UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN STEEL CONSTRUCTION, INC. and LOCAL 25, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, AFL-CIO	Case 07-RC-269162

BRIEF OF AMICI CURIAE COALITION FOR A DEMOCRATIC WORKPLACE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND AMERICAN BAKERS ASSOCIATION

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Dated: January 21, 2022

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I. INTERESTS OF THE AMICI CURIAE

The Amici Curiae ("Amici") who submit this brief represent a multitude of businesses with workforces of all sizes and in virtually every industry throughout the United States. The diversity of the Amici and their members mirrors the enormous variety of workplaces subject to the National Labor Relations Act ("NLRA" or "Act"). This array of work settings makes it critical that the National Labor Relations Board ("Board" or "NLRB") address bargaining unit issues consistent with the mandate set forth in the NLRA. There, Congress charged the Board with undertaking a rigorous evaluation of the appropriate unit "*in each case* . . . in order to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b) (emphasis added). As explained below, the Amici who submit this brief—and the millions of employees whose interests they represent—are vitally affected by the standard applied by the Board when making bargaining unit determinations.

The *Coalition for a Democratic Workplace* ("CDW") represents employers and associations and the interests of their employees, including nearly 500 member organizations and businesses of all sizes. The majority of CDW's members are covered by the NLRA or represent organizations covered by the NLRA, and therefore have a strong interest in the way that the NLRA is interpreted and applied by the NLRB.

The *Chamber of Commerce of the United States of America* (the "Chamber") is the world's largest business federation. It represents approximately 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 *National Federation of Independent Business* ("NFIB") is the nation's leading small business association, with members in Washington, DC and all 50 state capitals. NFIB was founded in 1943 as a nonprofit, nonpartisan organization, and its mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs—52 million working Americans—and contributing $3.9 trillion annually to the national Gross Domestic Product.

The *National Association of Wholesaler-Distributors* ("NAW") is a nonprofit trade association that serves as the national voice of the country's $5.6 trillion wholesale distribution industry. NAW members consist of direct firm members engaged in the wholesale and distribution trades of every sort of nondurable and durable products, from candy to cranes, sold to businesses and consumers, including roughly 395,000 wholesaler-distributor enterprises that provide employment to an estimated 5 million employees in the United States.

The *American Bakers Association* ("ABA") is a national trade association representing the interests of the wholesale baking industry, including more than 300 companies with a combined 1600-plus facilities. The wholesale baking industry currently operates the fourth largest fleet of vehicles (behind the United States Postal Service, FedEx, and UPS) for the distribution of their products to market as well as the distribution of supplies to baking facilities.

II. SUMMARY AND RESPONSE TO BOARD'S QUESTIONS

For decades, the Board and the courts have applied "community of interest" principles and certain industry-specific standards to ascertain whether a petitioned-for bargaining unit is appropriate. Properly applying these standards requires meaningful scrutiny by the Board and the courts of the petitioned-for bargaining unit—scrutiny that the Act mandates. Section 9(a) of the NLRA requires the Board to determine "in each case" whether a petitioned-for bargaining unit is "appropriate" for the "purposes of collective bargaining." The Board must consider a range of unit configurations listed in Section 9(b), which states the Board "shall decide" whether the unit should be "the employer unit, craft unit, plant unit, or subdivision thereof." Based on amendments adopted in 1947, Section 9(b) also provides that the Board's bargaining unit determinations must "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act." 29 U.S.C. 159(b) (emphasis added). The Act also lays out, however, what the Board may *not* do when making unit determinations: the Board is prohibited from making unit appropriateness turn on what group of employees already supports the union. To this effect, Section 9(c)(5) states: "In determining whether a unit is appropriate for the purposes specified in subsection (b) *the extent to which the employees have organized shall not be controlling*." *Id.* § 159(c)(5) (emphasis added).

