Case No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

Petition for Review from NLRB Order dated January 7, 2015
NLRB Case No. 01-CA-137863

PROPOSED *AMICI CURIAE* BRIEF BY THE COALITION FOR A DEMOCRATIC WORKPLACE, U.S. CHAMBER OF COMMERCE, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER CROSS-RESPONDENT MACY'S, INC.

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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICI*[1]

As set forth in detail in their contemporaneous and incorporated motion, all of the *amici* are large national associations of employers and labor-management professionals whose constituent members are subject to the National Labor Relations Act ("NLRA") and are directly affected by the manner in which the National Labor Relations Board ("NLRB" or "Board") makes bargaining-unit determinations. All of the *amici* have appeared as such in the proceedings below in this matter; and all regularly appear as *amici* at the administrative and federal appellate level in conjunction with important decisions under the NLRA. All of the *amici* and their members have a significant interest in ensuring that the standards articulated by the NLRB are consistent with the language and purposes of the NLRA and also are sound, practical, and responsive to the realities of today's workplace.

SUMMARY OF ARGUMENT

In *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 N.L.R.B. No. 83 (2011), a divided NLRB adopted a new and fundamentally different standard for determining the appropriateness of initial bargaining-

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned state that no party's counsel authored this brief in whole or in part. No party or its counsel or other person (other than the *amici*, their members and their counsel), contributed money intended to fund the preparation or submission of this brief.

unit requests. The new standard, as applied by a majority of the Board in this case, provides that "where the employees in the petitioned-for unit are a readily identifiable group who share a community of interest," they constitute a statutorily appropriate unit unless it can be demonstrated that other excluded employees share an "overwhelming community of interest" with the petitioned-for group. *Macy's Inc. & Local 1445, UFCWU,* 361 N.L.R.B. No. 4, at p. 1 (2014). The Board applied its *Specialty Healthcare* standard here to conclude that sales employees in the fragrance and cosmetic departments at a Macy's location in Saugus, Massachusetts were an appropriate bargaining unit.

This new standard for determining the propriety of initial bargaining units flies in the face of the statutory presumption in favor of broader bargaining units and departs from the standard consistently used by the Board for decades. Under the previously well-established standard, the Board would first determine if the petitioned-for group shared a community of interest and then would determine if any excluded employees shared a sufficient community of interest with the petitioned-for group to warrant their inclusion. *See, e.g.*, *Swift & Co.*, 129 N.L.R.B. 1391 (1961); *U.S. Steel Corp.,* 192 N.L.R.B. 58 (1971); *Publix Super Markets, Inc.,* 343 N.L.R.B.

1023 (2004); *Casino Aztar,* 349 N.L.R.B. 603 (2007). As the Board has noted, the Board's inquiry regarding the appropriateness of a requested unit

> 'never addresse[d], solely and in isolation, the question of whether the employees sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests 'in common'. Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group are *sufficiently distinct* from the other employees to warrant the establishment of a separate unit.' The Board has a long history of applying this standard in initial unit determinations. …The issue, however, is not whether there are too few or too many employees in the unit, but whether the unit 'is *too narrow in scope* in that it excludes employees who share a substantial community of interest with employees in the unit sought.'

Wheeling Island Gaming, Inc., 355 N.L.R.B. No. 127 at *1 n.2 (2010). The differences between the Board's traditional test and the new standard applied in this case are far from semantic and they yield vastly different results. Moreover, while the Board's traditional test is consistent with the commands of the NLRA, its new test is not.

Section 9(b) of the NLRA provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the 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). The standard enunciated in *Specialty Healthcare,* and applied in this case, conflicts with the

commands of Section 9(b) because, under the new standard, the Board does not determine the initial unit "in each case" but establishes a *per se* rule, applicable in every case, that if a petitioner seeks a unit composed of all of the employees that share the same job title or classification, or all the employees in the same department, such a unit is invariably appropriate and cannot be expanded. As such, the standard cannot be countenanced.

Finally, the adoption of the standard also violated the Administrative Procedure Act and well-settled law because the Board implemented a new generally applicable standard for determining bargaining units through adjudication without adhering to the procedural requirements for rulemaking in the Administrative Procedure Act.

ARGUMENT

I. The Initial Unit Determination Methodology Announced in Specialty Healthcare And Applied Here Violates Section 9(b) Because The Board Does Not Determine Initial Units "In Each Case."

