15-2442

United States Court of Appeals for the Second Circuit

CONSTELLATION BRANDS U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TEAMSTERS LOCAL UNION 601,

Intervenor.

Petition for Review of a Decision of the National Labor Relations Board

BRIEF *AMICI CURIAE* OF THE COALITION FOR A DEMOCRATIC WORKPLACE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL RETAIL FEDERATION, AND THE RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* the Coalition for a Democratic Workplace, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Retail Federation, and the Retail Litigation Center, Inc. state that they are not publicly held corporations, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

Dated: December 16, 2015

By: /s/ Zachary D. Fasman

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CONSENT TO FILE AS *AMICI*

This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW") represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of thousands of individuals working in every industry and in every region of the United States. CDW has advocated for its members on numerous issues of concern in employment and labor relations matters.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

[1] *Amici* jointly certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than the *Amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This Is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role retail plays in driving innovation.

The Retail Litigation Center, Inc. (the "Center") is a public-policy organization that identifies and engages in legal proceedings affecting the retail

industry. The Center's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The Center seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

Many of *Amici*'s members are covered by the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169. *Amici*'s members therefore have direct and immediate concerns about the question at issue here: the standard applied by Respondent National Labor Relations Board (the "Board") to determine appropriate bargaining units under the NLRA.

BACKGROUND AND FACTS

This case involves the application of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. No. 83, 2011 WL 3916077 (Aug. 26, 2011),[2] which established an entirely new rule for determining the composition of bargaining units under the NLRA. For more than fifty years, the Board had applied the traditional community-of-interest multi-factor test to determine appropriate bargaining units. *See, e.g.*, *Endicott Johnson Corp.*, 117 N.L.R.B. 1886, 1890-91

[2] *Enforced sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

(1957). Under that test, the Board determined whether a proposed unit was appropriate based upon a case-by-case examination of a multitude of factors, including mutuality of interest in wages, common hours, working conditions and conditions of employment, common supervision, interchange of employees, degree of skill, and functional integration within the business. The crux of this determination was whether the petitioned-for unit of employees shared a "community of interest" that was "separate and distinct" from other employees in the workplace. *Aztar Ind. Game Co.*, 349 N.L.R.B. 603, 604 (2007); *see Publix Super Markets, Inc.*, 343 N.L.R.B. 1023, 1027 (2004). As the Board explained in 2010 in *Wheeling Island Gaming, Inc.*:

> Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry . . . necessarily proceeds to a further determination whether the interests of the group are *sufficiently distinct* from the other employees to warrant the establishment of a separate unit.

355 N.L.R.B. 637, 637 n.2 (2010) (citation omitted). The resulting body of precedent had been predictable, evenly applied by both liberal and conservative Boards, and provided a high degree of labor-management stability in the workplace because all employees with common interests were grouped together.

One year later, in *Specialty Healthcare*, a divided Board departed from this well-established precedent and established a test based solely upon whether the individuals within the petitioned-for group shared common interests among

themselves, without regard to whether they shared interests with other employees within the workplace. According to the new rule:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are *readily identifiable as a group* . . . and the Board finds that the *employees in the group share a community of interest* after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, *unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest* with those in the petitioned-for unit.

Specialty Healthcare, 357 N.L.R.B. No. 83, at 12 (emphases added, footnotes omitted).

This new test abandoned the historical requirement that the Board determine whether employees in the petitioned-for unit share a community of interest among themselves separate and distinct from other employees, and has allowed the creation of micro-units composed of a fraction of employees with common interests. It has largely insulated the union's choice of bargaining unit from challenge by imposing a nearly insurmountable burden on employers seeking to prevent fractured bargaining units within their organizations. Indeed, since *Specialty Healthcare*, the Board has never found that employees outside the

proposed unit share an "overwhelming community of interest" with the group proposed by the union.[3]

In this case, the Board's Regional Director relied upon *Specialty Healthcare* in determining that 46 outside cellar employees, a subset of the cellar operations department within a completely integrated production facility, constituted an appropriate bargaining unit. The Regional Director rejected Constellation Brands' argument that the remaining employees within the cellar operations department should also be included in the unit, concluding that Constellation Brands failed to establish that the additional employees shared an "overwhelming community of interest" with the outside cellar employees. Decision & Direction of Election ("Decision") 40. In a footnote order, the Board declined to review the Regional Director's decision.

