IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, **Plaintiff,** **COALITION FOR A DEMOCRATIC WORKPLACE,** **Plaintiff,** **v.** **NATIONAL LABOR RELATIONS BOARD,** **Defendant.**	**Case 1:11-cv-02262-JEB** **Judge James E. Boasberg**

Proposed Brief *Amicus Curiae* Of The American Hospital Association, The American Society For Healthcare Human Resources Administration, The American Organization Of Nurse Executives, HR Policy Association, And The Society For Human Resource Management In Support Of Plaintiffs Chamber Of Commerce Of The United States Of America And Coalition For A Democratic Workplace

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Pursuant to Judge Boasberg's Minute Order dated January 11, 2012, the American Hospital Association ("AHA"), the American Society for Healthcare Human Resources Administration ("ASHHRA"), the American Organization of Nurse Executives ("AONE"), HR Policy Association ("HR Policy" or "the Association"), and the Society for Human Resource Management ("SHRM" or "the Society") (collectively, "*Amici*"), submit this proposed brief as *amici curiae* in support of Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace ("Plaintiffs").

STATEMENTS OF INTEREST

The AHA, ASHHRA, AONE, HR Policy, SHRM and their members have substantial interests in the Final Rule on representation case procedures published on December 22, 2011 by the National Labor Relations Board ("NLRB" or "Board"). (76 Fed. Reg. 80,138 (Dec. 21, 2011) (Final Rule)). AHA represents more than 5,000 hospitals, health systems and other health care organizations, and 38,000 individual members. AHA members run the gamut from large hospitals and health care systems to small, rural hospitals. Over 40 percent of the nation's hospitals are standalone hospitals and often are the sole health care provider in their communities.

ASHHRA is a personal membership group of the AHA and represents more than 3,400 human resource managers in hospitals and other health care facilities nationwide. AONE also is a personal membership group of the AHA, representing nurse leaders who design, facilitate and manage care at our nation's hospitals. AONE provides leadership, professional development, advocacy and research in order to advance nursing practice and patient care, promote nursing leadership excellence and shape health care public policy.

On August 22, 2011, the AHA, ASHHRA, and AONE submitted comments to the Board in response to its Notice of Proposed Rulemaking regarding representation case procedures, (76 Fed. Reg. 36,812 (proposed June 22, 2011)). (*See* of the AHA, ASHHRA, & AONE (Aug. 22, 2011), *available at* www.regulations.gov)). As demonstrated in the comments, nearly a quarter of all recently filed election petitions involved health care employers.

HR Policy and SHRM also submitted comments to the Board in response to the NPRM. (*See* Comments of HR Policy & SHRM (Aug. 22, 2011), *available at* www.regulations.gov)). HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. HR Policy consists of more than 330 of the largest corporations doing business in the United States and globally, with such business organizations represented in the Association by their most senior human resource executives. Collectively, HR Policy member companies employ more than 10 million people in the United States, and their chief human resource officers are responsible for identifying, hiring, and developing the talent needed to staff their organizations. Since its founding, one of HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource professionals and advances the interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

The substantial majority of the members of AHA, HR Policy, and SHRM are covered by the National Labor Relations Act, (29 U.S.C. §§ 151, *et seq.*) ("NLRA" or "the Act") and have

an interest in the Act and its administration, including representation case procedures amended by the Final Rule. Further, a substantial number of individual members of *amici* ASHHRA and AONE work at hospitals and other health care employers covered by the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The NLRB has had little experience and limited success in rulemaking. Including the instant initiative, the Board has only engaged in substantive rulemaking four times in the agency's over 75-year history. One of its attempts at rulemaking was ill-fated and subsequently withdrawn. (*See* Appropriateness of Single Location Bargaining Units in Representation Cases, 63 Fed. Reg. 8890 (Feb. 23, 1998)). In another of the Board's rulemaking initiatives, the Board recently issued regulations related to the adoption of an employee rights poster; an initiative that has engendered another legal challenge currently pending in this Court. (*Nat'l Ass'n of Mfgs. v. NLRB*, No. 11-cv-1629 (D.D.C. filed Sept. 8, 2011)). In that case, the Board already has twice delayed the implementation date of its rule. (Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 82,133 (Dec. 30, 2011)).

The Board has never before engaged in substantive rulemaking with respect to its election procedures. Although minor procedural changes have been made in the past to the Board's election rules, the Board, whether Democratic or Republican controlled, has steadfastly refrained from engaging in substantive rulemaking in this critically important area of the NLRA. Indeed, since the 1947 Taft-Hartley amendments to the NLRA, the Board has never sought to limit, as it does here, the right of the parties to have a meaningful pre-election hearing. Given the unprecedented scope and substance of the Board's rulemaking initiative, careful legal scrutiny of the Board's Final Rule is required.

Particular attention to the Board's Final Rule also is warranted given the hurried and irregular procedure that the Board used in adopting the Final Rule. In response to its Notice of Proposed Rulemaking regarding proposed changes to the election rules, the Board received more than 65,000 comments, many of which were highly critical of the proposed rule. On December 22, 2011, just four months after receiving such voluminous comments, two members of the Board adopted the Final Rule, without providing a meaningful review to the comments as required by the Administrative Procedures Act ("APA") (5 U.S.C. §§ 551 *et seq.*). The Board majority did not even allow time for the third member of the Board to draft his dissent to the Final Rule.[1]

The Board's rushed and defective process in adopting the Final Rule appears to have been designed to accommodate the departure date of former recess appointee Board Member Craig Becker. Member Becker's departure from the Board resulted in the Board's lack of a quorum and inability to act. (*See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010)). *Amici* submit that the Board's fear of an upcoming lack of quorum does not excuse the Board's failure to comply with the APA, including its failure to adequately explain how it gave meaningful review to the tens of thousands of comments received by the Board.

Amici commend to the Court's attention and endorse the Plaintiffs' arguments regarding the statutorily defective approach the Board used in adopting the Final Rule, including the failure to permit Member Hayes to meaningfully and effectively participate in the decision-making process leading to the Final Rule. Further, *Amici* join in the Plaintiffs' arguments regarding the

[1] The Board's hurried and haphazard approach in adopting the Final Rule is in stark contrast to the approach the Board undertook for adopting its health care bargaining unit rule in 1989. (*See* Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989) (to be codified 29 C.F.R. pt. 103)). In that initiative, the Board's rulemaking process lasted nearly two years and consisted of four public hearings across the country—one of which was held over seven days. (*See* Collective Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33,900 (Sept. 1, 1988) (to be codified at 29 C.F.R. pt. 103)).

Board's rejection, without a reasoned explanation, of its long-standing precedent requiring at a minimum three affirmative votes before changing Board precedent.