Since the issuance of its decision in *Specialty Healthcare,* the Board has abandoned its statutory obligation under Section 9(b) to determine the appropriate unit in each case. *See N.L.R.B. v. WKRG-TV, Inc.,* 470 F.2d 1302, 1310 (5th Cir. 1973) ("Before a bargaining order is issued, it should be determined that the unit that the union is seeking to represent contains a sufficient commonality of interest to be deemed 'appropriate' within the

meaning of the NLRA"). In practice, the Board instead has established and applied a rule that functionally equates all employees in any "readily identifiable group" with "an appropriate unit." Thus, if a petitioner seeks all the employees in any "readily identifiable group," the Board's analysis effectively ends. This does not constitute the requisite analysis of what is appropriate in each case. *See N.L.R.B. v. Yeshiva University,* 444 U.S. 672, 691 (1980) (noting that the Board cannot make unit determinations based on "conclusory rationales"); *N.L.R.B. v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156-57 (5th Cir. 1980) ("The unit determination will be upheld only if the Board has indicated clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support its appraisal of the significance of each factor.").

The Board has attempted to avoid this legal infirmity by asserting that a petitioner's request is subject to review "in each case," first by determining if the "readily identifiable group" shares a community of interest and is thus, in itself, appropriate; and, second, by determining if other excluded employees share such an "overwhelming community of interest" that their inclusion is required. *See, e.g.*, *Guide Dogs for the Blind, Inc.*, 359 N.L.R.B. No. 151 (2013); *Northrop Grumman Shipbuilding*, *Inc.*, 357 N.L.R.B. No. 163 (2011); *DTG Operations, Inc.,* 357 N.L.R.B. No. 175 (2011). In

practice, however, this alleged case-by-case analysis has constituted little more than lip service to the Board's statutory obligation. As the post-*Specialty Healthcare* full board decisions noted below demonstrate, if a petitioner seeks a unit composed either of all of the employees that share the same job title or classification, or all the employees in the same department or analogous administrative division, such a unit is invariably deemed appropriate and cannot be expanded. *See also* footnote 4, *infra*.

In the ordinary case, the proposed job classification unit or departmental unit often meets the first step in the *Specialty Healthcare* inquiry because there is a "readily identifiable group" that shares a "community of interest." As to the second step of that inquiry, where the unit sought is a departmental or classification unit, the Board has *never* found that any other employees share "an overwhelming community of interest" with the petitioned-for group. Thus, this portion of the *Specialty Healthcare* analysis has proven to be illusory wherever the petitioner seeks to organize all of the employees within a job classification or all of the employees within a department.

Specialty Healthcare thus stands for the new and radical proposition that classification or departmental units are *de facto* appropriate**.** Factors such as identical work location, common upper level supervision, the

applicability of the same pay system, same personnel policies, same benefits, same work, same qualifications, work related contact, functional integration and employee interchange, which exist in varying degrees in all the cases noted below, have never been found by the Board majority to be sufficient to establish an "overwhelming community of interest." Effectively, the bar is so high, that the second inquiry can rarely be met. Thus, under the Board's *Specialty Healthcare* approach, a classification or departmental unit in practice is irrebuttably appropriate.

A brief review of the Board's post-*Specialty Healthcare* precedent illuminates this reality. Including *Specialty Healthcare* and this case, the Board has issued fully explicated decisions in nine cases involving the so-called "micro unit" issue.[2]

In *Guide Dogs for the Blind*, 359 N.L.R.B. No. 151, the Board found appropriate a unit of approximately 33 employees in an integrated operation of approximately 75 employees all engaged in the breeding, care, training and placement of guide dogs. The proposed unit, confined to the "training

[2] It is not the size of the post-*Specialty Healthcare* units that is in issue. Rather, it is the fact that the unit constitutes only a portion of what would otherwise be deemed the appropriate unit under the pre-*Specialty Healthcare* "sufficient community of interest" test. This case is illustrative. The issue is not the number of fragrance and cosmetic employees there are in the requested unit. The issue is that the unit is an unworkable and impermissible portion of the presumptive, traditional store-wide unit.

department" was found appropriate despite the fact that all employees shared similar benefits, were subject to identical policies, common overall supervision, experienced interdepartmental interchange, and worked in a single integrated operation. Under *Specialty Healthcare*, the employer's administrative placement of the requested employees in a separate "department" trumped all other considerations.

In *DTG Operations, Inc.,* 357 N.L.R.B. No. 175, the Board reversed the Regional Director and found appropriate a unit of 31 rental service agents and lead rental service agents out of a workforce of 109 employees working at a single integrated rental car operation at the Denver airport because they shared the same job classification; notwithstanding that all of the employees were subject to common overall supervision and the same policies, enjoyed a similar wage structure, and had "an extensive amount of interchange between classifications." *DTG*, at *29, (2011). Yet again, the unitary classification of the requested employees was dispositive.

