UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN STEEL CONSTRUCTION, INC.

Employer

and **Case 07-RC-269162**

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

Petitioner

BRIEF OF *AMICUS CURIAE* OF HR POLICY ASSOCIATION

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I. STATEMENT OF INTEREST

HR Policy Association ("HRPA" or "Association") is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace. Finally, the Association has a vested interest in the National Labor Relations Board ("NLRB" or "Board") approach to determine the appropriateness of petitioned-for units and ensuring that such an approach is both permissible under the National Labor Relations Act ("NLRA" or "Act") and properly balances the interest of all stakeholders in promoting efficient and harmonious collective bargaining free from industrial strife.

II. SUMMARY OF POSITION

In its December 7, 2021 Order Granting Review and Notice and Invitation to File Briefs, the Board invited interested amici to submit briefs addressing the following questions:

> 1. 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)?
>
> 2. If not, what standard should replace it? Should the Board return to the standard in *Specialty Healthcare*, 357 NLRB 934 (2011), either in its entirety or with modifications?

Am. Steel Const., Inc., 370 NLRB No. 41, slip op. at 2 (Dec. 7, 2021). For the reasons set forth below, the Board should adhere to the standards for determining appropriate bargaining units articulated in *PCC Structurals* and *The Boeing Company.* Specifically, the Association submits the following:

- Bargaining unit determinations have signification consequences for all

stakeholders. Accordingly, the Board must strictly follow the requirements of the Act in performing its statutory duty as a neutral arbiter of bargaining unit appropriateness.

- Smaller and fractured units present numerous problems for employers, employees, and unions alike, and contravene the Act's stated purpose of ensuring industrial peace.
- Apart from a brief period beginning under *Specialty Healthcare*, the Board has, for decades, applied a single test – the community of interests test – for all parties when making bargaining unit determinations. This test is well established in Board case law and furthers the goals of the NLRA and is in accordance with Section 9(b) and 9(c) specifically.
- The *Specialty Healthcare* two-prong test, which gave unions preference for petitioned-for units and required non-petitioning parties to satisfy a newly created overwhelming community of interest test standard in order to have additional employees placed in the petitioned-for unit, is a legal fiction. It improperly created a higher burden for non-petitioning employers to meet compared to the initial burden for petitioning unions. Such test permitted unions to proceed to elections in gerrymandered, micro, or fractured units. The test also violated the NLRA and the Constitutional due process and equal protection rights of non-petitioning parties, including especially employers.

III. ARGUMENT

A. NLRB BARGAINING UNIT DETERMINATIONS HAVE SIGNIFICANT WORKPLACE CONSEQUENCES AND THE BOARD THEREFORE SHOULD STRICTLY FOLLOW THE REQUIREMENTS OF THE ACT IN PERFORMING ITS DUTY AS A NEUTRAL DECISIONMAKER IN SUCH CASES.

1. There are Many Important Consequences of Voting Unit/Bargaining Unit Determinations.

Inclusion or exclusion of employee classifications in a voting or bargaining unit has a considerable number of important consequences for employees, employers and unions. From an employee's perspective which unit, if any, the employee is placed in is extremely important. Beyond the important establishment of unit members' wages and benefits, employee unit placement has many other consequences. For example, will the employees' bargaining unit have leverage at the bargaining table? The outcome of such bargaining and the resulting labor agreement – assuming an agreement is reached – will determine virtually every aspect of an employee's work life. Correspondingly, for employees who are excluded from a bargaining unit, there are also numerous consequences. Most importantly, they are denied the opportunity to vote in a Board election to determine union representation. Further, such excluded employees may be adversely impacted by strikes, lockouts, and other disputes in the workplace, and have no say in how such confrontations between the union and their employer are resolved.

From an employer perspective, voting unit determinations can also have numerous important consequences. For example, micro and/or fractured units can present operational issues, particularly if, for example, one unit strikes and other units refuse to work in support of or in sympathy with the striking unit. Further, if a single fractured unit is found to be appropriate in a large factory which has a highly integrated production process, picketing or slowdowns in such a unit can disrupt the entirety of an employer's operations.

Geographically dispersed units could also be difficult to manage or control. Finally, if various unions represent workers in multiple units at an employer's place of business, harmful competition may occur between the competing unions resulting in wage leap frogging, "whipsawing," jurisdictional disputes, and other disruptive tactics by such unions.