Amici respectfully submit that the Board's Final Rule—particularly its interpretation of what constitutes an "appropriate hearing" under the Act—cannot stand for the following reasons:

- **The Final Rule conflicts with the Act, as evidenced by the Act's legislative history and the Board's own prior interpretations of the Act.**

Section 9(c)(1) of the Act requires that the Board engage in an "appropriate hearing" prior to directing an election. (29 U.S.C. § 159(c)(1)). In the Final Rule, the Board redefines an "appropriate" hearing to exclude consideration of critical employee eligibility issues, such as whether an individual is a supervisor exempt under Section 2(11) of the Act. The Act's legislative history, however, demonstrates that Congress rejected the very hearing structure now put forward by the Board in its Final Rule. In addition, the Board itself, in prior rulings, interpreted the Act as requiring a pre-election hearing that addresses individual eligibility issues. Accordingly, the Board's re-interpretation of the Act in the Final Rule contradicts the Act.

- **The Final Rule essentially eviscerates the right of the parties in all cases to engage in a meaningful pre-election hearing.**

The Board seeks to justify its newly imposed limitations on the Section 9(c)(1) pre-election hearing by attempting to minimize the legal and practical importance of resolving voter eligibility issues prior to an election. The Final Rule's limitation on pre-election hearings, however, effectively precludes outright the resolution of numerous critical issues in all cases. In addition to determining which employees are exempt supervisors under the Act, other important pre-election issues that historically have been addressed in the pre-election hearing include single versus multiple sites, manager and confidential classification issues, independent contractor issues, and plant clerical and office clerical issues. The Board's overly constrained view of an

"appropriate" pre-election hearing essentially eviscerates the process for resolving these issues prior to the election. Moreover, given the limitations imposed on the parties' rights to appeal after an election, these issues may never be resolved by the Board during the election process. As noted in Pls.' Mem. of Points & Authorities in Support of Pls.' Mot. For Summ. J. (Feb. 3, 2012), ECF No. 22-1 ("Pls.' Br.")), the Final Rule improperly curtails, if not eliminates all together, the right of an adversely affected party to appeal pursuant to Section 3(b) of the Act any adverse rulings issued at the pre-election hearing. (*See* Pls.' Br. 31-34).

The Final Rule's significant limitations on pre-election hearings may also effectively prevent non-petitioning parties from litigating the new bargaining unit composition standards in *Specialty Healthcare*. (*See Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011), *appeal filed sub nom., Kindred Nursing Ctrs. E. v. NLRB*, Case No. 12-1027 (6th Cir. Dec. 30, 2011)). In that highly controversial decision, which is presently under appeal in the U.S. Court of Appeals for the Sixth Circuit, the Board adopted for the first time in the Agency's history an "overwhelming community of interest" test for bargaining unit determinations for all employers other than acute health care providers.[2] Little guidance to date has been provided by the Board to its stakeholders or to its regional directors regarding how this new standard should be applied in any particular case. For example, under the Final Rule, an employer may be precluded prior to an election from introducing evidence or submitting briefs to challenge a union's proposed bargaining unit, even for exceedingly small bargaining units. The Final Rule's limitations may prevent the parties from creating an appropriate record for a reviewing regional director, Board, or court to consider whether the petitioned for unit is actually

[2] As noted *supra*, at footnote 1, bargaining units for acute health care providers have been prescribed by Board rule and are not subject to the traditional community of interest test.

appropriate. As a result, the Final Rule's limitations on pre-election hearings will impair significantly the development of Board decisions that would help illuminate the application of its new bargaining unit standards in the myriad of workplaces governed by the Act. Such "ad hoc" and uninformed decision-making will lead to increased litigation and delay—exactly the opposite of the alleged primary purpose of the Final Rule.

- **The Final Rule's elimination of post-hearing briefing will lead to "ad hoc" determinations that will prevent the Board from fulfilling the Act's mandate of assuring employees the "fullest freedom" in exercising their rights under the Act.**

The Board asserts that the Final Rule's elimination of the parties' right to file post-hearing briefs is of little consequence by stating that supervisory status and other pre-election issues are often insignificant and not legally complex. Jurisprudence in this area suggests just the opposite. For example, the Board and the courts of appeal repeatedly have grappled with the meaning of "supervisor" as defined in Section 2(11) of the NLRA, as has the Supreme Court in two decisions on this topic in the last 17 years. (*See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994)). The decisions of the Court in these cases evidence the legal complexity of the issue. Despite guidance from the courts, numerous commentators have opined on the legal difficulty in applying Section 2(11) of the NLRA.[3] By restricting the parties' ability to file post-hearing briefs and fully analyze such complex issues, the Final Rule increases the risk of the type of "ad hoc" determinations that prevent the Board from assuring employees the "fullest freedom" in exercising their NLRA rights. (*Specialty Healthcare*, 357 N.L.R.B No. 83 at *17, n.27).

[3] *See, e.g.*, Wilma B. Liebman & Peter J. Hurtgen, *The Clinton Board(s) – A Partial Look From Within*, 16 Lab. Law. 43, 48 (Summer 2000) (noting that "[d]istinctions between employee and supervisor blurs as the workforce becomes more highly educated, skilled, and technically expert," with supervisory status presenting of the "more persistently difficult" issues before the Board). Both Ms. Liebman and Mr. Hurtgen formerly served as Members and Chairmen of the Board.

- **The Final Rule violates the APA, as the Board failed to provide a reasoned analysis for engaging in such a significant departure from its longstanding and highly effective election rules.**

The Board failed to undertake any reasoned analysis of its existing procedures that have resulted in elections being held, on average, 38 days after the filing of a petition. In its rush to issue the Final Rule, the Board summarily dismissed the considerable efficiencies of its current election procedures by stating, in essence, "we can do better." Further, the Board gave, at most, only a cursory analysis of its own substantial election data. Because the Board failed to provide a reasoned analysis supporting the change in longstanding Board election regulations, the Final Rule is arbitrary and capricious under the APA.

ARGUMENT

On December 22, 2011, the Board published its Final Rule regarding representation case procedures (76 Fed. Reg. 80,138), which purportedly seeks to "reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation." (*Id.*).[4] The Final Rule claims to only "streamline Board procedures in order to eliminate wholly unnecessary barriers to the expeditious resolution of questions concerning representation." (*Id.* at 80,148). In reality, however, the Final Rule significantly limits or wholly eliminates certain important aspects of the pre-election hearing process rendering the hearing "inappropriate" under the Act. *Amici* submit that the type and scope of the hearing provided by the Final Rule is based on an impermissible construction of the Act and, as a result, must be invalidated.

[4] *Amici* incorporate by reference the more detailed account of the Final Rule's procedural history contained in Plaintiffs' Brief.

I. THE EXTENSIVE NATURE OF THE FINAL RULE'S CHANGES TO THE PRE-ELECTION HEARING PROCESS SHOULD NOT BE MINIMIZED.

The Final Rule's changes to the Board's pre-election hearing are extensive and significant for all employers, employees, and unions operating under the Act. *First*, the Final Rule limits what issues can be raised in a pre-election hearing by amending § 102.64 to state that the statutory purpose of a pre-election hearing is to determine if there is a question concerning representation. (76 Fed. Reg. 80,162). The Final Rule describes that a question of representation exists if a petition has been filed for an appropriate unit and there is no election bar. (*Id.*). The Final Rule also limits parties' ability to address disputes concerning individual employees' eligibility to vote and inclusion in, or exclusion from, the unit. (*Id.* at 80,162, 80,163-71). While the amendment to § 102.66(a) gives the regional director discretion to address eligibility issues prior to the election, the Final Rule explicitly states that the Board views "such evidence [a]s not relevant to the existence of a question of representation." (76 Fed. Reg. 80,162; *see also id.* at 80,164 ("[T]he regional director need not decide all individual eligibility and inclusion questions (so long as they do not affect the type of election that must be conducted) and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals")).