In *Northrop Grumman Shipbuilding Co.*, 357 N.L.R.B. No. 163, the Board found a subset of the employer's technical employees to be an appropriate unit solely because the proposed unit was co-extensive with a department. The majority reached this result even though all of the employer's technical employees worked in the same facility, shared the

same salary structure and personnel policies, shared similar technical training, enjoyed the same benefits, had daily work-related contact, were subject to the same upper level management supervision, and had duties functionally integrated with all the other technical employees. Rather, the fact that the requested employees comprised a single technical department dominated not only over all other facts, but also over long-standing Board doctrine that an appropriate unit should include all technical employees who share a community of interest. *See, e.g., PECO Energy Co.*, 322 N.L.R.B. 1074, 1085 (1997); *see also Westinghouse Electric Corp*. (Westinghouse II), 300 N.L.R.B. 834 (1990); *Westinghouse Electric Corp. (Westinghouse I)*, 137 N.L.R.B. 332 (1962).

And in *Fraser Engineering*, 359 N.L.R.B. No. 80 (2013), the Board majority found a unit of 26 welders, pipefitters, plumbers and HVAC technicians employed by Fraser Engineering to be appropriate, despite the fact that it excluded 13 welders, pipefitters, plumbers and HVAC technicians employed by Fraser Petroleum, a wholly owned subsidiary.[3] The fact that the 26 employees were housed in the same "administrative unit," akin to a department, was again dispositive, despite the fact that the job function and

[3] To be sure, Frasier Engineering and Frasier Petroleum were legally separate entities that were arguably not the same employer. However, the Board's failure to even address this issue demonstrates that the *Specialty Healthcare* standard is in practice virtually irrebuttable.

requirements were the same, they were housed in the same facility, were subject to common supervision, were subject to the same wage system, were covered by the same handbook and personnel policies, were included in the same group health, dental and vision plans, covered under the same group life insurance policy, 401(k) plan, and employee stock ownership plan. Once again the Board elevated the departmental or administrative form over all the commonly shared factors that are actually related to the substance of collective bargaining.

Those full cases in which the Board found a requested "micro-unit" inappropriate are equally instructive. In *Neiman Marcus Group, Inc.*, 361 N.L.R.B. No. 11 (2014), the Board found a unit of sales associates who sold shoes in two different departments inappropriate since the request was not confined to a single department, and did not encompass all of the employees classified as sales associates. In *Odwalla*, *Inc.*, 357 N.L.R.B. No. 132 (2011), the Board rejected a proposed unit, which combined a number of job classifications but which excluded the classification of merchandiser, on the ground that the proposed unit did not reflect "classification" or "departmental" lines. Finally, in *ASV, Inc.*, 360 N.L.R.B. No. 138 (2014), the Board cited with approval the decision of an Acting Regional Director finding inappropriate a unit request for a portion of the employer's

assemblers and parts employees who performed "undercarriage" work finding, once again, that the request did not encompass all the employees within a classification and did not encompass a department.

At bottom, the Board's fully explicated decisions reveal that it has adopted a new standard under which it will find any petitioned-for unit that consists of all employees in a classification or job title, or all employees in a department irrebuttably appropriate.[4] Under the *Specialty Healthcare* rubric, as the dissent in *DTG* correctly noted:

> 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.

[4] The cases in which the Board has issued a short-form order (not published in Board volumes) adopting a Regional Director's post-*Specialty Healthcare* approach are to the same effect. *See, e.g.*, *Swissport USA, Inc.*, No. 29-RC-144512 (March 26, 2015) (cleaners only unit deemed appropriate classification unit); *CNH America, LLC*, No. 25-RC-116569 (January 16, 2014) (welders only unit deemed appropriate classification unit); *Nestle Dryer's Ice Cream*, No. 31-RC-66625 (Dec. 28, 2011) (unit of maintenance employees deemed appropriate where proposed co-extensive with maintenance department); *First Aviation Servs., Inc.*, No. 22-RC-061300 (line service technicians only unit deemed appropriate classification unit); *Prevost Car U.S.*, No. 03-RC-071843 (Mar. 16, 2012) (full time assemblers only unit deemed appropriate classification unit).

