressional Fellow
1995 – 1999	National Merit Scholar

Relevant Professional Experience

2002 – 2003	Consultant, World Bank Group, Washington, DC
2001 – 2002	NGO Liaison, Mellemfolkeligt Samvirke, Copenhagen, Denmark
2001	Researcher for Special Projects, International Labor Organization, Washington, DC

EXHIBIT B

Percentage of Directed Elections versus Agreed Elections

Data drawn from Election Reports available by fiscal year at the NLRB Website at: https://www.nlrb.gov/reports/agency-performance/election-reports

Includes only single union elections. Agreed Elections includes both Stipulated and Consent elections.

FY 2014
Type of Election:
Stipulated: 1231
Consent: 27
Directed: 121
Agreed Elections: 91.23%
Directed elections: 8.77%

FY 2015
Type of Election:
Stipulated: 1441
Consent: 24
Directed: 131
Agreed Elections: 91.79%
Directed Elections: 8.21%

FY 2016
Type of Election:
Stipulated: 1275
Consent: 10
Directed: 141
Agreed Elections: 90.11%
Directed Elections: 9.89%

FY 2017
Type of Election:
Stipulated: 1124
Consent: 8
Directed: 200
Agreed Elections: 84.98%
Directed Elections: 15.02%

FY 2018:
Type of Election:
Stipulated: 1036
Consent: 4
Directed: 152
Agreed elections: 87.3%
Directed elections: 12.7%

FY 2019
Type of Election:
Stipulated: 1084
Consent: 6
Directed: 95
Agreed elections: 91%
Directed elections: 9%

FY 2020
Type of election:
Stipulated: 730
Consent: 6
Directed: 150
Agreed elections: 83%
Directed elections: 17%

FY 2021
Type of Election:
Stipulated: 715
Consent: 7
Directed: 210
Agreed elections: 77.4%
Directed elections: 22.6%

FY 2022 (first quarter)
Stipulated: 192
Consent: 1
Directed: 34
Agreed elections: 85%
Directed elections: 15%

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, the foregoing Brief of *Amicus Curiae* American Federation of Labor and Congress of Industrial Organizations in Response to the Board's Notice and Invitation to File Briefs was filed through the NLRB E-Filing system and served on all parties and/or their counsel of record by electronic mail:

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/s/ Matthew Ginsburg
Matthew Ginsburg