Finally, unit composition also has several considerable consequences for unions. Units of workers with diverse skills and interests may make it difficult for a union to reach consensus in making proposals for collective bargaining purposes. Obtaining ratification of a tentative labor contract agreement from workers with diverse interests may be difficult to achieve and lead to confrontation with the employer. A union may also face financial issues in attempting to represent a number of small or micro units including groupings of employees at geographically diverse work locations. Additionally, a union may have difficulty meeting its duty of fair representation responsibility under the NLRA for multiple bargaining units with the same employer. For example, employees in one unit might wish to take a matter to arbitration, but employees in another unit at the same work location may have a different position on such issue and be opposed to the union pursuing an arbitration remedy for such matter.

2. Bargaining Units Have Considerable Longevity

Once the NLRB certifies a bargaining unit there is a strong likelihood that it may continue at such location for the duration of the employer's operation. Bargaining unit certification and recognition under the NLRA, as a general rule, does not have reoccurring election cycles to determine continued legal status. Under the NLRA, a bargaining unit continues to exist at an employer's place of business unless a union withdraws from

representing the unit, the employer ceases to do business at the bargaining unit location, or the unit employees decertify or remove the union representing the unit. Such decertification elections occur infrequently.[1]

Further, not only does a certified or voluntarily recognized unit have longevity with the employer but, in most situations, employees in such units never had the opportunity to initially vote on whether such unit should have been certified in the first instance. This point was emphasized in a research paper published by the Heritage Foundation:

> Very few union members chose their union to represent them. Most accepted union representation as a condition of employment but did not separately choose either general representation or the specific union that represents them. This happens because the National Labor Relations Act (NLRA) does not require private sector unions to stand for re-election…A unionized workforce remains unionized until the employer goes bankrupt, or the workers decertify it (a prohibitively difficult undertaking). New employees are represented by the union for which previous employees voted. The overwhelming majority of workers in both the private sector and in government inherited collective representation in this manner… Just 7 percent of private-sector union members voted for their union… The vast majority of unions that exist today are inherited unions. Few current employees had a say in forming them.[2]

Accordingly, as noted above, not only are there many important consequences for employees, employers, and unions regarding the composition of a voting or bargaining unit, but once such has been established, it has considerable longevity in the workplace, and the Board, accordingly, should exercise great care and impartiality in making

[1] Parties to a bargaining unit can file unit clarification petitions with the NLRB to change the composition of the bargaining unit. Between 2000 and 2021, the Board received 68,518 combined representation petitions, decertification petitions, and employer-filed petitions. Of that total, only 12,387 petitions were for decertification. Furthermore, only 4,099 – or only 6 percent of the total petitions received – resulted in a decertification. 2022 http://lrirightnow.com The Board also conducts unit clarification elections. Such petitions are, however, very seldom filed. Indeed, they are so infrequently filed that the Board does not keep publicly available data regarding such petitions.

[2] James Sherk, *Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives*, The Heritage Foundation, Aug. 27, 2012.

bargaining unit determinations.

B. THE NLRB FOR DECADES HAS ONLY APPLIED ONE TEST – THE COMMUNITY OF INTEREST TEST – TO ALL PARTIES IN MAKING VOTING UNIT DETERMINATIONS

One of the most important functions of the NLRB is to serve as a neutral arbiter in deciding which classification of employees can be grouped together in voting units in Board conducted elections.[3] NLRB representation case law has been well settled for decades, but for the short-lived and ill-advised *Specialty Healthcare* detour in 2011. In deciding such cases, the Board, under both Democrat and Republican majorities, has applied a single test to determine the composition of voting units – the community of interest test.[4] In applying the community of interest test, the Board has consistently determined whether the petitioned-for employees have interests that are "sufficiently distinct" from other employees to warrant a finding that the unit being sought is appropriate for bargaining.[5]

The Board's long-established application of its community of interest test has been succinctly stated as follows:

> *The Board's inquiry into the issue of appropriate units, even in a non- healthcare industrial setting, never addresses, solely and in isolation the question whether the employees in the unit sought have interest in common with one another.* Numerous

[3] For example, the Board oversaw 42,132 election cases between 2000 and 2021. 2022 http://lrirightnow.com.