Second, the Final Rule amends § 102.66(d) to eliminate the parties' current right to file post-hearing briefs summarizing the evidence and analyzing applicable law. (76 Fed. Reg. 80,170-71). The Final Rule claims that "given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case." (*Id.* at 80,170). While the Final Rule again notes that the amendment "does not prevent parties from filing post-hearing briefs," it does prevent a party from filing a brief without the "special permission" of the hearing officer. (*Id.* at 80,185 (to be codified at 29 C.F.R. § 102.66(d))). In

light of the Final Rule's goal of accelerating hearings and elections, it is clear that the Final Rule's intent is for hearing officers to rarely grant such "special permission."

II. THE FINAL RULE IS AN IMPERMISSIBLE CONSTRUCTION OF THE ACT.

Section 9(c)(1) of the National Labor Relations Act requires that the Board engage in an "appropriate hearing" prior to directing an election. (29 U.S.C. § 159(c)(1)). In the Final Rule, the Board asserts that the amended hearing process allows for an "appropriate hearing" because it "permit[s] parties to introduce all evidence at the pre-election hearing that is relevant to whether a question of representation exists." (76 Fed. Reg. 80,164). Under the Final Rule, an "appropriate hearing" excludes consideration of individual eligibility issues, including, among other issues, whether an individual is a supervisor who is exempt from the Act or an employee who is part of the unit at stake in the election. (*Id.*). In sum, the Board interprets "appropriate hearing" to mean that individual eligibility and inclusion issues do not have to be addressed before the election.

Amici respectfully submit that the Board's Final Rule—particularly its definition of what constitutes an "appropriate hearing"—is an impermissible construction of the Act. The Final Rule's overly-simplistic approach ignores numerous pre-election questions that often arise beyond the mechanical filing of a petition for what may or may not be an appropriate unit. It ignores, for example, the potential for differences of the parties on whether the unit is appropriate, whether categories of employees should be added to the unit, and whether individual employees or entire categories of employees should be excluded from the unit on the basis of independent contractor, supervisory, managerial, or confidential status. While the Act's text does not explicitly define what constitutes an "appropriate hearing," the Act's legislative history and prior Board interpretations of the Act reveal that individual eligibility issues must be addressed at a pre-election hearing, making the Final Rule's interpretation of the statute

impermissible. (*See, e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Air Line Pilots Ass'n v. FAA*, 3 F.3d 449 (D.C. Cir. 1993) (applying *Chevron* to invalidate agency's unreasonable and impermissible interpretation defining statutory term)).

When applying *Chevron* to review an agency's construction of the statute it administers—here, the NLRB's construction of what constitutes an "appropriate hearing" under the NLRA—the court first asks whether Congress has directly addressed the issue. (467 U.S. at 842-43). If so, both the Board and the court must give effect to Congress's intent. (*Id.*). In determining whether Congress has addressed the issue, the court employs traditional tools of statutory construction, including a review of legislative history. (*Id.* at 843 n.9). The courts, and not the Board, are the final authority on whether Congress's intent in the NLRA is clear. (*See id.*). If Congressional intent on an issue is silent or ambiguous, the court will defer to the agency's interpretation as long as it is a permissible construction of the statute. (*Id.* at 843).

In this case, the Act's legislative history and purpose require that the Final Rule be invalidated at *Chevron*'s first step—an argument forcefully made by Plaintiffs. (Pls.' Br. 17-18). But even if the Court proceeds to *Chevron*'s second step, the Act's legislative history and the Board's own prior interpretations of the Act reveal that the Final Rule is an impermissible construction of the Act.

A. The Board's Final Rule Conflicts With Congressional Intent As Evidenced By The Act's Legislative History.

The legislative history of Section 9(c) confirms that Congress intended for the pre-election hearing at a minimum to address, if not decide, issues regarding voting eligibility. (*See* 93 Cong. Rec. 6860 (June 12, 1947) (statement of Sen. Taft); H.R. Rep. 86-741, at 24-25 (1959) *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting & Disclosure Act, 1959, 782-83 (1974); Pls.' Br. at 25-26). Indeed, the legislative history to the 1947

amendments reveals that Congress considered, and rejected, exactly the unsupported and specious concerns with election timing that the Board now uses as the foundation for the Final Rule.

While the Senate debated a conference report resolving issues between House and Senate versions of the Taft-Hartley legislation, Senator Morse addressed his concerns with the proposed conference report, including the report's recommendation to delete language allowing for an election prior to any hearing. (*See* 93 Cong. Rec. 6444 (June 5, 1947)). He noted that "[t]he procedure of holding an immediate election, before hearing, in simple representation cases that present no substantial issues, avoids the necessity for many hearings altogether, and often makes collective bargaining possible without delay." (*Id.* at 6454). Senator Morse stated that requiring a hearing would "play[] into the hands of employers who wish to resort to dilatory tactics" and delay elections "even though there is no reason why an immediate election cannot be held, except refusal of a recalcitrant employer or union desiring delay to consent." (*Id.*). Senator Morse's position was rejected. Both chambers concluded that pre-election hearings were important and agreed to require an "appropriate" hearing prior to election. (*Id.* at 6444).

In response to the statements of Senator Morse and others, Senator Taft stated that:

> The conferees dropped from [Section 9(c)(4)] a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. *It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.* During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill.

(93 Cong. Rec. 6860) (emphasis added).

While the Final Rule acknowledges Senator Taft's statements, albeit in a footnote (76 Fed. Reg. 80,165 n.116), the Board's analysis of the statement's meaning is incorrect and unreasoned. For instance, the Final Rule incorrectly states that Senator Taft's statement should have less import because it was "made after the dispositive vote." (*Id.*). In fact, consideration of the Taft-Hartley legislation went far past the date of Senator Taft's statement, including a Presidential Veto by President Truman, days of subsequent filibuster debate (*see* 93 Cong. Rec. S-7551-7675 (daily ed. June 21, 1947)), and successful votes to override the veto in both chambers. (93 Cong. Rec. H-7504 (daily ed. June 20, 1947); 93 Cong. Rec. S-7692 (daily ed. June 23, 1947)).

Further, the Board's suggestion that Senator Taft was speaking as a single senator and not reflecting the intent of Congress ignores Senator Taft's important role in the legislation and the context of his statement. (93 Cong. Rec. 6860). Senator Taft was the legislation's principal sponsor and Chairman of the U.S. Senate's Labor and Public Welfare Committee. Further, Senator Taft was acting in his capacity as the legislation's principal sponsor when he entered these statements into the Congressional Record "to make clear the legislative intent," (*id.* at 6858), which included the House's "strenuous object[ion]" to the proposal to allow pre-hearing elections. (*See id.* at 6860).