The Board and the courts cannot disregard this plain language in the Act. Based on the Act's requirements, in addition to its legislative history and underlying policies and purposes, the Amici respond as follows to the two questions posed by the Board in the present case:

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

Yes, the Board should reaffirm *PCC Structurals* and *Boeing*. These cases are based on explicit requirements governing bargaining unit determinations that are set forth in the Act. Any material departure from the standards applied in *PCC Structurals* and *Boeing* would warrant reversal by the courts. Putting aside the repudiation of *Specialty Healthcare,*[1] which Amici address in response to question 2 below, the Board in *PCC Structurals* properly recognized that

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[1] *Specialty Healthcare & Rehab. Ctr. of Mobile ("Specialty Healthcare")*, 357 NLRB 934 (2011), *enforced sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

it must comply with the Act's explicit requirements; explained that the Act's requirements were the result of substantial deliberation by Congress, as evidenced by the Act's legislative history; reaffirmed that, when making unit determinations, the Board would evaluate the interests of employees *within* the petitioned-for unit and those who were *excluded* from the unit (which was part of the *Specialty Healthcare* standard, although it attached little weight to the interests of excluded employees); and held that the Board would continue to apply traditional "community of interest" factors and industry-specific standards, which have governed unit determinations throughout the Act's history (and which *Specialty Healthcare* disclaimed changing). The Board in *Boeing* did nothing more than articulate a three-part framework giving effect to these same principles.

2. What standard should replace *PCC Structurals* and *Boeing*? Should the Board return to the standard in *Specialty Healthcare*, 357 NLRB 934 (2011), either in its entirety or with modifications?

As discussed above, the Board should reaffirm *PCC Structurals* and *Boeing*. The Board should *not* reinstate or return to the *Specialty Healthcare* standard, which required the Board to approve every petitioned-for bargaining unit (notwithstanding the exclusion of employees who shared substantial interests) absent proof that the excluded employees shared "an *overwhelming* community of interest" with employees in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at 944 (emphasis added). As explained in *PCC Structurals* and *Boeing*, *Specialty Healthcare*[2] is irreconcilable with the express requirements of the Act, its legislative history, and

[2] In this brief, "*Specialty Healthcare*" and the "*Specialty Healthcare* standard" mean the Board's holding that required acceptance of any petitioned-for unit that excludes other employees unless there is proof that the excluded employees share an "overwhelming" community of interests with employees in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at 944. However, before considering whether excluded employees share an "overwhelming" community of interest with employees in the petitioned-for unit, the Board majority in *Specialty Healthcare* stated that the Board must initially evaluate, among other things, whether the petitioned-for unit employees "are *readily identifiable as a group* (based on job classifications, departments, functions, work

underlying purposes and policies. Specifically, *Specialty Healthcare*'s "overwhelming" community-of-interest test disregarded legislative choices made by Congress that emphasized the Board's role in determining appropriate bargaining units; it contravened the requirement that the Board "in each case" make unit determinations that "assure to employees the *fullest freedom* in exercising [protected] rights"; it inappropriately discounted or disregarded the interests of employees excluded from a petitioned-for unit; it gave "controlling" weight to "the extent to which the employees have organized," contrary to Section 9(c)(5); and it promoted "the proliferation of fractured units that can only hobble a unionized employer's ability to manage production and to retain a necessary flexibility to respond to industry change," which "can only create instability."[3] Moreover, "sound policy reasons" support "the traditional community-of-interest standard that the Board has applied throughout most of its history." *PCC Structurals*, 365 NLRB No. 160, slip op. at 7. Unlike *Specialty Healthcare*, the traditional standard "permits the Board to evaluate the interests of all employees—both those within and those outside the

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locations, skills, or similar factors)" and "the employees *in the group* share a community of interest after considering the traditional criteria." *Id.* at 945–46 (emphasis added). Regarding the requirement that employees *within* any petitioned-for unit must share a community of interests among themselves to be deemed appropriate for purposes of collective bargaining, the Board's majority opinions in *PCC Structurals* and *Boeing* are not materially different from *Specialty Healthcare*. Thus, the Amici in this brief do not address this aspect of the *Specialty Healthcare* opinion.

[3] *DPI Secuprint, Inc.*, 362 NLRB 1407, 1417–18 (2015) (Member Johnson, dissenting). *See also Rayonier Inc. v. NLRB*, 380 F.2d 187, 194 (5th Cir. 1967) (rejecting "utility" unit where the Board's justification "would result in the entire plant being fragmented into many small bargaining units with detriment to the employer and all the employees in the mill"); *NLRB v. Convair Pomona*, 286 F.2d 691, 696 (9th Cir. 1961) (rejecting Board's unit determination as "arbitrary and capricious" where it operated "to fragmentize a homogeneous group of skilled workers" having the same skills, interests, machinery, tools, pay and working conditions); *NLRB v. Pittsburgh Plate Glass Co.*, 270 F.2d 167, 173–74 (4th Cir. 1959) (rejecting Board approval of electricians-only unit where "[i]nstead of selecting an appropriate bargaining [unit] after a study of the circumstances of the case before it, it followed its announced policy of acceding to the wishes of a small group of employees . . . for separate representation . . .").

petitioned-for unit—*without regard* to whether these groups share an 'overwhelming' community of interests." *Id.* (emphasis added).