DTG, at * 11. The observation is correct, and this mechanistic application of such a rule cannot be squared with the obligation of the Board under Section 9(b) to determine the appropriate unit in each case.[5]

The Board has argued that its approach is sanctioned under the D.C. Circuit's decision in *Blue Man Vegas LLC v. N.L.R.B.,* 529 F.3d 417 (D.C. Cir. 2008). But *Blue Man* does not support the Board's approach. That decision does not involve an initial bargaining unit determination as does *Specialty Healthcare* and its progeny, including this case. *Blue Man* instead concerned the propriety of adding a historically excluded group of employees to a bargaining unit that had existed for several years, was represented by the same union and had engaged in collective bargaining negotiations over that extended period. In the factual circumstances of the

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[5] The Board's radical departure from precedent and statutory mandate with the new "overwhelming community of interest" test does not extend to a concern over the Board's presumption that a traditional craft unit is appropriate. Section 9(b)(2) and established precedent favor approval of craft units. Specifically, Section 9(b)(2) prohibits the Board from deciding that any craft is inappropriate for collective bargaining purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation. The Board has described a craft unit as "one consisting of a distinct and homogenous group of skilled journeymen craftsmen, who together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment." *Burns & Roe Services, Corp.*, 313 N.L.R.B. 1307, 1308 (1994). The same deferential treatment of departmental and classification units, however, is inconsistent with the Act and Board precedent.

case, and relying heavily on the parties' long bargaining history, the NLRB's Regional Director found the historical unit to be appropriate and the Board affirmed. The propriety of the unit determination reached the D.C. Circuit in the wake of a technical refusal to bargain. The court affirmed the Board, and in doing so found the unit appropriate pursuant to an "overwhelming community of interest" standard. This standard had not been applied to initial bargaining unit determinations, but had been reserved for *accretion* situations. *See, e.g.*, *Safeway Stores, Inc.*, 256 N.L.R.B. 918 (1981); *See also*, *NV Energy*, 362 N.L.R.B. No. 5, slip op. at 3 (2015); *AT Wall*, 361 N.L.R.B. No. 62, at *3 (2014); *Milwaukee City Ctr., LLC*, 354 N.L.R.B. 551, 552-553 (2009); *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. 1270, 1271 (2005), enf'd. by 181 F. App'x. 85 (2d Cir. 2006).

The distinction between initial determinations and accretions is crucial. In a classic accretion, a group of employees is added to a pre-existing bargaining unit without the right to vote by secret ballot whether they wish to be represented. Accretion is therefore permissible only where inclusion of the excluded group is compelled by virtue of their "overwhelming community of interest." *See N.L.R.B. v. Superior Protection*, *Inc.,* 401 F 3d 282, 288 (5th Cir. 2005) (quotations omitted) (holding that accretion is appropriate "only when the additional employees have little or

no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted"). In an accretion, the inclusion bar should be high, because those included have no right to vote on whether to engage in collective bargaining. Such is not the case in an initial unit determination.

Blue Man did not present a classic accretion scenario. The court, however, either by imprecise analogy or more fundamental error imported the accretion standard into that case. This was plainly not the only misconstruction at play in *Blue Man*. To the extent it purportedly stands for the proposition that the "overwhelming" standard applies to initial unit determinations, it is simply incorrect and unsupported by the Board's then-extant representation case jurisprudence. It relies on only two Board cases *Jewish Hospital of Cincinnati*, 223 N.L.R.B. 614 (1976), and *Holiday Inn City Center*, 332 N.L.R.B. 1246 (2000). Contrary to the *Blue Man* court's assertion, the Board did not find in either of those decisions that an "overwhelming community of interest" standard is applicable in initial unit determinations. Thus, neither *Jewish Hospital of Cincinnati* nor *Holiday Inn City Center* supports the proposition for which they are cited. The factual uniqueness of the underlying case and the misconstruction of Board

precedent may account for the fact that *Blue Man*'s overwhelming community of interest test is at odds with the view of this and virtually all other reviewing Circuits. *See, e.g.*, *N.L.R.B. v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980); *N.L.R.B. v. ADT Security Services, Inc.,* 689 F. 3d 628, 633 (6th Cir. 2012); *N.L.R.B. v. Great Western Produce, Inc.* 839 F.2d 555 (9th Cir. 1988). The Board in *Specialty Healthcare* compounds the matter by improperly importing the accretion standard into the initial unit determination analysis with the result of establishing a *per se* rule that invariably finds a "classification" or "departmental" unit appropriate in contravention of the requirements of Section 9(b).

II. The New Standard Does Not Assess A Proposed Unit In Terms Of Its Propriety "For The Purposes Of Collective-Bargaining."

The congressional directive to the Board in Section 9(b) is a functional one. It mandates that the Board make an initial unit determination that is properly suited to the conduct of collective bargaining. Although the Board has some degree of discretion in meeting this statutory command, its discretion is not absolute. Its determination must be tethered to the central purposes of the Act. Thus, units found appropriate by the Board must both be suited to the purpose of collective bargaining and must be consistent with the Board's overarching obligation to create an efficient and stable

bargaining structure that assures industrial peace. *See, e.g.*, *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 165 (1941); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211 (1964*); Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 674 (1981) (citing*, Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937).