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[3] *See DPI Secuprint, Inc.*, 362 N.L.R.B. No. 172, at 5 (Aug. 20, 2015) (applying *Specialty Healthcare* rule to approve bargaining unit limited to approximately 13 pre-press, digital press, offset and digital bindery employees and excluding 7 offset-press employees); *Macy's, Inc*., 361 N.L.R.B. No. 4, at 19 (July 22, 2014) (applying rule to approve bargaining unit limited to 41 cosmetics and fragrances employees and excluding 80 other sales employees); *Guide Dogs for the Blind, Inc.*, 359 N.L.R.B. No. 151, at 7-10 (July 3, 2013) (applying rule to approve bargaining unit limited to 12 canine welfare technicians and 21 instructors and excluding 55 employees in the other "dog handling" classifications in the same facility); *see also Fraser Eng'g*, 359 N.L.R.B. No. 80 (Mar. 20, 2013); *Grace Indus., LLC*, 358 N.L.R.B. No. 62 (June 18, 2012); *Northrop Grumman Shipbuilding Co.*, 357 N.L.R.B. No. 163 (Dec. 30, 2011); *DTG Operations, Inc*., 357 N.L.R.B. No. 175, at 1-3 (Dec. 30, 2011); *Nestle Dreyer's Ice Cream*, 31-RC-66625 (Dec. 28, 2011) (unpublished).

SUMMARY OF ARGUMENT

This Court should grant Constellation Brands' petition for review and deny the Board's cross-petition for enforcement for three independent reasons.

First, the *Specialty Healthcare* rule violates the plain terms of the NLRA by granting too much deference to the union's proposed unit in violation of (i) Section 9(b), which mandates that "the *Board*" determine the appropriate bargaining unit, and (ii) Section 9(c)(5), which provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized shall not be controlling." 29 U.S.C. §§ 159(b), (c)(5). The *Specialty Healthcare* rule abdicates the Board's role in reasoned decision-making and eliminates the Board's consideration of important, historically recognized factors in the unit-determination process. The rule ensures in virtually every representation case that the unit the union has requested will be deemed appropriate by the Board, without regard to whether the employees share a community of interest "separate and distinct" from other personnel.

Second, *Specialty Healthcare* represents a radical departure from the Board's longstanding precedent, and encourages a multiplicity of fractured units within workplaces throughout the country. Multiple small bargaining units comprised of employees who share common interests, in turn, encourage labor instability and present the potential for labor unrest. This violates the basic policy of the Act,

which is to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151.

Third, in deciding *Specialty Healthcare*, the Board violated the Administrative Procedure Act by failing (i) to acknowledge that it was promulgating a new rule for determining appropriate bargaining units or (ii) to provide a reasoned explanation for the new rule and, in particular, its general applicability throughout industry. *Specialty Healthcare* involved a dispute about the standard for unit determinations in non-acute healthcare facilities. Nevertheless, the Board *sua sponte* issued an order inviting *amicus* briefs addressing the *general* standard for determining appropriate bargaining units. In its decision, the Board not only abandoned the standard that was in place in non-acute healthcare facilities, but also made a wholesale change to the traditional community-of-interest test across all other industries, without providing a reasoned explanation for the change.

Amici respectfully submit that the Board wrongly decided *Specialty Healthcare* and that the decision below based on that ruling should be overruled.[4]

[4] The Fourth and Fifth Circuits have recently heard arguments in cases presenting challenges to *Specialty Healthcare*. *See Nestle Dreyer's Ice Cream Co. v. NLRB*, Nos. 14-2222, 14-2339 (4th Cir. Oct. 28, 2015); *Macy's, Inc. v. NLRB*, No. 15-60022 (5th Cir. Oct. 6, 2015). To date, only the Sixth Circuit has approved the NLRB's *Specialty Healthcare* ruling. *See Kindred Nursing*, 727 F.3d at 565. Significantly, *Kindred Nursing* relied on the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008). *See infra* at 20-21; *see*

ARGUMENT

I. THE *SPECIALTY HEALTHCARE* RULE VIOLATES THE NATIONAL LABOR RELATIONS ACT

A. The Board's Traditional Standard Complied with the Plain Language and Underlying Policy of the NLRA

Section 9(b) of the Act mandates that "[t]he *Board* shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the[ir] rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." 29 U.S.C. § 159(b) (emphasis added). The Supreme Court has reiterated the statutory mandate:

> [W]henever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone.

Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611 (1991).

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also Specialty Healthcare, 357 N.L.R.B. No. 83, at 19 n.17 (Member Hayes, dissenting) (suggesting that *Blue Man Vegas* was wrongly decided). The *Kindred Nursing* court, however, did not address whether *Specialty Healthcare* properly applied *Blue Man Vegas*, which held that the petitioned-for employees must share community-of-interest factors "*as distinct from other employees*." *DPI Secuprint*, 362 N.L.R.B. No. 172, at 11 n.7 (Member Johnson, dissenting) (citing *Blue Man Vegas*, 529 F.3d at 421). *Amici* submit that even if *Kindred Nursing* was correctly decided, it did not address the propriety of the Board's expansion of its new standard outside the narrow facts of that case.

Francis Biddle, then-Chairman of the precursor to the Board and one of the architects of the Act, explained why the Board needed to decide who among the employees should be allowed to vote:

> To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units, they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant.

The Labor Management Relations Act, 1947: Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. 82 (1935), *reprinted in* 1 *1935 Legislative History* 1458. Mr. Biddle also testified that "[t]he determination of the unit . . . must be made by an impartial agency which is aware of the industrial relationship existing in various types of industry, and of the history and experience of craft, trade, and industrial unions." *Id.* at 1459.

In 1947, as part of the Labor Management Relations Act, Congress added Section 9(c)(5), which provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized *shall not be controlling.*" 29 U.S.C. § 159(c)(5) (emphasis added). This provision "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577,

1580 (4th Cir. 1995) (citation omitted). A House report explained that this language:

> *[S]trikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time.* Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. . . . *While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and . . . is not to be controlling.*

H.R. Rep. 80-245, at 37 (1947), *reprinted in* 1 *Legislative History of the Labor Management Act 1947* 328 (emphases added).

For decades, in consonance with these precepts, the Board had faithfully executed its duty to determine appropriate bargaining units. The Board developed a "community of interest" analysis, which looked to such factors as "similarity of skills and functions, similarity of employment conditions, centralization of administration, managerial and supervisory control, employee interchange, [and] functional integration of the employer" among others. *NLRB v. Heartshare Human Servs., Inc.*, 108 F.3d 467, 471 (2d Cir. 1997) (citation omitted). Significantly, the Board's inquiry "never addresse[d], solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Wheeling Island*, 355 N.L.R.B. at 637 n.2. The touchstone of appropriate unit determinations was whether the proposed unit's members shared a community of interest "*sufficiently distinct*" from other excluded employees. *Id.*

(citing *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980)); *see NLRB v. Long Island Coll. Hosp.*, 20 F.3d 76, 79 (2d Cir. 1994) (articulating the standard as whether the employees in the proposed unit are an "identifiable group with a community of interest that is sufficiently separate or distinct" from other employees) (citation omitted); *In re Boeing Co.*, 337 N.L.R.B. 152, 153 (2001) (finding a unit of recovery and modification employees at an air base inappropriate because the petitioned-for group did not share a community of interest sufficiently distinct from all production and maintenance employees at the base); *Transerv Sys.*, 311 N.L.R.B. 766, 767 (1993) (finding a petitioned-for unit of bicycle messengers inappropriate because they did not share "a sufficiently distinct community of interest" from driver messengers).

The Board traditionally had been mindful of the potential disruption that multiple smaller units could have on business operations, stable labor relations, and effective collective bargaining. The Board has long rejected fractured units, observing in *Kalamazoo Paper Box Corp.*:

> [P]ermitting severance of truck drivers as a separate unit based upon a traditional title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act" as contemplated by Section 9(b).