III. ARGUMENT

A. The Act's Plain Language and Legislative History Warrant Reaffirming *PCC Structurals* and *Boeing*.

1. The Requirement of an "Appropriate" Bargaining Unit Is Central to the NLRA and Governed by Mandates That Are Binding on the Board.

Any evaluation of a statute's requirements must start with the text. The cornerstone of the NLRA is Section 7, which protects the right of employees "to bargain collectively *through representatives of their own choosing*" and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" but also "*to refrain* from any or all of such activities." 29 U.S.C. § 157 (emphasis added).

The Act gives effect to the above rights through three core principles: (1) "majority" rule; (2) "exclusive" representation; and (3) most importantly, an "appropriate" bargaining unit. All three principles are reflected in Section 9(a), which states that union representatives "designated or selected for the purposes of collective bargaining by the *majority* of the employees *in a unit appropriate for such purposes*, shall be the *exclusive* representatives of all the employees *in such unit*." *Id.* § 159(a) (emphasis added). Ensuring that these principles are realized is one of the Board's primary responsibilities. The Board processes union representation petitions, provided that the petition identifies an "appropriate" unit. *Id.* And the Act requires the Board to conduct an "election by secret ballot" among unit employees to determine whether an employee "majority" supports or opposes union representation. *Id.* § 159(c).

Nothing is more important in the above process, however, than determining what constitutes an "appropriate" bargaining unit. The scope of the unit controls many fundamental employee rights. These rights include: (1) who can, and cannot, vote in any election; and

(2) how many votes will control the outcome of the election; and if a majority of unit employee votes favor union representation: (3) which employees will the union represent; (4) whether the unionized group will have sufficient shared interests, and be sufficiently distinct from other employees, to produce stable collective bargaining; (5) which employees will be denied union representation based on their exclusion from the unit; and (6) whether the bargaining unit will cause bargaining instability and subvert the interests of all employees based on illusory distinctions, arbitrary line-drawing, and/or a proliferation of bargaining units.

Congress understood that the Board's determinations about "appropriate" bargaining units would be critical to employee protections afforded by the Act. For example, during Senate hearings prior to enactment of the Wagner Act, Francis Biddle, Chairman of the precursor to the current NLRB, explained that fragmented bargaining unit determinations would fatally undermine the NLRA, especially in relation to the "majority rule" principle:

> The major problem connected with the majority rule is not the rule itself, but its application. *The important question is to what unit the majority rule applies*. . . . Section 9 (b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the [A]ct, may be a craft, plant, or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? . . . 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*.[4]

Chairman Biddle warned that, "of course, the Board can gerrymander in any case," but "any arbitrary act of the Board in selecting the unit *is subject to check on review by the court*."[5]

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[4] 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1458 (emphasis added).

[5] *Id.* at 1459 (emphasis added).

It is no accident, therefore, that Congress imposed significant requirements and restrictions on the Board regarding determinations about what constitutes an "appropriate" bargaining unit. Section 3(b) vests authority in the Board "to determine the unit appropriate for the purpose of collective bargaining." 29 U.S.C. § 153(b). This is elaborated in Section 9(a), which requires the Board to determine "*in each case*" whether a petitioned-for bargaining unit is "appropriate" for the "purposes of collective bargaining," *id.* § 159(a) (emphasis added), and Section 9(b), which expressly directs the Board to choose among a range of possible unit configurations, including whether the unit should be "the *employer* unit, *craft* unit, *plant* unit, or *subdivision thereof*." *Id.* § 159(b) (emphasis added). Moreover, based on language added in 1947, Section 9(b) states that the Board's bargaining unit determinations must "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act." *Id.* (emphasis added). Finally, the Act also *prohibits* the Board from making unit appropriateness turn on what group of employees already supports the union. Section 9(c)(5) states: "In determining whether a unit is appropriate for the purposes specified in subsection (b) *the extent to which the employees have organized shall not be controlling*." *Id.* § 159(c)(5) (emphasis added).