The Board also attempts to minimize the impact of Senator Taft's important remarks by stating that Senator Taft could not have meant that the Board had to "decide" questions on eligibility, citing certain federal court decisions that, according to the Board, purportedly hold that no statutory entitlement exists to a decision on eligibility issues prior to an election. (76 Fed. Reg. 80,165 n.116). All of the cases cited in the Final Rule to support this point, however, were decided decades after Senator Taft's remarks. Indeed, none of those cases actually analyzed the

propriety of delaying decisions on eligibility issues, instead simply noting the Board's practice of deferring decisions on questions of eligibility in narrow and limited circumstances primarily involving small numbers of voters that would not be expected to have an impact on the election. (*See Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) (noting the Board's practice); *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506 (2d Cir. 1986) (noting that deferring decisions on eligibility was intended to be used where the challenges "involve only the inclusion or exclusion of a few voters and, even if successful, may not change significantly the scope of the unit."); *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1301 (9th Cir. 1985) (noting practice and its limits); *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1443 (9th Cir. 1983) (noting practice); *NLRB v. Doctors' Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973) (noting practice)). Accordingly, such decisions provide no guidance or context for Senator Taft's statements.

The Board's rationale for disregarding Senator Taft's remarks is devoid of any other analysis, reasoned or otherwise. (76 Fed. Reg. 80,165 n.116). Instead, the Board simply says that it "does not believe that Senator Taft's vague reference to 'eligibility to vote' was intended to encompass" the types of issues the Final Rule prohibits. (*Id.*). Senator Taft's statement, however, reveals much more. First, Congress intended the hearing to go beyond the mere question concerning representation and reach eligibility issues. Senator Taft envisioned at least two sequential issues to be addressed in the hearing. Initially, the hearing would address whether an election was proper at the time, *i.e.*, whether the union had support and an election was not barred. (93 Cong. Reg. 6860). "*If so,*" the hearing would proceed to the issues of determining the appropriate unit and determining those employees eligible to vote for that unit. (*Id.*).

Senator Taft's statement also reveals that Congress was not rejecting some hypothetical hearing and election scenario. At the time the amendment was considered, the Board was holding a portion of its elections prior to hearings. (*Id.*). Congress's refusal to endorse that practice is yet further evidence that Congress desired a substantive pre-election hearing as stated by Senator Taft. Rather than providing a reasoned analysis for the Final Rule's departure from Congress's two-stage "appropriate hearing" or its explicit rejection of prior Board practice, the Board instead merely relies on the unsupported "belief" that Senator Taft, the principal sponsor and floor manager of the legislation, did not mean what he said. (76 Fed. Reg. 80,165 n.116).

B. The Board's Final Rule Conflicts With Its Own Prior Interpretations Of The Act.

The Final Rule also recognizes that the Board's own precedent agreed with Congress's vision of a pre-election hearing requiring at least the consideration of eligibility issues. In *Barre-National, Inc.*, (316 N.L.R.B. 877 (1995)), the Board considered whether a Regional Director's decision to prohibit the litigation of supervisory status prior to an election rendered the Section 9(c) hearing "inappropriate." (*Id.* at 878). The Regional Director, "as a means of avoiding delay and expense," prevented the litigation of supervisory status, instead allowing those employees to vote subject to challenge—nearly identical to the procedure the Board endorses in the Final Rule. (*See id.*). The Board concluded that the abbreviated pre-election hearing conducted by the Regional Director in the case "did not meet the requirements of the Act and the Board's Rules and Statements of Procedure." (*See id.*). In a concurring opinion, another Board Member echoed the majority's holding, noting that the Regional Director's "action constituted error because . . . the statute—even apart from our implementing rules and regulations—entitles parties to preelection testimonial hearings." (*Id.* at 880) (Stephens, concurring).

In *Barre-National*, the Board majority concluded that, given the circumstances of the particular case, the proper remedy was to raise the unlitigated supervisory issue in post-election objections. (*Id.* at 879). The Board majority, however, cautioned regional directors against adopting the approach of denying parties the ability to present evidence and then simply relegating the issues to post-election review. (*Id.*). While one Member dissented on the remedial issue, he noted that the majority "concede[s], as they must, that the Regional Director violated the procedures of the Act, as well as the Rules of the Board, by not permitting the Employer to adduce evidence on the issue of supervisory status." (*Id.* at 880) (Cohen, dissenting).

Through the Final Rule, the Board overturns its *Barre-National* decision. (76 Fed. Reg. 80,165).[5] In the Final Rule, the Board acknowledged that, when *Barre-National* held that the hearing "did not meet the requirements of the Act and the Board's rules and Statements of Procedure," the opinion used the conjunctive "and" rather than "or." (76 Fed. Reg. 80,165) While a reasonable interpretation of the word "and" would mean that both the Act "and" the Board's rules were violated when the regional director prohibited the pre-election litigation of the supervisor issue, the Board reaches a different conclusion in the Final Rule. Engaging in circular logic, the Board states that, because "nothing in Section 9(c) of the Act can possibly be understood to give parties a right to litigate questions of individual eligibility or inclusion prior to an election," the use of the word "and" must not have meant "and." (76 Fed. Reg. 80,165). As a result, the Board concludes that *Barre-National* must have only been relying on the Board's own regulations and not the Act. (76 Fed. Reg. 80,165). The Final Rule, however, makes no

[5] Contrary to the Board's assertion, the Final Rule is substantive, rather than procedural, at least in part because of the Board's decision to overturn prior Board precedent in the Final Rule. (76 Fed. Reg. 80,165) ("The Board will no longer follow *Barre-National* under the amended rules.")). In any event, the Final Rule is "sweeping" in its impact on parties' substantive rights. (*See, e.g.*, Pls.' Br. 41). As Senator Morse noted in the 1947 debates, while "[m]any of the changes . . . may be termed procedural, rather than substantive . . . . it is virtually impossible to separate procedure from substance, especially in the field of labor relations." (93 Cong. Rec. 6451).

mention of either the concurring or dissenting opinions in *Barre-National*, which explicitly state the Board's conclusion that the hearing was inadequate under "the Act" (316 N.L.R.B. at 880), and "the statute—*even apart from our implementing rules and regulations*." (*Id.*) (emphasis added).

In addition, the Final Rule is devoid of any consideration of *Barre-National*'s remedial issues. The Final Rule fails to discuss the Board's admonition that regional directors refrain from routinely delaying eligibility issues to post-election review. (*See* 316 N.L.R.B. at 879). Instead, the Final Rule adopts that very approach without any acknowledgement of the Board's admonishment in *Barre-National* to refrain from doing so.

The Final Rule's interpretation of what constitutes an "appropriate hearing" rewrites its prior decision without any reasoned analysis. Where, as here, an agency "fail[s] to come to grips with conflicting precedent [it] constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" (*Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971))).

In short, the Board's limited analysis of the Act, its legislative history, and the Board's own prior interpretations of Section 9(c)(1) within the Final Rule, was unreasonable, inconsistent, and thus, impermissible. Accordingly, the Final Rule must be set aside. (*See Airline Pilots Ass'n*, 3 F.3d at 453 (setting aside agency definition which is "internally inconsistent and therefore unreasonable and impermissible under *Chevron*.")).