136 N.L.R.B. 134, 139 (1962).

Indeed, this Court has required that in making unit determinations, the Board must "effect the policy of the Act to assure employees the fullest freedom in exercising their rights," yet at the same time "respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations." *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2d Cir. 1968); *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 472 (2d Cir. 1985) ("We respect [the Board's] discretion when it is exercised after reflective consideration of a properly developed record in light of the relevant policies of the Act and of precedent.").

Moreover, in determining appropriate bargaining units, the Board is required to explain its reasoning. *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (noting that the Board cannot make unit determinations based on "conclusory rationales"); *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156-57 (1980) (stating that the "unit determination will be upheld only if the Board has indicated clearly how the facts of the case . . . support its appraisal of the significance of each factor"). Explaining that (i) the group in question is "identifiable" in some way and (ii) the individuals within the group share common interests, even if others within the workplace are similarly situated and share substantially the same interests, does not render a decision reasoned. A reasoned decision requires that the Board undertake a functional approach, looking beyond the groupings based upon job titles or classifications in evaluating how certification of one unit as

opposed to another might affect the rights of all employees, as well as the operation of an employer's business. *See, e.g.*, *Buckhorn, Inc.*, 343 N.L.R.B. 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Avon Prods., Inc.*, 250 N.L.R.B. 1479, 1483-84 (1980) (reversing Regional Director's decision that failed to account for employer's "highly integrated process").

The resulting body of Board precedent established a careful balancing of competing interests of employees, employers, and unions that allowed individual employers to conduct their respective businesses efficiently while protecting the rights of employees to engage, or not to engage, in meaningful collective bargaining. These decisions created, for more than fifty years, the effective framework within which the bargaining process functioned.

B. Application of the New Rule in This Case Contravenes the NLRA

In *Specialty Healthcare*, and again here, the Board (i) abandoned this well-developed body of precedent, (ii) eliminated consideration of the interests employees shared within and outside the proposed unit, (iii) ignored the "circumstances within which collective bargaining is to take place," *Kalamazoo*, 136 N.L.R.B. at 137, and (iv) shifted the burden to employers, dissident employees and rival unions, under an impossible test, to prove that a unit should be larger. Under the new rule, rather than independently analyzing whether the employees

included in the smaller petitioned-for unit share interests that are "sufficiently distinct" from non-included employees, the Board looks only to whether a "readily identifiable" group of employees *within the proposed unit* shares a community of interest. The Board thus has for the first time ruled that *any identifiable group* can become an appropriate unit for bargaining, entirely without considering the interests of other employees in the workplace. *Cf. Newton-Wellesley Hosp.*, 250 N.L.R.B. at 411 ("The Board's inquiry into the issue of appropriate units . . . never addresses, solely and in isolation, the question of whether the employees in the unit sought have interests in common with each other.").

Moreover, if an employer, a rival union, or another group of employees contends that such a unit is "inappropriate because it does not contain additional employees, the *burden is on the party so contending* to demonstrate that the excluded employees share an *overwhelming* community of interest with the included employees." *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 1 (emphases added). The "overwhelming community of interest" standard, in turn, requires that the excluded employees' interests "overlap almost completely" with those of included employees. *Id.* at 11 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)). If the challenging party fails to meet this stringent standard, the Board defers to the union's proposed choice of the bargaining unit, in

clear derogation of its duty to determine appropriate bargaining units independent of the extent of union organization.

The end result is that the Board now approves units sought by a petitioning union based on job titles, departments, or classifications without regard to how bargaining in such a unit would occur in the context of the daily practicalities of operating the business. As Board members have noted in dissent from cases applying these new rules, "the determination of whether there is a readily identifiable group has become an infinitely malleable standard that shows that anything goes, regardless of whether the 'group' tracks any organization or other lines drawn by the Employer." *DPI Secuprint*, 362 N.L.R.B. No. 172, at 10 (Member Johnson, dissenting); *see DTG Operations, Inc.*, 357 N.L.R.B. No. 175, at 8-9 ("As long as a union does not make the mistake of petitioning for a unit that consists of only a part of a group of employees in a particular classification, [or] department . . . it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant.").