As the Board described in *PCC Structurals*, this statutory language "resulted from intentional legislative choices made by Congress over time," and "the history of those changes reveals an increasing emphasis on the role to be played by the Board in determining appropriate bargaining units." 365 NLRB No. 160, slip op. at 3. As the Board observed in *PCC Structurals*:

> The earliest versions of the Wagner Act legislation, introduced in 1934, did not contain the phrase "in each case," nor did they state that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." . . .
>
> When reintroduced in 1935, the legislation added a statement that unit determinations were "to effectuate the policies of this Act." When reported out of the Senate Labor Committee, the legislation stated that the Board "shall decide *in each case*" the appropriateness of the unit. . . .

> In the final enacted version of the Wagner Act, Section 9(b) stated that the Board's unit determinations "in each case" were "to insure to employees *the full benefit* of their right to self-organization, and to collective bargaining, and otherwise to effectuate the policies of this Act." . . .
>
> In 1947, in connection with the Labor Management Relations Act (Taft-Hartley Act or LMRA), Congress devoted further attention to the Board's unit determinations. The LMRA amended Section 7 so that, in addition to protecting the right of employees to engage in protected activities, the Act protected "the right to *refrain from* any or all of such activities." The LMRA also added Section 9(c)(5) to the Act, which states: "In determining whether a unit is appropriate . . . *the extent to which the employees have organized shall not be controlling*." . . . Finally, the LMRA . . . amended Section 9(b) to state . . . that the Board shall make bargaining unit determinations "in each case" in "order to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act.[6]

Thus, the Board does not write on a clean slate when it considers changing the standard governing bargaining unit determinations. The Board is constrained by what the statute requires and prohibits, both of which are reinforced by the Act's legislative history.

2. The Board Should Reaffirm *PCC Structurals* and *Boeing*, Which Give Effect to the Act's Requirements Governing "Appropriate" Bargaining Units.

The Board should reaffirm *PCC Structurals* and *Boeing*. Putting aside *Specialty Healthcare* (which Amici address below), *PCC Structurals* and *Boeing* merely give effect to the NLRA's express requirements governing the Board's evaluation of whether a representation petition identifies an "appropriate" bargaining unit. If the Board materially departs from the standards applied in *PCC Structurals* and *Boeing*, this would invite and warrant reversal on appeal.

The Board's decision in *PCC Structurals* embraced several concepts that govern "appropriate" bargaining units, all of which should be reaffirmed here.

[6] *PCC Structurals*, 365 NLRB No. 160, slip op. at 3–4 (emphasis added) (footnotes omitted) (citations omitted).

First, the Board reiterated the basic rule that it must comply with the explicit requirements of the Act (as set out above) and explained that these requirements were the result of congressional deliberation, as reflected in the statute's legislative history. None of these observations can reasonably be disputed. *See, e.g.*, *PCC Structurals*, 365 NLRB No. 160, slip op. at 3 ("Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation."); 29 U.S.C. § 159(b) ("The Board shall decide *in each case* whether, in order to *assure to employees the fullest freedom* in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (emphasis added)); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991) (same); *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962) (stating that "the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship" and "if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered").

Second, the Board in *PCC Structurals* stated that—when making determinations about what constitutes an "appropriate" bargaining unit—the Board would evaluate the interests of employees *within* the petitioned-for unit and the interests of employees *excluded* from the unit. Both sets of interests must be expressly considered in order for the Board to satisfy its responsibility under the Act—i.e., to decide whether a petitioned-for unit is "appropriate." The Board explained this in *PCC Structurals*:

> [N]othing in today's decision provides for the Board to reject an appropriate petitioned-for bargaining unit on the basis that a larger unit is more appropriate. *Our decision merely underscores that the Act requires the Board "in each case" to decide whether the petitioned-for unit is appropriate.* When evaluating unit appropriateness, as the Act requires, the Board will consider *different unit configurations identified in the statute (i.e., "the employer unit, craft unit, plant*

> *unit, or subdivision thereof")*, and nothing in today's decision precludes the possibility that, in a given case, multiple potential bargaining units may be appropriate.[7]

Thus, if a petition proposes a bargaining unit consisting of a particular "subdivision" of employees, while excluding other employees who might be part of an "employer unit," "craft unit" or "plant unit," the Board must consider the interests of employees outside of the petitioned-for group. Indeed, even in *Specialty Healthcare*—although the Board discounted the *weight* given to the interests of excluded employees—the Board indicated that the employees in an approved unit must be "readily identifiable as a group," which nominally requires a comparison of unit employees to those outside the unit, *Specialty Healthcare*, 357 NLRB at 944, and the Board recognized (at least when excluded employees shared an "overwhelming" community-of-interests) that the interests of excluded employees would warrant finding a unit inappropriate.