III. THE HEARING PROVIDED UNDER THE FINAL RULE IS STATUTORILY INADEQUATE AND CREATES NUMEROUS LEGAL AND PRACTICAL PROBLEMS FOR EMPLOYERS, EMPLOYEES, AND UNIONS.

The Final Rule's changes to the pre-election hearing process are not merely legalistic errors, but will have a significant impact on all parties. First, while the Final Rule claims to allow parties the possibility of litigating individual eligibility issues, the Final Rule's mandate is

that the hearing be expedited by not addressing those issues. Second, the Final Rule creates a hearing system that will limit the right of parties to present legal authority and relevant facts to regional directors and the Board regarding important voter eligibility issues. Such accelerated and uninformed decision-making will result in legally unsupportable "ad hoc" decisions, rendering the Section 9(c) statutorily-required pre-election hearing "inappropriate."

A. The Final Rule's Significant Limitation On The Pre-Election Hearing Leaves Important Issues Unresolved And Threatens Employees' Exercise Of Their Section 7 Rights.

The Final Rule significantly limits the issues that may be raised by parties at a pre-election hearing. The Board in the Final Rule claims that these issues are "wholly unnecessary barriers" to an election and "unnecessary litigation" in the pre-election hearing. (76 Fed. Reg. 80,148). *Amici* respectfully, but strongly, disagree. The Final Rule's curtailed pre-election hearing leaves open a number of important supervisory issues and other eligibility issues that should be addressed prior to the election.

1. Prohibiting Resolution, Or Even Analysis, Of Section 2(11) Supervisory Issues Creates Legal And Practical Problems For All Parties During The Time Period Prior To An Election.

The Final Rule's failure to address individual eligibility issues raises both legal and practical problems, particularly with respect to potential supervisors under Section 2(11) of the Act. (*See* Comments of the AHA at 18, 20-22; Comments of HR Policy & SHRM at 59-61). Similar questions on voter eligibility also may arise regarding independent contractor status and managerial and confidential employee exclusion issues. The Final Rule described the concerns of *Amici* and other commenters as "exist[ing] only at the margin" and that "in virtually every case" the employer is left with other managers and supervisors whose status is undisputable. (76 Fed. Reg. 80,168). The Board's unsupported assertions are misplaced. The fact that employers may have other undisputed supervisors with no relation to the petitioned-for unit is irrelevant.

Further, rather than "exist[ing] only at the margin," supervisory status has been at the center of numerous Board, Court of Appeals, and Supreme Court decisions, especially in the healthcare industry. (*See Ky. River Cmty. Care*, 532 U.S. 706; *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006); *see also* Def.'s Mem. In Support Of Its Mot. For Summ. J. & Alternative Mot. To Dismiss Counts I & II Of Pls.' First Am. Compl. ("NLRB Br.") 16 ("Voter eligibility questions—including who is a supervisor—may be of great moment to the parties.")).

Oakwood Healthcare underscores the complex and fact-intensive nature of Section 2(11) supervisory issues where the Board is required to "protect the rights of those covered by the Act" and "hew[] to the language of Section 2(11)." (348 N.L.R.B. at 686). In that case, the Section 2(11) issues required the Board to analyze the nature of the work assigned by the supervisors whose status was in dispute and the degree of discretion each supervisor could exercise. (*Id.* at 689, 692). The analysis also required a review of the employer's policies and verbal instructions to determine what limits, if any, were placed on the independent judgment of the individual supervisors in question. (*Id.* at 693).

Additionally, because some of Oakwood Healthcare's employees rotated in and out of a charge nurse position and thus potentially were supervisors, the Board was required to consider the regularity with which each individual employee rotated and whether they spent a "substantial" part of their time in the charge nurse position. (*Id.* at 687, 699). The Board found supervisory status where individuals spent only 10 to 15 percent of their total work time in a supervisory position. (*See id.* at 694).

As American employers continue to design more efficient workforces by allowing employees to frequently rotate among job positions and functions, significant portions of an employer's workforce may be eligible to be considered supervisors under the Board's fact-

intensive test. The Final Rule, however, prohibits pre-election consideration of supervisory status issues, which will lead to frequent elections where supervisory status issues are left completely unaddressed.

The Final Rule's limitation on addressing supervisory issues renders the hearing "inappropriate." By leaving unanswered such important issues, both employers and unions will face a number of legal and practical problems as they prepare for an election. For example, assume that a union petitions for a unit of over 500 registered nurses at a health care facility. The employer objects to the inclusion of 100 of the nurses and submits an offer of proof that those nurses are Section 2(11) supervisors because they are either permanent charge nurses or nurses who regularly rotate into such positions. Under the Final Rule, the hearing officer may be allowed to direct that those 100 employees vote subject to challenge without their Section 2(11) status being addressed. This scenario creates a number of legal and practical problems.

For instance, if the employer erroneously believes that a nurse is actually a Section 2(11) supervisor, and thus, gives him or her management training on what can and cannot be said during a union election campaign, the employer is at risk of committing an unfair labor practice by restraining Section 7 protected activity. (*See St. Alphonsus Hosp.*, 261 N.L.R.B. 620 (1982) (finding a violation where an employer mistakenly believed that employees were supervisors; "it is too well settled to brook dispute that the test of interference, restraint, and coercion . . . does not depend on an employer's motive." (quotation marks & citation omitted)). Conversely, if the employer does not object to the inclusion of a nurse, erroneously believing that he or she is not a supervisor, and allows the nurse to talk with co-workers about unionization when the nurse is actually a Section 2(11) supervisor, the employer also has violated the Act. (*See, e.g.*, *Lee-Rowan Mfg. Co.*, 129 N.L.R.B. 980 (1960) (holding that line leaders were supervisors and then

finding violations based on acts of line leaders); *see also Israel, A.C., Commodity Corp.*, 160 N.L.R.B. 1147 (1966) (accord)).[6]

Additionally, improper conduct by a putative supervisor—who may be a legal "agent" of an employer—could support objections to the election by the non-prevailing party and result in an overturning of election results. Moreover, in the event that an employer disciplines an employee who is believed to be a supervisor for breaching his or her duty of loyalty to the employer, the employer could face significant backpay and benefits liability, in addition to other remedies available under the Act, if it is eventually determined that the putative supervisor was an employee engaging in protected activity.

A union is open to similar problems (76 Fed. Reg. 80,168), if it mistakenly uses supervisors as part of an organizing campaign. For instance, if the union while organizing its petitioned-for 500 nurse unit allows a charge nurse to hand out authorization cards, but the charge nurse qualifies as a Section 2(11) supervisor, the union's conduct could result in an election in favor of the union being set aside. (*See Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 906-07 (2004) (noting that "supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances" and that, generally, "employees are protected from conduct by supervisors, be it prounion or antiunion, which interferes with the employees' freedom of choice.")).