The Board has never explained why the *Specialty Healthcare* standard results in either a bargaining unit that is consistent with the purposes of the Act or one more consistent with its purposes than a unit configured under the Board's long-standing traditional standard. Why is a multiplicity of bargaining units artificially confined to a job classification or department suited at all to collective bargaining? Why are such units to be preferred over units configured on the basis of common personnel policies, common overall supervision, functional integration, and common pay and benefit systems—all the grist of collective-bargaining negotiations? The Board's silence on this central issue is deafening. *See Purnell's Pride*, 609 F.2d at 1156 (holding that to properly determine a bargaining unit, "the Board must assign a relative weight to each of the competing factors it considers"). The simple conclusion is that the *Specialty Healthcare* standard does *not* advance

the goals of collective bargaining as mandated by Section 9(b). Indeed, it is precisely to the opposite effect.

In the present case, for example, the Macy's store in Saugus, Massachusetts has 120 selling employees in ten sales departments, in addition to the fragrance and cosmetics department, and an additional 30 non-selling employees. *Macy's*, 361 N.L.R.B. No. 4, at *1, *3. Under the Board's representation case jurisprudence that applied for more than fifty years before *Specialty Healthcare,* a single storewide unit would have been presumptively appropriate in this retail store. *See, e.g.*, *I. Magnin & Co.*, 119 N.L.R.B. 642 (1957); *Haag Drug Co*., 169 N.L.R.B. 877 (1968); *Levitz Furniture Co.*, 192 N.L.R.B. 61 (1971); *Charrette Drafting Supplies Corp*., 275 N.L.R.B. 1294 (1985). Under the *Specialty Healthcare* rubric, however, these same 150 employees could now be subdivided into a minimum of twelve separate, "appropriate" bargaining units.

The balkanization of a workforce in this manner is diametrically opposed to creating an efficient and rational bargaining framework, and fostering labor stability as mandated by Section 9(b). Thus, such an arrangement would result in the prospect of near ceaseless negotiations for a minimum of twelve collective-bargaining contracts each of which having its own expiration date would multiply the risk of discrete work stoppages

affecting an otherwise integrated work force. In addition, the *Specialty Healthcare* bargaining scheme would result in serial bargaining with the attendant inevitability of poisoning the process through whipsaw and leap-frog tactics. Most importantly, however, there potentially would be twelve different sets of negotiations resulting in twelve divergent contractual resolutions of such commonly shared matters as wage systems, benefits, including group health and other group insurance, retirement programs, seniority, hours of employment, personnel policies, work rules, and all other common "terms and conditions of employment." These matters constitute the meat of the collective-bargaining process: and where they are common to all employees they should not be subject to multiple negotiations. *See N.L.R.B. v. Catalytic Indus. Maint. Co. (CIMCO)*, 964 F.2d 513, 518 (5th Cir. 1992) (quotations omitted) ("the most reliable indicium of common interest among employees is similarity of their work, skills, qualifications, duties and working conditions"). Yet this is exactly what the real world application of the *Specialty Healthcare* rubric yields; and is precisely the result Congress made clear is unacceptable.

The post-*Specialty Healthcare* bargaining framework, when viewed from the employee side of the table, is no less problematic or inconsistent with the purposes of the statute. The most fundamental precept of collective

bargaining is that there is strength in numbers. Except in rare situations, a small, discrete segment of any workforce, exercises exponentially less leverage at the bargaining table than does a company-wide or similarly comprehensive grouping of employees. In the real world, negotiation is invariably about leverage. In labor negotiations, from the employer's side of the table, that leverage often boils down to whether it is in its interest to accede to the employees' collective economic demands, or to sustain the economic losses that would result from the employees' collective withholding of services. It is axiomatic in most instances that the smaller the group, the less the economic impact of their withholding of services; and, thus, the less the employees' leverage. Classification or departmental units make organizing easier, but make bargaining less effective. Section 9(b), indeed the Act in its entirety, is concerned with the latter, not the former.

Under *Specialty Healthcare*, unit making is not only less effective for employees in terms of bargaining, it also is contrary to employees' best interests in terms of contract administration. A multiplicity of bargaining units carries with it the very real possibility of contractual language that is ultimately injurious to employees. For example, a common feature of many collective-bargaining agreements is the imposition of "unit seniority" preferences in bidding and promotions. Such language, repeated over

multiple departmental or classification based units will have a very predictable "silo" effect making it difficult for employees to transfer between departments or classifications, develop new skills, or avail themselves of promotional or other career advancement opportunities.