Third, the Board in *PCC Structurals* held that it was appropriate to continue applying traditional "community of interest" factors and industry-specific standards, which have governed unit determinations throughout most of the Act's history (and which the Board majority in *Specialty Healthcare* disclaimed changing). *See PCC Structurals*, 365 NLRB No. 160, slip op. at 5 (reaffirming the Board's traditional community-of-interest standards and relying on *United Operations, Inc*., 338 NLRB 123 (2002) and *Wheeling Island Gaming*, 355 NLRB 637 (2010)); *Specialty Healthcare*, 357 NLRB at 945–46 & n.29 (stating the Board would evaluate whether "employees in the group share a community of interest after considering the traditional criteria" and refer to "special industry and occupation rules"); *see also Green JobWorks, LLC*, 369 NLRB No. 20, slip op. at 2 (2020) (finding that "application of the traditional community of

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[7] *PCC Structurals*, slip op. at 12 (emphasis added) (footnote omitted) (quoting 29 U.S.C. § 159(b)).

interest standard is essential" to satisfying the Act's requirements regarding the Board's appropriate unit determinations).

Thus, in the present case, the Board should reaffirm *PCC Structurals*, which gives effect to the Act's explicit requirements and reaffirms the Board's traditional (and required) approach to cases involving a dispute over what constitutes an "appropriate" bargaining unit.

For the same reasons, the Board should also reaffirm *Boeing*. There, the Board did nothing more than articulate a three-part framework that embraces the same traditional standards and industry-specific tests described above:

> *First*, the *proposed unit* must share an internal community of interest. *Second*, the interests of those *within* the proposed unit and the shared and distinct interests of those *excluded* from that unit must be comparatively analyzed and weighed. *Third*, consideration must be given to the Board's decisions on appropriate units *in the particular industry involved*.[8]

Like *PCC Structurals*, the three-part framework referenced in *Boeing* gives effect to the Act's requirements, and it reflects no change from the traditional standards and industry-specific rules that have governed unit determinations for most of the Act's history, and which have been applied and upheld by the Board and the courts for decades.

B. *Specialty Healthcare* Is Irreconcilable with the Act Because It Eliminates Any Meaningful Board Assessment of Unit Appropriateness.

1. The *Specialty Healthcare* Standard Contradicts the Board's Responsibility in Each Case to Engage in a Rigorous Review of Unit Appropriateness.

The Act and its legislative history demonstrate that "Congress intended that the Board's review of unit appropriateness would not be perfunctory."[9] As discussed above, and as the Board aptly summarized in *PCC Structurals*:

> Section 9(b) mandates *that the Board determine what constitutes an appropriate unit "in each case,"* with the additional mandate that the Board only approve a

[8] 368 NLRB No. 67, slip op. at 3 (emphasis added).
[9] *PCC Structurals*, 365 NLRB No. 160, slip op. at 4.

unit configuration that "assure[s]" employees *their "fullest freedom" in exercising protected rights*. Although more than one appropriate unit might exist, the statutory language plainly requires that the Board "in each case" consider *multiple* potential configurations – *i.e.*, a possible "*employer unit*," "*craft unit*," "*plant unit*" or "*subdivision thereof*."[10]

Specialty Healthcare converted bargaining unit determinations by the Board into a rubber stamp, except in the rare situation when both included and excluded employee groups are proven to have "*overwhelming*" common interests. *Specialty Healthcare*, 357 NLRB at 945–46 (emphasis added).[11] This is at odds with what the Act requires and what Congress intended when it mandated that the Board "shall decide in *each* case" whether the petitioned-for bargaining unit was "appropriate" for purposes of collective bargaining.[12] As noted above, Section 9(b) states that the Board must determine whether the "appropriate" unit "shall be the employer, unit, craft unit, plant unit, or subdivision thereof." Yet, *Specialty Healthcare* "gives *all-but-conclusive* deference to every petitioned-for 'subdivision' unit, without attaching *any* weight to the interests of excluded employees . . . unless the employer proves the existence of '*overwhelming'* interests shared between petitioned-for employees and those outside the petitioned-for 'subdivision.'"[13]