This case proves the point. Here, the Board applied its "infinitely malleable"[5] standard and certified the petitioned-for unit containing 46 outside cellar employees, even though the interests of the outside cellar employees were virtually

[5] *DPI Secuprint*, 362 N.L.R.B. No. 172, at 10 (Member Johnson, dissenting).

indistinguishable from those of other employees within the cellar operations department. The record in this case clearly shows that outside cellar, barrel, and cellar services employees had identical job descriptions and skill requirements, were subject to the same general policies and work rules, had similar wages, received the same benefits, and, most importantly, were part of an integrated production process to transform grapes into wine. The cellar operations employees' ability to perform their jobs depended directly and immediately on the performance of jobs by their colleagues. Moreover, although the Regional Director found that the petitioned-for unit "completely align[ed] with one of the Employer's own departmental demarcations—the entirety of the cellar department," Decision 31, the unit was actually a subset of Constellation Brands' "Cellar Operations Department," which includes outside cellar, barrel and cellar services employees. Because the union only proposed a unit of outside cellar employees, however, the Board looked only to those employees and found that they shared a common interest. At that point, the burden shifted to Constellation Brands to establish that the excluded employees shared an overwhelming community of interest—a virtually total identity of interests—with outside cellar employees. Despite Constellation Brands' extensive evidence of commonality of interests, the Regional Director focused on the distinctions among employees,

without explaining why the distinctions were significant and how they outweighed the substantial common interests of the employees.

As demonstrated by this case and other cases that followed *Specialty Healthcare*, the Board's new rule virtually eliminates the community-of-interest test and impermissibly assigns controlling weight to the union's organizing efforts. Because any appropriate unit must include employees who share *some* community of interest, the inquiry that drives the NLRB's current unit-determination standard is the amorphous test of whether the employees within the petitioned-for unit are "identifiable as a group." That "identifiable group" test will necessarily be applied to the unit chosen by the union based upon the extent of its organizing efforts, whether grouped by job classification, title or department assignment. *Specialty Healthcare* thus establishes a rule that the Act specifically forbids: a bargaining unit that—protected from alteration by the "overwhelming community of interest" standard—will be the exact one requested by the petitioning union on the basis of the union's extent of organizing.[6]

[6] The recent *Macy's* case is a perfect example. *Macy's, Inc*., 361 N.L.R.B. No. 4. In *Macy's, Inc.*, a Regional Director approved a unit made up of an entire store, 01-RC-022530 (Mar. 24, 2011), but the employees in this unit voted against union representation. Two years later, after *Specialty Healthcare*, the union petitioned for a unit comprised of only the cosmetics and fragrance department employees of the same store. The Regional Director and the Board ignored the common interests throughout the store that had justified the "whole store" unit and approved the smaller unit, finding that the employer had not established an "overwhelming community of interest" among all employees.

C. The Purported Justification for the New Rule Is Misplaced

The Board unsuccessfully attempted to impose an "overwhelming community of interest" standard in the mid-1990's in *Lundy Packing*, 68 F.3d at 1581. In *Lundy Packing*, the union requested a unit that excluded certain quality-control, laboratory, industrial-engineering, and other employees. *Id*. at 1579. Overruling its Regional Director, who would have included some of those employees in the bargaining unit, the Board abandoned its traditional multi-factor analysis, presumed that the petitioned-for unit was appropriate, and held that the excluded employees did not share "such an overwhelming community of interest" with the employees included in the unit as to mandate their inclusion. *Id.* at 1581.

The Fourth Circuit vacated the Board's decision, concluding that the Board violated Section 9(c)(5) by giving "controlling weight" to the extent of union organizing. *Id.* Rejecting the Board's "overwhelming community of interest" standard, the court explained: "By presuming the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because the union will propose the unit it has organized." *Id.* (citations and internal quotation marks omitted). The court further observed that under those circumstances, the Board's ruling made it "impossible to escape the conclusion that the . . . [quality-control and industrial-engineering employees] were

excluded [by the Board] 'in large part because the Petitioners do not seek to represent them.'" *Id.* (quoting underlying Board decision). The Fourth Circuit found that the Board's ruling bore "the indicia of a classic [§] 9(c)(5) violation." *Id.*