The adoption and application of the *Specialty Healthcare* standard does not reflect the type of policy choice that the Board concededly has discretion to make. Rather, it represents a choice demonstrably at odds with the commands of the statute—a choice the Board is not empowered to make.

III. Contrary To The Statute, The New Standard Reverses The Presumption In Favor of Larger Bargaining Units.

Section 9(b) also includes the mandate to approve a unit configuration that "assures" employees their "fullest freedom" in exercising protected rights. *See N.L.R.B. v. Fid. Maint. & Constr. Co.*, 424 F.2d 707, 709 (5th Cir. 1970) ("Section 9(b) of the Act directs the Board to fashion its bargaining unit determination in such a manner as to insure to employees the fullest freedom in exercising their rights guaranteed by the Act"). This mandate is satisfied when broader bargaining units are approved.

The plain language of the statute makes clear Congress's presumption in favor of larger, broader bargaining units. Section 9(b) specifically makes reference to "employer" units and "plant" units, or, in the alternative, units that are "a subdivision thereof." Although "departmental" units, "employee

classification" units, or any of the other more narrowly drawn units found appropriate by the Board in the wake of *Specialty Healthcare* might arguably be deemed appropriate under the "subdivision" alternative, the specific statutory reference to employer-wide and plant-wide units in the text of 9(b), and the alternative "subdivision" reference, is indicative of a presumption in favor of broader units in most industrial settings. This presumption makes sense because, as this Court has noted, "the designation of a small unit that excludes employees with common skills, attitudes, and economic interests may unnecessarily curtail the union's bargaining power and may generate destructive factionalization and in-fighting among employees." *Purnell's Pride*, 609 F.2d at 1156. Indeed as Chairman Biddle persuasively explained, the comprehensive unit—all eligible employees at the facility—is the presumption:

> … 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 Act, may be a craft, plant or employer unit… If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; *and, by breaking off into small groups, could make it impossible for the employer to run his plant*.

Hearings Before the S. Comm. On Educ. & Lab. on S. 1958, 74th Cong. 82 (1935) (testimony of Francis Biddle, then Chairman of the precursor to the

Board) (emphasis added), reprinted in 1 N.L.R.B., *Legislative History of the Labor Management Relations Act of 1947,* at 1458 (1948).

Until the issuance of *Specialty Healthcare*, the "presumptively" appropriate units that the Board for decades had found in most industries plainly reflected this statutory preference. *See, e.g.*, *Kalamazoo Paper Box Corp.* 136 N.L.R.B. 134, 136 (1962) ("a plantwide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees"); *Jackson Liquors*, 208 N.L.R.B. 807 (1974) (plant/ employer wide unit is presumptively appropriate); *Appliance Supply Co*., 127 N.L.R.B. 319 (1960) (unit of production and maintenance employees is presumptively appropriate); *Jersey Shore Nursing & Rehabilitation Center*, 305 N.L.R.B. 603 (1998) (service and maintenance unit in nursing home is presumptively appropriate); *Daniel Finley Allen & Co.,* 303 N.L.R.B. 846, 847 (1991) (unit of all drivers and helpers presumptively appropriate). For nearly 60 years, the Board has consistently recognized that "storewide" bargaining units are presumptively appropriate in the retail industry due to nature of the employer's overriding business objective to sell. *See, e.g., May Department Stores Co.*, 97 N.L.R.B. 1007, 1008 (1952) ("storewide unit" called "the optimum unit for the purpose of collective bargaining" in the retail industry); *I. Magnin & Co.*, 119 N.L.R.B. 642, 643 (1957) (stating that

the Board "has long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry"); *Montgomery Ward & Co.*, 150 N.L.R.B. 598, 600 (1964) (recognizing that "storewide or overall unit is presumptively appropriate for the purposes of collective bargaining"); *Sears, Roebuck & Co.*, 261 N.L.R.B. 245, 346 (1982) (calling a storewide unit "presumptively appropriate"); *see also Charrette Drafting Supplies Corp.*, 275 N.L.R.B. 1294, 1297 (1985) (holding that in retail context "the Board finds a single-facility unit presumptively appropriate").

The Board expressly recognized the continued validity of existing bargaining unit presumptions, like that in the retail industry, throughout its decision in *Specialty Healthcare*. For example, the Board stated: "We note that the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. Our holding today is not intended to disturb any rules applicable only in specific industries…." *Specialty Healthcare*, 357 N.L.R.B. at *13 n.29. Indeed, in subsequent cases, the Board has continued to recognize that *Specialty Healthcare* does not displace existing bargaining unit presumptions in industries outside the non-acute care healthcare industry. *See, e.g.*, *Northrop Grumman*, 357 N.L.R.B. at *5 (noting that "the holding in *Specialty* was 'not intended to disturb any

rules applicable only in specific industries'" and concluding that "to the extent that the Board has developed special rules applicable to technical employees . . . those rules remain applicable."); *DTG*, 357 N.L.R.B. at *5 n.16 (stating that the Board "will also apply established presumptions" that exist in specific industries for bargaining unit determinations).