These defects are not remedied by the hypothetical isolated case in which the Board might find employees outside the petitioned-for bargaining unit have "overwhelming" shared interests, which could prompt the Board to reject the petitioned-for unit. The Board's track

[10] *Id.* at 4–5 (emphasis added).
[11] Under *Specialty Healthcare*, the Board might sometimes find a petitioned-for unit inappropriate on the basis that employees *within* the petitioned-for group do not have enough common interests *among themselves* to be deemed appropriate. As indicated in note 2 above, however, this aspect of *Specialty Healthcare*—involving whether petitioned-for unit employees lack sufficient common interests among themselves—is not materially different from *PCC Structurals*, *Boeing* and numerous other cases.
[12] 29 U.S.C. §§ 159(a), 159(b) (emphasis added).
[13] *PCC Structurals*, 365 NLRB No. 160, slip op. at 6–7 (emphasis added).

record reveals that *Specialty Healthcare* made it "virtually impossible" for a party to satisfy the "overwhelming community of interests" standard,[14] and the application of *Specialty Healthcare* became "an *infinitely malleable standard* that shows that *anything goes*," without regard to the "organizational or other lines drawn by the Employer."[15]

Even when it has been obvious that the petitioned-for unit resulted from a highly selective picking and choosing among employees doing the same or similar jobs with the same or similar interests, the Board has repeatedly upheld the petitioned-for unit. *See, e.g.*, *Yale Univ.*, 365 NLRB No. 40 (2017) (denying review of nine petitioned-for bargaining units, each of which excluded teaching fellows in other academic departments, by disregarding evidence that all teaching fellows shared common duties, hours, wages, and health care benefits and that the Graduate School of Arts and Sciences exerted significant centralized control over the entire Teaching Fellows Program); *DPI Secuprint, Inc.*, 362 NLRB 1407 (2015) (approving a petitioned-for unit in a 20-employee workplace of press, bindery, shipping and receiving employees, while excluding 4 offset-press employees in the middle of the employer's integrated printing process, when all employees were commonly supervised, were functionally integrated, shared the same benefits, had similar pay rates, and were subject to the same general policies and operating procedures manual); *Macy's, Inc.*, 361 NLRB 12 (2014) (approving a petitioned-for unit of sales employees from a single cosmetics and fragrances department that was part of a full-service department store with salespersons in 10 other departments, where all salespersons

[14] *Specialty Healthcare*, 357 NLRB at 952 (Member Hayes, dissenting). *See also DPI Secuprint, Inc.*, 362 NLRB 1407, 1416 (Member Johnson, dissenting) (noting that *Specialty Healthcare* "imposes a nearly impossible requirement" where, for example, the Board "has gone to extraordinary lengths to inflate the most insignificant of distinctions to defeat the Employer's showing").

[15] *DPI Secuprint, Inc.*, 362 NLRB 1407, 1416 (Member Johnson, dissenting) (emphasis added).

had common tasks, job duties, benefits, hours, working conditions, job requirements, policies and evaluation criteria, and where dissimilarities *between* the petitioned-for department and other departments also existed among salespersons who worked *within* the petitioned-for unit); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 (2011) (approving a petitioned-for unit limited to roughly 220 technical employees, while excluding more than 2,100 other technical employees, notwithstanding that the work performed by all technical employees was functionally integrated and all technical employees worked at the same facility based on the same salary structure, personnel policies, benefits, and break facilities, among other things). *Odwalla, Inc.*, 357 NLRB 1608 (2011) is no exception. There, although the Board found that the exclusion of "merchandisers" would have rendered a bargaining unit inappropriate based on a finding that merchandisers and other unit employees shared an "overwhelming" community of interests, the case did not involve Board review of a petitioned-for unit. Rather, in *Odwalla*, the parties *stipulated* to the unit, and the Board merely resolved election challenges to the merchandisers' ballots (which the Board found were appropriate to count). *Id.* at 1613.