Sixteen years later, in *Specialty Healthcare*, the Board resurrected the "overwhelming community of interest" standard, claiming it was justified in doing so based upon *Blue Man Vegas*, 529 F.3d at 422. That reliance is misplaced. The *Blue Man Vegas* court interpreted *Lundy Packing* to prohibit "the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit." *Id.* at 423. According to the court, "[a]s long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be prima facie appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." *Id.*

That reading is erroneous. The problem before the court in *Lundy Packing* was the Board's over-reliance on the union's choice of unit and creating an impermissibly high burden on the objecting employer to prove that other employees shared an overwhelming community of interest with the employees in the petitioned-for unit. Moreover, the *Blue Man Vegas* court imported the "overwhelming community of interest" test from an accretion context, drastically

different from the context of initial appropriate unit determination. *See, e.g.*, *Safeway Stores, Inc.*, 256 N.L.R.B. 918 (1981). Accretion cases involve adding a group of previously unrepresented employees to an existing bargaining unit, without allowing them to vote. Unlike normal representation cases, where the Board is charged with determining an initial appropriate unit after which employees will have the right to vote for or against union representation, accreted employees do not have the opportunity to vote in an election. For this reason, the Board allows an accretion only where the petitioning union demonstrates that the accreted employees share an "overwhelming community of interest" with the employees in the established unit. *See E.I. Du Pont, Inc.*, 341 N.L.R.B. 607, 608 (2004) (citation omitted). This context is vastly different from initial unit determinations. To the extent *Blue Man Vegas* holds that the "overwhelming community of interest" standard applies to initial unit determinations, it is incorrect and unsupported by the Board's precedent.[7]

[7] Even if *Blue Man Vegas* was correctly decided, the Board's application of the *Specialty Healthcare* standard is inconsistent with *Blue Man Vegas*. In articulating the community-of-interest test in *Blue Man Vegas*, the D.C. Circuit observed that "unit determinations must be made only after weighing all relevant factors on a case-by-case basis" and such "factors include 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.'" *Blue Man Vegas*, 529 F.3d at 421 (citations omitted) (emphasis added). *Specialty Healthcare* abandoned the requirement that the Board

By deferring to the union's requested unit and erecting an impermeable barrier so that alternative units have always failed, the *Specialty Healthcare* rule elevates the union's requested unit to controlling status and impermissibly abdicates the Board's responsibility to determine the appropriate bargaining unit. The practical effect is to eliminate the Board's role in carefully balancing the various competing interests of employees, employers, and unions, and to exclude the employer from the process. This is contrary to the plain terms of the Act, the intent of Congress, and the policy behind the NLRA.

II. THE *SPECIALTY HEALTHCARE* RULE SIGNIFICANTLY HARMS EMPLOYERS AND EMPLOYEES

For more than fifty years, the Board has refused to allow micro-units that fragment the workplace into a multitude of competing departments, each with its own union representative. But after *Specialty Healthcare*, the Board has approved multiple smaller bargaining units based upon groupings such as job titles, department or job classifications, instead of units reflecting the reality of an employer's functional integration and the resulting community of interests shared among its employees. *See, e.g.*, *DPI Secuprint, Inc.*, 362 N.L.R.B. No. 172 (approving a bargaining unit that excluded a functionally-integrated department of offset-press employees, even though the excluded employees worked in the same

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determine whether employees in the petitioned-for unit share a community of interest among themselves separate and distinct from other employees.

space and formed part of the same workflow as the employees in the petitioned-for unit); *Macy's*, 361 N.L.R.B. No. 4, at 19 (approving a bargaining unit limited to department-store cosmetics and fragrances salespeople within an integrated department store where all sales employees performed the same fundamental task of selling merchandise). The change has a massive impact on employers and employees alike.