Prior to *Specialty Healthcare*, the proper inquiry under the long-standing Board standard had been whether disputed groups of employees shared a sufficient community of interest with those sought by the petitioner as to require their inclusion. *See, e.g.*, *Aerospace Corp.*, 331 N.L.R.B. 561, at *5 n.16 (2000) (unit of laboratory mechanics did not share a "sufficient community of interest to be included in the petitioned-for unit."); *Science Applications Corp*., 309 N.L.R.B. 373 at *1 n.1 (1992) (software development employees lacked a "sufficient community of interest" with petitioned for unit to require their inclusion); *Typecraft Press*, 275 N.L.R.B. 553, at *1 n.1 (1985) ("paste-up" employees and typesetters shared sufficient community of interest with petitioned for employees to warrant inclusion in the unit); *Hallam & Boggs Truck & Implement Co.*, 92 N.L.R.B. 1339, 1340 (1951) ("set up men" shared sufficient community of interest with petitioned-for operating and maintenance employees to warrant inclusion in the unit). Under the standard established in *Specialty*

Healthcare, and applied in this case, as long as the group sought by the petitioner has a recognizable identity the Board generally accepts the petitioned-for group as appropriate and no other employees can be added unless the party seeking inclusion and the right to exercise their protected rights can show the excluded employees have an *overwhelming* community of interest with the petitioned-for group. *See Specialty Healthcare*, 357 N.L.R.B. at *1. This new standard takes the statutory presumption in favor of broad units and stands it on its head. Under *Specialty Healthcare*, the presumptively appropriate unit is always *the smallest identifiable group of employees*, not the broadest. This standard is contrary to decades of Board law, and contrary to Section 9(b) of the Act.

IV. The New Standard Violates The Act By Failing to Consider All Of The Rights Guaranteed By The Act When Making Unit Determinations.

Section 9(b) of the 1935 Wagner Act stated that the Board's unit determinations 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." Wagner Act, ch. 372, § 9(b), 49 Stat. 449, 453 (1935) (emphasis added). In 1947, as part of the Labor Management Relations Act ("LMRA"), Congress amended this language in Section 9(b) to state that unit determinations must "assure to employees the fullest

freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. §159(b). The LMRA also amended Section 7 of the Act 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." 29 U.S.C. §157. These important amendments to the Act "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose or not to choose representatives for collective bargaining." H.R. Rep. No. 80-510, at 47 (1947) (Conf. Rep.), *reprinted* in 1 N.L.R.B., *Legislative History of the Labor Management Relations Act of 1947*, at 551. By guaranteeing "in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so," the belief was that the Act would "result in substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." *Id*. Thus, the Act now requires the Board to consider the full range of employee rights—both to engage in collective bargaining and to refrain from it—when making bargaining unit determinations.

The construction of Section 9(b) adopted by the Board in *Specialty Healthcare* and its progeny fails to "assure" employees freedom in the exercise of their rights under the Act. It does this by improperly focusing

solely on the Section 7 rights of employees in the petitioned-for unit, and by disregarding the Section 7 rights of excluded employees unless the excluded employees can show that they share an "overwhelming community of interests" with those of the included employees. As noted by the dissenting Board Member in this case:

> All statutory employees have Section 7 rights, whether or not they are initially included in the petitioned-for unit. The Act's two most important core principles governing elections – the concepts of "exclusive bargaining representation" and "majority rule," both set forth in Section 9(a) – are completely dependent on the scope of the unit. For these reasons, the Board's unit determination must, in part, consider whether the rights of nonpetitioned-for employees warrant inclusion in any bargaining unit. Such inquiry, however, is effectively precluded under *Specialty*.

Macy's Inc. and & Local 1445, UFCWU, 361 N.L.R.B. No. 4, at *32 (2014).

By artificially narrowing the scope of the bargaining unit, the Board impermissibly impairs the rights of unit employees. Because the *Specialty Healthcare* standard applied by the Board here fails to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act," it violates Section 9(b).