The *Specialty Healthcare* standard, on its face, promotes a proliferation of bargaining units, regardless of whether *all* employees share substantial interests. This type of unit proliferation has consistently been denounced by the courts for decades. In *Pittsburgh Plate Glass Co*., 270 F.2d at 172–74, the court stated, in reference to Section 9(b), that the Board could not "surrender to anyone else its statutory duty to determine in each case the appropriate unit," and the court rejected as "arbitrary" a unit of electricians rather than a "plantwide" unit, where a unit limited to electricians disregarded "the integrated nature of the Company's operations" and "acced[ed] to the wishes of a small group of employees . . . for separate representation." In *NLRB v. Convair Pomona*, 286 F.2d at 696, the court rejected a one-department unit which "fragmentize[d] a homogeneous group of skilled workers" and permitted "two groups," each potentially represented by a different union, which "creates rather than avoids difficult problems for labor and management." In *Rayonier Inc.*, 380 F.2d at 194, the court held that the Board abused its discretion when approving a "utility" unit that disregarded "the employer's integrated operations," ruling that the Board's rationale would cause "the entire plant" to be "fragmented into many small bargaining units with detriment to the employer and all the employees . . . ."

Finally, as noted above, the Board cannot reasonably rely on language in *Specialty Healthcare* that nominally suggests the Board might sometimes consider the interests of employees excluded from the petitioned-for unit. In this regard, *Specialty Healthcare* states that the petitioned-for unit would warrant approval only if it were "readily identifiable," 357 NLRB at 945–46, which seemingly entails comparing the interests of unit employees and those outside the petitioned-for unit. Courts have also held that the first stage of the *Specialty Healthcare* analysis, which references "traditional" community-of-interest criteria, *id.*, requires the Board to evaluate employee interests both within and outside the petitioned-for unit. *See, e.g., Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016).

However, the potential consideration of non-unit employee interests is rendered illusory by the *Specialty Healthcare* holding that those interests are immaterial unless they are "overwhelming" and overlap "almost completely" with the interests of petitioned-for unit employees. *Specialty Healthcare*, 357 NLRB at 944–46 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)). Moreover, innumerable Board cases that have applied *Specialty Healthcare* demonstrate that the *Specialty Healthcare* standard entails no meaningful consideration of excluded employees *even when* there appears to be abundant evidence that they share "overwhelming" interests with employees in the petitioned-for unit. *See* cases cited on pages 14-15 above. For these reasons, the Board cannot reasonably engage in a selective parsing of the *Specialty Healthcare* majority opinion to support a conclusion that *Specialty Healthcare* permits the Board to give meaningful consideration to the interests of employees excluded from the petitioned-for unit. To the contrary, in "case after case applying the *Specialty Healthcare* standard," the Board has given virtually no consideration to the interests of excluded employees, which "is inherent in the *Specialty Healthcare* standard" and reveals that "*the standard itself is the problem*." *PCC Structurals*, 365 NLRB No. 160, slip op. at 10 n.45 (emphasis added) (citations omitted).

In short, the *Specialty Health* standard is "fundamentally flawed." It contradicts the express responsibilities placed on the Board by the Act.[16] Although "multiple potential bargaining units may be appropriate,"[17] the Board cannot properly make the petitioned-for unit "controlling in all but those extraordinary cases when the evidence of overlapping interests between included and excluded employees is overwhelming."[18] Rather, Congress placed a much higher burden on the Board "in each case" to determine which unit configuration(s) satisfy the requirement of assuring employees their "*fullest freedom*" in exercising protected rights.[19]

2. The *Specialty Healthcare* Standard Improperly Disregards the Section 7 Rights of Employees Who Have Been *Excluded* from the Petitioned-for Unit.

As the above discussion makes clear, *Specialty Healthcare* forces the Board to approve any petitioned-for unit—even if it fails to encompass employees who have substantial interests in common with employees the union seeks to represent—except where there is proof that an "overwhelming" community of interests exists across the different employee groups. *Specialty*

[16] *PCC Structurals*, 365 NLRB No. 160, slip op. at 7.
[17] *Id.* at 12.
[18] *Id.* at 5.
[19] *Id*. at 5, 10 (emphasis added).

Healthcare, 357 NLRB at 945–46. As a result, the *Specialty Healthcare* standard leads the Board to improperly disregard the Section 7 rights of excluded non-unit employees.