Proliferation of multiple smaller units disrupts both the efficient operation of the business and effective collective bargaining. It creates instability because an employer's operations, having been divided into multiple units that bear little or no relationship to the functional integration of the entire business, will tend to evolve in different directions as each individual unit's terms and conditions of employment change through separate bargaining, spurred on by employee and union rivalry to outpace other groups at the bargaining table. More time must be spent bargaining contracts and more resources deployed to keep the artificially separated groups of employees functioning efficiently. Employer flexibility and employee advancement opportunities inevitably will decrease as separate bargaining units isolate employees in different seniority systems and job classifications, and the opportunities to move to other jobs within the business are blocked by separate bidding systems and seniority rights.

Proliferation of separate units also results in empowering a union representing employees in a pivotal portion of the business, while disenfranchising employees in other parts of the operation. The most basic precept of collective bargaining is that there is strength in numbers and the larger the group, the more leverage it can exert at the bargaining table. After *Specialty Healthcare*, however, the strength of the union depends on whether it controls a unit of employees working in the department crucial to the operation of the employer's business. If that unit calls for a work stoppage, the employer finds itself at the mercy of a small fraction of its employees. Other workers dependent on the operation of this unit find themselves out of work without having any say in the matter over issues that they do not share or deem important. This result significantly harms employees and employers alike, and it is inconsistent with the NLRA's policies of industrial and social peace and the free flow of commerce.

III. THE BOARD FAILED TO ENGAGE IN REASONED DECISION-MAKING WHEN IT EXTENDED THE OVERWHELMING COMMUNITY-OF-INTEREST TEST BEYOND THE NON-ACUTE HEALTHCARE INDUSTRY

In *Specialty Healthcare*, the Board "fundamentally change[d] the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 15 (Member Hayes, dissenting). While an agency may change its standards and policies, it must (i) "display awareness that it *is* changing position," and (ii) "show

that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As applied to *Specialty Healthcare*, if the Board intended to depart from its past precedent with respect to the test to be applied in unit determination cases, it was required to "announce the change of mind," *Rayonier, Inc. v. NLRB*, 380 F.2d 187, 189 (5th Cir. 1967), and "supply a reasoned analysis for the change," *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In *Specialty Healthcare*, however, the Board did neither.

First, the Board did not acknowledge its departure from decades of precedent. Rather, at the outset and throughout its decision, the Board said that it was merely "clarifying [the] verbal formulation and application" of the traditional standard. *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 13; *see id.* at 1, 12. The Board likewise insisted that the decision "adhere[s]" to "the traditional community of interest test." *Id.* at 14. But the Board also paradoxically announced that it was making "*changes in the law*" and that it has "fully explained why *these changes* further the policies and purposes of the Act." *Id*. (emphases added).

Perhaps in anticipation of challenges like this appeal, the Board stretched itself too thin in trying to cover all bases by simultaneously characterizing the decision as both a "clarification" as well as a "change[] in the law." *Compare Specialty Healthcare*, 357 N.L.R.B. No. 83, at 1, 12, 13, *with id.* at 14. Regardless

of the Board's description, *Specialty Healthcare* was indeed a "change in the law." As Board members have noted in dissent from cases applying the new rule, the purported "clarification" gutted the traditional standard and imposed an entirely new one, contrary to the plain language of the NLRA, which has since been applied to alter more than five decades of Board precedent. *See, e.g.*, *Macy's, Inc.*, 361 N.L.R.B. No. 4, at *24 (Member Miscimarra, dissenting) ("*Specialty Healthcare* constitutes an unwarranted departure from standards developed over the course of decades that have long governed the Board's bargaining-unit determinations."); *DPI Secuprint*, 362 N.L.R.B. No. 172, at *9 (Member Johnson, dissenting) ("[S]hifts in the way we construe and apply the Act can only be deemed *clarification* if they actually provide clarity. . . . *Specialty Healthcare* was more a loosening of the constraints requiring the Board to act with transparency and intelligibility than it was a clarification of standards . . . ."); *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 18 (Member Hayes, dissenting) ("[T]he majority's definition of [the traditional community of interest] principles is far from traditional and will have the intended dramatically different results in appropriate unit determinations for all industries.").

Second, because *Specialty Healthcare* was a "change[] in the law," the Board was required, but failed, to provide a reasoned explanation for the new rule. Although the Board explained why it changed the unit determination standard in

non-acute healthcare industry, it provided no explanation why abandoning the traditional community-of-interest test, and extending the non-acute healthcare industry standard to all businesses on a wholesale basis, served the goals of the Act.