Even if, as noted in the Final Rule, all of the uncertainty regarding supervisory status cannot be completely resolved (76 Fed. Reg. 80,168), the Final Rule significantly exacerbates the problem. The Final Rule effectively eliminates the possibility of resolution of the

[6] As these cases reflect, while the supervisory status issue is particularly important in the health care field, the issue is present across a wide spectrum of employers.

supervisory issue at a hearing prior to the election and requires that the affected putative supervisors vote subject to challenge, thereby exposing both employers and unions to potential unfair labor practice charges and election objections.[7]

The Final Rule simply chooses to ignore these important issues until after the election has been concluded, leaving the issues either deferred or unresolved. In the event that the challenged ballots of the contested employees would be determinative to the outcome of the election, the unresolved issues would be litigated and decided, meaning that the Final Rule would only delay, rather than avoid, the time and cost of litigation. On the other hand, in the event that the challenged ballots are not determinative and "rendered moot by the election results," (*id.* at 80,166), the Section 2(11) status of those disputed individuals may never be resolved, enabling the aforementioned significant legal and practical problems to persist.

Returning to the example of the petitioned-for nursing unit, an employer with unresolved charge nurse issues will be left without any guidance on whether the permanent or rotating charge nurses—a potentially significant number of employees—should be included or excluded from the unit. (*See* 76 Fed. Reg. 80,174). As a result, the employer acts at its peril when, for example, it (1) unilaterally changes the terms and conditions of employment for those individuals, including their rates of pay, schedules, on-call availability, and availability to transfer or "float" to other units; (2) deals directly with them by, for instance, asking about their willingness to work a modified schedule of shifts; or (3) provides them with training that, if given to an employee, would be considered a restraint on Section 7 activity. Likewise, the union

[7] Similar issues also arise regarding manager employee eligibility issues, given that such classification of employees may be found to be employer agents. *(See Idaho Falls Consol. Hosps., Inc.*, 257 N.L.R.B. 1045 (1981) (finding that employees were managerial employees and then setting election aside based on employees' conduct), *enf. denied in part*, 731 F.2d 1384 (9th Cir. 1984) (finding that facts of the particular case did not support conclusion individuals were speaking on behalf of employer); *see also A&R Window Cleaning*, 247 N.L.R.B. 532 (1980) (imputing managerial employee actions to employer)).

lacks any guidance on whether it represents those charge nurses for purposes of grievances and bargaining or owes them a duty of fair representation. But perhaps most importantly for the purposes of the Act, failing to resolve the Section 2(11) issues means that the employees whose supervisory status remains unresolved are left uncertain of whether they possess Section 7 rights. Absent agreement among the parties on these issues, the differences will only be resolved by litigation. Once again, the Final Rule will only have delayed the resolution of an issue that, prior to the Final Rule, generally had been addressed in a hearing typically lasting less than one day. (76 Fed. Reg. 80,170) ("[T]he Board notes that the average pre-election hearing lasts for less than one day.")).

The Final Rule abdicates the Board's "responsibility to protect the rights of those covered by the Act," (*Oakwood Healthcare*, 348 N.L.R.B. at 686), and still presents the risk that litigation will eventually be required—a factor considered by Congress in rejecting the Board's earlier practice of pre-hearing elections. (93 Cong. Rec. 6860). As a result, the Final Rule's limitation on raising eligibility issues such as Section 2(11) issues renders both the pre-election hearing "inappropriate" and the Final Rule invalid.

2. The Final Rule's Provisions Prohibiting An Analysis Of Large Portions Of Potential Units Thwarts Employee Informed Choice And Creates Potentially Fractured Units.

The Board's NPRM proposed that "[i]f, at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing." (76 Fed. Reg. 36,841). *Amici* and others commented that directing an election without addressing eligibility issues for such a significant portion of the unit violated due process, violated Section 9(c)(1)'s "appropriate hearing" requirement, would create confusion among the voters regarding the unit at stake, and could

prolong, rather than delay, election litigation. (Comments of the AHA, ASHHRA & AONE at 16-18; Comments of HR Policy & SHRM at 57-61).

In response, the Final Rule eliminated the "20-percent rule," instead giving regional directors largely undefined and wide discretion to address, or refuse to address, any issues of individual eligibility, regardless of the percentage of the unit those individuals comprise. (76 Fed. Reg. 80,168). The Final Rule states that the "hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals," including "whether . . . groups of individuals fall within the terms used to describe the unit." (*Id.* at 80,164). For many of the same reasons that the "20-percent rule" violated Section 9(c)(1)'s requirement of an "appropriate hearing," (*see* Comments of the AHA, ASHHRA & AONE at 16-18; Comments of HR Policy & SHRM at 57-61), the Final Rule's instruction preventing parties from addressing the eligibility of entire classes of employees—apparently regardless of size—also is an impermissible construction of the Act's "appropriate hearing" requirement.

As the Board recognized in its NPRM, federal courts have previously overturned elections where, post-election, a significant number of challenged ballots are upheld and employees excluded from the unit, thus changing the scope and character of the unit. (76 Fed. Reg. 36,824 & n.52 (collecting cases)). In those cases, courts have held that "by informing employees that they were voting to be represented in one unit and then changing the scope and character of the unit after the election, the Board was 'misleading the voters as to the scope of the unit.'" (*Id.* at 36,824 (quoting *Lorimar Prods., Inc.*, 771 F.2d at 1302); *see also NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpublished) ("Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as

modified, is fundamentally different in scope or character . . . the employees have effectively been denied the right to make an informed choice in the representation election.”))).

The Final Rule’s example of a petitioned-for unit reveals that the Board’s interpretation of an “appropriate hearing” allows, and may actually encourage, elections in which “employees [will be] effectively denied the right to make an informed choice in the representation election” because the employee will not know whether he or she or who else will be included in the final unit. The Final Rule’s example posits that:

> if the petition calls for a unit including “production employees” and excluding the typical “professional employees, guards and supervisors as defined in the Act,” then the following would all be eligibility or inclusion questions: (1) Whether production foremen are supervisors; (2) whether production employee Jane Doe is a supervisor; (3) whether workers who perform quality control functions are production employees; and (4) whether Joe Smith is a production employee.

(76 Fed. Reg. 80,164 (internal citations omitted)). Because the Final Rule notes that a hearing officer conducting an “appropriate hearing” “need not permit” evidence on these issues, the election will occur with those individuals voting subject to challenge. (*Id.* at 80,166).

As a result, the potential units for certification range from including only production employees to also including any combination of production foremen, employees performing quality control functions, and a whole cast of individuals who perform quasi-supervisory or quasi-production employee functions, depending on whether the challenged ballots could be determinative of the outcome of the election. For non-acute health care employers with substantial numbers of employees rotating through supervisory positions, there may be as many potential units as there are challenged ballots, vastly increasing the range of possible units. Even though the Board eliminated the “20-percent rule,” the Final Rule still creates the potential for frequent elections where the range of units at stake are “fundamentally different in scope or

character," thus preventing employees from making an informed choice. (*See Beverly Health & Rehab. Servs.*, 120 F.3d 262). Because the Final Rule will routinely create these issues, as shown by the Board's own example, the hearing in the Final Rule is not an "appropriate hearing" that facilitates the "fullest freedom" in the exercise of Section 7 voting rights. (*See id.*; *Lorimar Prods, Inc.*, 771 F.2d at 1302).