[4] This test examines such factors as mutuality of interest in wages, hours and other conditions of employment, commonality of supervision, degree of skill and common functions, frequency of contact and interchange with other employees, functional integration, and bargaining history, if any, between the parties. *See*, e.g., *NLRB v. Catalytic Industrial Maintenance Co*., 964 F.2d 513, 518 (5th Cir. 1992). *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir.1995), cert. denied submom, *Food and Commercial Local Workers 204 v. Lundy Packing Co*., 54 U.S. 1019 (1996).

[5] *Amalgamated Clothing Workers v. NLRB*, 491 F.2d 595, 598 n. 3 (5th Cir. 1974) ("The touchstone of appropriate unit determinations is whether the unit's members have a recognizable community of interest sufficiently distinct from others."). *See also*, *Wheeling Island Gaming*, 355 NLRB 637, 637, at n. 2 (2010). Prior to *Specialty Healthcare,* and since its recission by the previous Board, the Board has never applied its community of interest test in isolation from a review of the interests of other employees at the employer's workplace.

> groups and employees fairly can be said to possess employment conditions or interests in "common". Our inquiry - although perhaps not articulated in every case – necessarily proceeds to a further determination whether the interest of the groups sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. *Newton-Wellesley Hospital*, 250 NLRB 409, 411 (1980) (emphasis added).

Additionally, the Board for decades has also considered what weight, if any, to give to the various community of interest factors. Failure of the Board to explain what weight, if any, to give to such factors will result in its unit determination findings being rejected by the courts. *NLRB v. Purnell's Pride, Inc*., 609 F.2d 1153, 1156 (5th Cir. 1980) ("This determination demands that the Board do more than simply tally the factors on either side of a proposition. The crucial consideration is the weight or significance, not the number, of factors relevant to a particular case." *Id*. Therefore the Board is required to "assign a relative weight to each of the competing factors it considers"; "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."). *Id*., at 1156. *See also, NLRB v. DMR Corp*., 795 F.2d 472, 475 (5th Cir. 1986).

The Board, except for the brief period that the *Specialty* test was in place, has never applied one test to the petitioning party in a unit case and then a separate or different test to non-petitioning parties to determine the composition of the voting unit.

C. THE BOARD IS STATUTORILY REQUIRED TO FOLLOW THE REQUIREMENTS OF SECTIONS 3(b), 9(b), AND 9(c)(5) OF THE ACT IN MAKING UNIT DETERMINATION DECISIONS.

Congress has clearly spoken regarding the decision-making process and procedure that the Board must follow in unit determination cases. First, Section 3(b) of the Act states

that the Board shall have authority "to determine the unit appropriate for collective bargaining." 29 U.S.C. § 153(b) (emphasis added). Second, Section 9(b) of the Act requires the Board to determine "in each case" when a petitioned-for unit is appropriate for the "purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). Third, Section 9(b) further states that the Board shall consider whether the petitioned unit should be "the employer unit, craft unit, plant unit, or subdivision thereof." *Id*. Fourth, Section 9(b) also requires that the Board must "assure to employees the fullest freedom of exercising the rights guaranteed by [the] Act." *Id*. Fifth, Section 9(c)(5) of the Act (discussed below) requires the Board not to assign "controlling" weight in unit determination cases to a union's organizing success among the petitioned-for employees. 29 U.S.C. § 159(c)(5).

Nowhere in the Act's legislative history did Congress permit the Board to give preference to, or controlling weight to, the petitioned-for unit – just the opposite is provided for in Section 9(c)(5). Further, Congress directed the Board to consider the rights of all employees – not just petitioned-for employees – and give all employees "the fullest freedom" in exercising their rights under the Act. 29 U.S.C. § 159(b). Specifically, all employees are provided the right to determine whether they desire representation by a labor organization and inclusion in an appropriate unit.

Section 9(c)(5) of the NLRA is particularly important to resolve unit composition issues. This section of the NLRA prohibits the Board from giving "controlling weight" to the organizing success of the union in making unit determination decisions.[6]

[6] 29 U.S.C. Section 159(c)(5). *See, John E. Higgins* et al., The Developing Labor Law, Ch. 11.II.B., at 693 (6th ed. 2012). *NLRB*, 68 F.3d 1577.