The traditional community-of-interest standard that the Board had historically applied was clearly rooted in the fundamental goals of the Act. In *Wheeling Island*, for example, the Board reaffirmed the standard as "whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." 355 N.L.R.B. at 637 n.2; *Seaboard Marine, Ltd.*, 327 N.L.R.B. 556 (1999) (same). The Board also historically used terms like "substantial,"[8] "significant,"[9] and "strong,"[10] yet all of those terms "le[ft] open the question of what degree of difference renders the groups' interests 'sufficiently distinct.'" *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 12. By creating the "overwhelming community-of-interest" standard, the Board required a degree of difference that far exceeded anything ever required in the past, without providing any reasoned explanation for this new standard.

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[8] *Colo. Nat'l Bank of Denver*, 204 N.L.R.B. 243 (1973) ("a substantial community of interest"); *Lawson Mardon, U.S.A.*, 332 N.L.R.B. 1282, 1283 (2000) (same).

[9] *Mc-Mor-han Trucking Co.*, 166 N.L.R.B. 700, 701-02 (1967); *Home Depot, USA*, 331 N.L.R.B. 1289, 1289 (2000).

[10] *Engineered Storage Prods. Co.*, 334 N.L.R.B. 1063, 1063 (2001); *J.C. Penney Co.*, 328 N.L.R.B. 766, 766 (1999).

Moreover, the Board never explained why its new standard should be applied generally, across all industries. *Specialty Healthcare* involved a limited dispute concerning appropriate bargaining units in non-acute healthcare facilities. The employer claimed that the Regional Director failed to apply a unit determination test applicable to nursing homes, rehabilitation centers, and other non-acute healthcare facilities. As Member Hayes pointed out, it was a "simple case." *Specialty Healthcare*, 356 N.L.R.B. No. 56, at 4-6 (Dec. 22, 2010) (Member Hayes, dissenting). Nevertheless, the Board *sua sponte* invited *amicus* briefing outside the four corners of the factual context of the case. *See id.* at 2. The Board asked eight questions, seven expressly related to non-acute healthcare facilities, and the last one inquiring whether the Board should "find a proposed unit appropriate if . . . the employees in the proposed unit are 'readily identifiable as a group whose similarity of function and skills create a community of interest.'" *Id.* (citation omitted). Notably, with the exception of *amicus* the Chamber of Commerce, all responding *amici* were healthcare organizations and associations. *Specialty Healthcare*, 357 N.L.R.B. No. 83, at 14 n.36. The Board nevertheless abandoned the standard that was in place for non-acute healthcare facilities and made a wholesale change to the traditional community-of-interest test across other industries.[11] The Board did so without any rationale and without recognizing that

[11] *See supra* n.3.

unit determinations in other industries are based upon entirely different considerations.

Significantly, at the time *Specialty Healthcare* was decided, the Board issued a press release announcing that "it has adopted a new approach" for unit determinations in non-acute healthcare facilities, but that it "did not create new criteria for determining appropriate bargaining units outside of health care facilities." Press Release, Nat'l Labor Relations Bd., Board Issues Decision on Appropriate Units in Non-acute Health Care Facilities (Aug. 30, 2011), *available at* http://www.nlrb.gov/news-outreach/news-story/board-issues-decision-appropriate-units-non-acute-health-care-facilities (last accessed Dec. 15, 2015). As demonstrated by this case and other cases that followed *Specialty Healthcare*, this is not true. The Board has repeatedly applied its new rule across virtually every type of industry subject to the Board's jurisdiction. Because the Board failed to acknowledge that it was implementing a generic change in the unit determination standard, and failed to provide a reasoned explanation for the new standard or why it was to have general applicability beyond the non-acute healthcare industry, the *Specialty Healthcare* rule violated the Administrative Procedure Act and cannot be upheld.

CONCLUSION

The Court should grant Constellation Brands' petition for review and deny the Board's cross-petition for enforcement.

Dated: December 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

1. This brief contains 6,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2015, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users and will be served by the Appellate CM/ECF system.

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