Additionally, pre-election hearings under the Final Rule will encourage elections in and certifications of overly-narrow units. The standards for unit appropriateness determinations recently changed significantly in the Board's decision in *Specialty Healthcare*, (357 N.L.R.B. No. 83 (Aug. 26, 2011), *appeal filed sub nom., Kindred Nursing Ctrs. E. v. NLRB*, Case No. 12-1027 (6th Cir. Dec. 30, 2011)). *Specialty Healthcare* eliminated the long-standing requirement that as a part of the appropriateness analysis a union must show that "the interests of the group sought are sufficiently distinct from those of other employees." (*E.g.*, *Wheeling Island Gaming*, 355 N.L.R.B. No. 127 (Aug. 27, 2010), slip op. at *1 n.2). The Board now holds that, when the petitioned-for employees are "readily identifiable as a group" and share the traditional community of interests criteria, the unit will be found appropriate unless a party could show that excluded employees share "an overwhelming community of interests with those in the petitioned-for unit." (357 N.L.R.B. No. 83, at *17). The Board has offered limited guidance regarding the application of this new standard. (*See, e.g.*, *Odwalla, Inc.*, 357 N.L.R.B. No. 132 (Dec. 9, 2011))).

The Final Rule, by limiting the issues that may be raised in a pre-election hearing, appears to significantly limit an employer's opportunity to meet the heightened standard regarding excluded employees as set forth in the Board's *Specialty Healthcare* decision. Again referring to the Final Rule's own "production employees" example, once the hearing officer is

satisfied that "production employees" share a community of interest, have exhibited a showing of interest, and that an election is not barred, the election will be directed. However, if the employer believes that the unit of "production employees" is overly narrow or a fractured unit and seeks to add, for instance, workers who perform quality control functions, the employer may be prohibited from addressing the issue. (76 Fed. Reg. 80,164).

In the event that the challenged ballots are determinative as to the outcome of the election, litigation on this issue would proceed and the time- and cost-saving effects sought by the Final Rule will be unrealized. In the event that the union prevails by a margin greater than the number of challenged ballots, however, the regional director will certify the union, apparently as the representative for only those production employees that were undisputed, with the unit placement of all other employees left unresolved and subject to potential future litigation through a unit clarification petition. (*Id.* at 80,174). The Board's apparent preference for more litigation and disputes over the definition of a unit is internally inconsistent with the Final Rule's stated goal of reducing litigation and dispute in representation cases. (*See Air Line Pilots Ass'n*, 3 F.3d at 453-54 (noting internal inconsistencies when invalidating a rule as unreasonable and impermissible)).

In combination, *Specialty Healthcare* and the Final Rule are likely to have a profound effect on the Board's pre-election process. First, *Specialty Healthcare* lowers the unit appropriateness standard by eliminating the requirement that the unit be "sufficiently distinct" from excluded employees. Second, the Final Rule creates the potential for a hearing that will only address (1) whether the petitioned-for unit is appropriate under *Specialty Healthcare*; (2) whether there is an election bar, which the union would almost certainly be aware of; and (3) the showing of interest, which is non-litigable. (76 Fed. Reg. 80,170). Assuming that the union has

engaged in reasonable diligence, the Final Rule's pre-election hearing may fail to address important substantive unit eligibility issues, becoming an illusory proceeding before an election is directed. The Final Rule, by limiting consideration of these issues, not only increases the likelihood that overly-narrow units will be certified, but also eliminates the possibility of creating a sufficient record for a reviewing regional director, Board, or court to analyze whether the unit is actually appropriate.

The inability of the parties to create as a matter of right a record on these issues, together with the limited appeal rights provided under the Final Rule, will impair the development of coherent standards in applying *Specialty Healthcare.* The Board's *Specialty Healthcare* decision recognized the "highly fact-specific endeavor" involved in the pre-election hearing process, particularly in regard to diverse workplaces. (357 N.L.R.B. No. 83, at *17). The opinion further noted that a standard allowing for slight variances did not fulfill Section 9(b)'s admonition that the Board assure "'employees the fullest freedom in exercising the rights guaranteed by the Act.'" (*Id.*; 29 U.S.C. § 159(b)). Significantly, in response to observations that unit determinations were historically "chaos" and "ad hoc", the Board stated that an "ad hoc" standard "is hardly a standard to aspire to in this area fraught with implications for the effective exercise of statutory rights." (357 N.L.R.B No. 83 at *17, n.27).

The Final Rule, by limiting parties' ability to make a record or appeal adverse determinations on such "highly fact-specific" issues, will be more likely to produce the type of "chao[tic]" and "ad hoc" bargaining unit determinations that *Specialty Healthcare* claimed it was attempting to avoid. (*Id.*). Such a process simply cannot be what Congress intended when it required an "appropriate hearing" to address issues related to "eligibility to vote." (93 Cong. Rec. 6860).

B. The Final Rule's Elimination Of Post-Hearing Briefing Ignores The Fact-Intensive Nature Of Eligibility Issues And Will Lead To Inconsistent Results Under The Act.

In the Final Rule, the Board asserts that "given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case." (76 Fed. Reg. 80,170). As a result, the Final Rule amends § 102.66(d) to require that parties obtain "special permission" from a hearing officer before filing post-hearing briefs. (76 Fed. Reg. 80,185 (to be codified at 29 C.F.R. § 102.66(d))).

The Final Rule's assertion that the factual scenarios currently addressed in pre-election hearings are "often recurring and uncomplicated" understates the fact-intensive analysis required in many individual eligibility issues. (*See Ky. River Cmmty. Care*, 532 U.S. 706; *Health Care & Retirement Corp. of Am.*, 511 U.S. 571; *Oakwood Healthcare*, 348 N.L.R.B. 686). As the Board noted in its *Specialty Healthcare* decision, slight variances in the application of legal standards to "highly-fact specific endeavor[s]" can produce "ad hoc" and inconsistent decisions in an "area fraught with implications" for employees' rights. (357 N.L.R.B. No. 83, at *17, n.27). By significantly restricting parties' ability to offer written analysis applying the law (whether settled or not) to fact-specific cases, however, the Board in the Final Rule fosters an "ad hoc" regime that it decried just six months earlier.

One example of such "highly-fact specific endeavor[s]" can be seen in the Section 2(11) supervisory issues surrounding charge nurses addressed by the Board in *Oakwood Healthcare*. (348 N.L.R.B. 686; *see* Section III.A.1, *supra*). The Board majority recognized that "[w]hether an individual possesses a [Section] 2(11) supervisory function has not always been readily discernible by either the Board or the reviewing courts." (348 N.L.R.B. at 688). While the Board's decision attempted to offer "clear and broadly applicable guidance for the Board's regulated community," (*id.* at 686), it still required that the Board "analyze each case on its

individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11)." (*Id.* at 690).

Oakwood Healthcare addressed the supervisory status of twelve nurses who permanently served as charge nurses as well as numerous other nurses who rotated into this position. (*Id.* at 687). In deciding the case, the Board addressed, among other issues, the following:

- The nature of the assignments given, specifically whether an employee is assigned to regularly administer medications or assigned to immediately give medication to a particular patient, (*id.* at 689);

- The degree of discretion the employee exercises in providing direction, specifically whether the employee's responsible direction is performed with the degree of discretion required to reflect independent judgment, (*id.* at 692);

- Whether an employer's policies, rules, collective bargaining agreements, or verbal instructions from higher authorities effectively control or dictate an putative supervisor's decision-making process, (*id.* at 693); and

- Whether putative supervisors rotate with regularity and, if so, whether they regularly spend a "substantial" part of their time in the putative supervisor positions. (*Id.* at 699).