The Act applies to *all* employees, including those employees not represented by a union or included in a petitioned-for bargaining unit. *See PCC Structurals*, 365 NLRB No. 160, slip op. at 8 ("All statutory employees have Section 7 rights, including employees that have been excluded from the petitioned-for unit."). And the Board's bargaining unit determinations do not merely affect employees who are *within* a particular unit. Rather, as noted previously, the scope of the bargaining unit has equally profound effects on employees who are *excluded* from the bargaining unit. Those excluded employees (1) are denied the ability to vote in any election that results from the petition; (2) are denied representation by the union (even if it prevails in the election); and (3) most importantly, will be adversely affected by any resulting instability—and damage to the business—if the approved bargaining unit is based on illusory distinctions, arbitrary line-drawing and/or a proliferation of bargaining units.[20]

Again, it bears emphasis that Section 9(b) affirmatively states that the Board "shall decide in each case" *whether* the appropriate unit "shall be the *employer* unit, *craft* unit, *plant* unit, or *subdivision* thereof." 29 U.S.C. § 159(b) (emphasis added). This makes it inappropriate for *Specialty Healthcare* to give all-but-conclusive deference to every petitioned-for "subdivision" unit, while attaching no weight to the interests of excluded employees in potential "employer," "craft," "plant," or alternative "subdivision" units absent proof of "overwhelming" interests on the part of excluded employees. As stated in *PCC Structurals*, 365 NLRB No. 160,

[20] *See PCC Structurals*, 365 NLRB No. 160, slip op. at 5 (recognizing that the Act does not permit bargaining units that are "arbitrary, irrational, or 'fractured'—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit").

slip op. at 7: "Congress expected *the Board* to give careful consideration to the interests of all employees when making unit determinations . . . ." For this reason too, the Board should decline to reinstate or return to the *Specialty Healthcare* standard.

3. The *Specialty Healthcare* Standard Effectively Makes the "Extent to Which Employees Have Organized" Controlling, Contrary to Section 9(c)(5) of the Act.

Beyond the above considerations, the Board should decline to reinstate *Specialty Healthcare* given Section 9(c)(5)'s prohibition that, when the Board determines "whether a unit is appropriate," the "extent to which employees have organized shall not be controlling." As the Board concluded in *PCC Structurals*, 365 NLRB No. 160, slip op. at 7, "*Specialty Healthcare* effectively makes the extent of union organizing 'controlling,' or at the very least gives far greater weight to that factor than statutory policy warrants, because under the *Specialty Healthcare* standard, the petitioned-for unit is deemed appropriate in all but rare cases."

Although several courts have indicated that the *Specialty Healthcare* standard, on its face, is permissible under Section 9(c)(5), those courts placed weight on the *Specialty Healthcare* majority's indication that the Board would determine, as a first step in its analysis, that the petitioned-for employees were "readily identifiable as a group" (which would ostensibly require comparing them to employees excluded from the unit) and that "employees in the group share a community of interest after considering the traditional criteria." *Specialty Healthcare*, 357 NLRB at 945. Based on this language, courts "have indicated that [*Specialty Healthcare*] requires the Board to evaluate shared interests both within and outside the petitioned-for unit as an essential part of the first step of the *Specialty Healthcare* analysis. . . ."[21] However, as the Board properly recognized in *PCC Structurals*, the cases applying *Specialty Healthcare*

[21] *PCC Structurals*, 365 NLRB No. 160, slip op. at 9 (citing *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 794).

demonstrate that (1) it "does *not* permit consideration of the interests of employees excluded from the petitioned-for unit," except in the "rare instance" when both groups share an "overwhelming community of interests," *PCC Structurals*, 365 NLRB No. 160, slip op. at 10 n.45; and (2) in practice, even when "overwhelming" shared interests exist (as illustrated by the cases described on pages 14-15 above), the Board repeatedly held that they were not "overwhelming" enough. Thus, the Board cannot reasonably rely on court decisions that have upheld the *Specialty Healthcare* standard, and the Board should reaffirm *PCC Structurals*, where the Board concluded that "the standard itself is the problem." *Id.* (citations omitted).

Alternatively, even if *Specialty Healthcare* could be deemed permissible, abandoning the "overwhelming" community-of-interest standard "better serves the Board in carrying out its responsibility to make unit determinations that assure to employees their 'fullest freedom' in exercising their rights under the Act."[22]

IV. CONCLUSION

For the reasons described above, the Board should reaffirm its decisions in *PCC Structurals* and *Boeing* and decline to reinstate or return to the *Specialty Healthcare* standard.

Respectfully submitted,

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Dated: January 21, 2022

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[22] *PCC Structurals*, 365 NLRB No. 160, slip op. at 10 (quoting 29 U.S.C. § 159(b)).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the BRIEF OF AMICI CURIAE COALITION FOR A DEMOCRATIC WORKPLACE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND AMERICAN BAKERS ASSOCIATION, was filed today, January 21, 2022, using the NLRB's e-Filing system and were served by email upon the following individuals:

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