V. The Adoption Of The New Standard Was An Abuse Of Discretion And Violates The Administrative Procedure Act.

A. Rulemaking is distinct from adjudication under the APA.

Rulemaking is the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. §551(5). A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). The APA requires that an agency follow certain procedures whenever implementing a new rule. For example, the agency must publish a notice of the proposed rulemaking in the Federal Register. *Id.* § 553(b). The agency must give the public an opportunity to participate in the rulemaking process "through submission of written data, views, or arguments" and the adopted rules must contain "a concise general statement of their basis and purpose." *Id.* § 553(c). And the resulting new rule qualifies as final agency action, which is subject to judicial review in proper cases by anyone aggrieved by the new rule. *See id.* § 701-706.

Adjudication is quite different. Through adjudication, the agency issues an "order," which is "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. § 551(6)-(7). Because an adjudicated order applies only to the particular parties to the dispute before the agency, other equally interested individuals or entities are not able to seek judicial review to challenge the agency's order. Unlike with rulemaking, a nonparty cannot

directly challenge an agency's adjudication order until the agency applies the order against that nonparty in a subsequent case. *See Am. Fed'n of Lab. v. N.L.R.B.*, 308 U.S. 401, 411 (1940).

B. In *Specialty Healthcare*, the Board improperly used adjudication to implement a new generally applicable standard for determining bargaining units.

The parties in *Specialty Healthcare* never asked the Board to change its decades-old rule for defining bargaining units. Nevertheless, the Board decided to address that issue. Because the standard for determining bargaining units was not part of the parties' dispute, the APA prohibits the Board from addressing such a fundamental issue through adjudication. "Adjudications typically resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals." *City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 242 (5th Cir. 2012). An adjudicative order is only appropriate when it "interpret[s] the rights of a small number of parties properly before [the agency]." *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 798 (5th Cir. 2000). In *Specialty Healthcare*, the Board did not merely interpret the rights of the parties before it or resolve the parties' specific dispute. Instead, it entered a ruling regarding an issue that the parties never even mentioned,

and which has a far-reaching impact on all businesses—not just the parties involved in that case.

An agency abuses its discretion when it "establishe[s] a new policy and then applie[s] that new policy to several" affected companies through adjudication. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001). Adjudication is only appropriate to resolve disputes "which would have an immediate and determinable impact on specific factual scenarios." *City of Arlington*, 668 F.3d at 243. When the scope of an agency's ruling will only become clear after subsequent adjudications, the agency has engaged in "classic rulemaking." *Id.* In *Specialty Healthcare*, the Board purposefully announced a new standard whose effect stretched far beyond the specific parties and factual scenario presented in that case. To justify its use of adjudication to reach this result, the Board intimated that the new *Specialty Healthcare* standard would only apply when "determining if a proposed unit is an appropriate unit in nonacute health care facilities" and was not intended to disturb industry-specific presumptions and rules developed by the Board in other cases. *Specialty Healthcare*, at *12, *13 n.29. But subsequent Board decisions—including in this case—demonstrate that the new policy for defining bargaining units is not confined to the factual context presented in *Specialty Healthcare*, but instead constitutes the

new generally applicable policy for *all* employers across *all* industries. *See, e.g., DTG*, 357 N.L.R.B. No. 175 (rental-car facility); *Northrop Grumman*, 357 N.L.R.B. No. 163 (submarine and aircraft carrier manufacturer); *Odwalla*, 357 N.L.R.B. No. 132 (producer of fruit drinks). The Board abused its discretion and violated the APA by employing adjudication rather than rulemaking to enact such a sweeping change to its standard for determining initial bargaining units, and the Court should not apply the *Specialty Healthcare* standard in this case or any others.

C. The Board's abuse of discretion was prejudicial error.

The Board's abuse of discretion was not harmless. Although the doctrine of harmless error applies to violations of the APA, *see* 5 U.S.C. § 705, it only applies "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207, 215 (5th Cir. 1979) (quotation omitted). "This Court has affirmed that absence of such prejudice must be clear for harmless error to be applicable." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (quotation omitted).

The Board's error in using adjudication rather than rulemaking to change its policy for defining bargaining units was not harmless. Instead of following the necessary rulemaking requirements, the Board changed its

policy through adjudication and merely requested amicus briefs on the issue. The Board avoided its obligation to provide public notice of the rule change, receive comments, and provide responses to all significant comments to allow for immediate judicial review. *See Home Box Office, Inc. v. F.C.C.,* 567 F.2d 9, 35-36 (D.C. Cir. 1977). The Board's error in *Specialty Healthcare* is not "one that clearly had no bearing on the procedure used or the substance of decision reached." *U.S. Steel Corp.*, 595 F.2d at 215. It was a prejudicial abuse of discretion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review and deny enforcement of the Board's Order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

Dated: April 27, 2015

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CERTIFICATE OF SERVICE

I certify that on April 27, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which caused a copy to be delivered to counsel of record.

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