Nothing in the Final Rule diminishes the complexity of Section 2(11) issues recognized by *Oakwood Healthcare* or any other pre-election issue. Instead, the Final Rule makes such issues more complex for resolution by moving their resolution, if at all, to post-election proceedings. The Final Rule's elimination of the right of parties to carefully analyze these issues—even assuming they are allowed to be addressed in the hearing—through post-hearing briefing will only serve to exacerbate the problem. (76 Fed. Reg. 80,170-71, 80,185 (to be codified at 29 C.F.R. § 102.66(d))). Because the Final Rule's "appropriate hearing" will be more likely to produce "chao[tic]" and "ad hoc" determinations in an "area fraught with implications for the effective exercise of statutory rights," (*Specialty Healthcare*, 357 N.L.R.B No. 83 at *17,

n.27), *Amici* submit that the Final Rule's hearing is not a permissible construction of what constitutes an "appropriate hearing" guaranteed by the Act.

IV. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS UNDER THE ADMINISTRATIVE PROCEDURES ACT AS IT IS NOT BASED ON ANY REASONED ANALYSIS AND FAILS TO IDENTIFY A REASONED NEED TO CHANGE CURRENT BOARD ELECTION RULES.

The Board in the Final Rule claims that it "will reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation." (76 Fed. Reg. 80,138). Yet the Board notes that its "present timeframes for processing representation cases are among the most expeditious in the Board's history," and that it meets or exceeds most of the current time targets set by the Board's General Counsel. (*Id.* at 80,148). The Board, however, deems that success "irrelevant" to whether the current changes are warranted. (*Id.*). Additionally, the Final Rule claims that its changes are supported by a correlation between shorter periods of time between petition and election and lower occurrences of unfair labor practices. (*Id.* at 80,148-49, 80,153 & ns.33, 54).

Amici respectfully submit that the Final Rule is arbitrary and capricious under the APA (5 U.S.C. § 706(2)(A)), because the Board failed to engage in a "reasoned analysis" supporting its decision "to change an existing regulatory regime." (*See AT&T Corp. v. FCC*, 236 F.3d 729, 735 (D.C. Cir. 2001)). When engaging in rulemaking, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (*Id.* at 734 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962))). Further, "when an agency determines to change an existing regulatory regime it must do so on the basis of 'reasoned analysis.'" (*Id.* (citation omitted)). Even where an agency's decision to embark on a new course of action may be reasonable, "it is arbitrary and capricious for the [agency] to apply such new approaches without

providing a satisfactory explanation when it has not followed such approaches in the past." (*Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009)).[8]

The Final Rule engages in no such analysis. Regarding the Board's own data on targets for timely elections, the Final Rule deems its admitted success as "irrelevant." (76 Fed. Reg. 80,148). Instead, the Final Rule baldly asserts a "we can do better" approach (*see id.*), without any analysis of whether the Final Rule will actually achieve "better" results. Indeed, the Final Rule may only serve to delay litigation, in elections where the challenged ballots could determine the election, or cause additional litigation, in cases where unit clarification petitions will be required.

The Board claims to rely on data from a study that concluded that shortening the time between petition and election would decrease unfair labor practices and thus better protect employees' rights under the Act. (*Id.* at 80,148-49 & ns.33, 54). Reliance on this isolated and disputed study does not meet the requirements of the APA. In response to the Board's NPRM, *Amici* reviewed the Bronfenbrenner & Warren report cited by the Board in the Final Rule and demonstrated that the report was unreliable given its flawed methodology, which included counting any allegation, regardless of merit, as an instance of an unfair labor practice occurrence. (*See* Comments of the AHA at 8-10; Comments of HR Policy & SHRM at n.9).

Nonetheless, the Final Rule continues to rely on the Bronfenbrenner & Warren report as support for its position. (76 Fed. Reg. 80,148-49 & n.33). In response to the comments of *Amici*, the Board stated that "[t]he importance of the study's findings . . . does not rest on whether or not the charges had merit, but rather on the fact that they were filed based on pre-

[8] Of course, the Board has followed extremely similar approaches in the past. Both Congress, through the 1947 amendments, and the Board, through *Barre-National*, rejected those approaches. (*See* Section II, *supra*).

petition conduct and that available information . . . suggests the employer had pre-petition knowledge of the organizing campaign." (*Id.* at 80,153). In the Final Rule, the Board relies on this study without any other factual foundation to show employer knowledge of union campaigns and, from that, assumes that employers are more likely to commit unfair labor practices. Such "'conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision.'" (*AT&T Corp.*, 235 F.3d at 737 (quoting *ARCO Oil & Gas Co. v. FERC*, 932 F.2d 1501, 1504 (D.C. Cir. 1991))).

The arbitrary and capricious nature of the instant rulemaking appears to have been driven by the rushed nature of the Board's rulemaking proceeding, in anticipation of Member Becker's departure from the Board. The Board states in the Final Rule that it adequately and meaningfully reviewed over 65,000 comments to the NPRM in only a few short months, in part due to a novel process for the computerized categorization of submitted comments. (76 Fed. Reg. 80,145 n.19). Having rushed through those tens of thousands of comments, the Board pushed through its Final Rule without providing Member Hayes an opportunity to review or vote on the text of the Final Rule. This statutorily defective approach is addressed in detail in Plaintiffs' Brief and *Amici* join Plaintiffs in this argument. (*See* Pls.' Br. 8-15). The Board also promulgated the Final Rule and reversed Board precedent with only two affirmative votes, violating its long-standing tradition of not reversing precedent without three affirmative votes to do so. (*See id.* 39 (citing *Hacienda Resort Hotel & Casino*, 355 N.L.R.B. No. 154, at *3 & n.1 (2010) (collecting cases)).

The Board's decision to promulgate the Final Rule without allowing Member Hayes an opportunity to offer his viewpoint or circulate a dissenting opinion is the antithesis of reasoned agency decision-making entitled to deference under the APA. *Amici* strongly endorse Plaintiffs' arguments underscoring the important role of a dissenting opinion in improving the

governmental decision-making process. (*See* Pls.' Br. 41-45). Accordingly, because the Final Rule failed to include a reasoned analysis for the regulatory change and the process was significantly defective, the Final Rule is arbitrary and capricious and thus must be set aside under the APA.

CONCLUSION

For the foregoing reasons as well as those set forth in Plaintiffs' Brief, *Amici* respectfully submit that the Board's Final Rule fails to satisfy the judicial review standards of the Administrative Procedures Act. The Final Rule rests on impermissible constructions of Section 9(c)(1)'s guarantee of an "appropriate hearing" and is arbitrary and capricious. For these reasons as well as those set forth in Plaintiffs' Brief, *Amici* support Plaintiffs' request that the Court grant their motion for summary judgment and hold that the Final Rule is invalid.

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