Prior to 1947, certain Board unit determination decisions gave considerable weight to the extent of union organizing success. The Board frequently issued "decisions where the unit determination could only be supported on the basis of extent of organization." *NLRB v. Metro Ins. Co*., 380 U.S. 438, 441 (1965). The rationale for such position was based "…on the theory that it is often desirable to render collective bargaining reasonably early for the employees involved, lest prolonged delay expose these organized employees to the temptation of striking to obtain recognition."[7] This gerrymandering approach by the Board, however, met with considerable criticism.[8] Accordingly, in 1947 Congress added 9(c)(5) to the NLRA. Although this added section of the Act did not completely preclude the Board from considering the extent of union organizing success in representation case proceedings, it clearly was intended to change the prior Board practice in this area and significantly limit the importance of the success of union organizing in unit composition cases. Such limitation also required the Board to articulate the precise weight given to such factor. Failure to do so is a basis for finding that the sought after unit is not appropriate. *NLRB v. Purnell*, at 1156.

The legislative history of the Act also makes clear that the Board is to act as a neutral government agency in making unit determination decisions.[9] Any deviation from this Congressionally required process and procedure is highly suspect and should be subjected to strict scrutiny. As outlined below, the 2011 Board's *Specialty* test does not survive such scrutiny.

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[7] The Developing Labor Law, at Ch. 11.II.B., at 693. See also, NLRB, 1947 Annual Report 21 (1948).
[8] *See*, e.g., *Lundy Packing* 68 F.3d at 1580 and dissenting opinion of NLRB Member Reynolds in *Garden State Hosiery Co*. 74 NLRB 318, 20.
[9] H.R. Rep. 74-969 at 20 (1935). Reprinted in 2 NLRA Hist. 29, 30.

Further, the 2011 Board, in inventing the requirement that that non-petitioning parties must meet the overwhelming community of interest test to add employee classifications to a petitioned-for unit, either failed to understand the meaning that Congress conveyed by adding Section 9(c)(5) to the Act or disregarded this Section of the statute altogether.

D. THE BOARD'S *SPECIALTY* TEST WAS A TWO-PRONGED TEST THAT HAD NUMEROUS LEGAL DEFICIENCIES INCULDING VIOLATING THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF NON-PETITIONING PARTIES.

1. The Board's *Specialty* Test Was Improperly "Hijacked" from the Board's Accretion Doctrine.

Prior to *Specialty Healthcare* the overwhelming community of interest test had only been utilized in accretion cases.[10] These cases involved situations where groups of non-union employees, generally small in number, were accreted or added to a larger unit or group of already unionized employees without a Board conducted election being held. This "accretion" of the small group of non-union workers to the larger unionized group does not occur under established Board case law unless the employees in both groups have an "overwhelming community of interest." Virtually every term and condition of employment of the employees in both groups have to be identical. In these situations, application of the overwhelming community interest test serves an arguably legitimate policy rationale and a secret ballot election is not held.[11] This test, however, by design, is very rigorous, difficult to meet, and was never intended to be part of the community of interests criteria for initial

[10] In *Lundy Packing* more than 30 years ago, the Board did unsuccessfully attempt to apply its overwhelming community of interest test to representation cases, an approach that was subsequently rejected by the Fourth Circuit. *NLRB v. Lundy Packing*, 68 F.3d 1577 (1995).
[11] *See E.I. Du Pont, Inc*., 341 NLRB 607, 608 (2004). *See also Ready Mix, Inc*., 340 NLRB 946, 954 (2003).

bargaining unit determinations.[12]

E. THE "MECHANICS" OF THE BOARD'S *SPECIALTY* TEST REVEALS THAT IT IS A LEGAL FICTION THAT THE BOARD SHOULD NOT RETURN TO

The Board's *Specialty* test consisted of the following two prongs[13]: *Prong One* – The Board reviews the group of employees being petitioned-for to determine whether they are a "readily identifiable group." *Specialty Healthcare*, at 8. The Board examines the petitioned-for unit and certifies such unit if the employees "are readily identifiable as a group" and "the employees in the group share a community of interest after considering traditional criteria." *Specialty Healthcare,* at 8. If the Board affirms such petitioned-for unit, it proceeds no further.

Prong Two - Any non-petitioning party desiring to add employees to the petitioned-for unit is required to establish that such additional employees have an overwhelming community interest with the petitioned-for employees. Failure of a non-petitioning party to meet this burden will result in the petitioned-for unit remaining unchanged. *Specialty Healthcare*, at 8.[14]

Both prongs of this test are directed at the same question: which employees should be included in the voting unit. Only prong two, however, is directed at non-petitioning parties, which are primarily employers. A petitioning union is not subject to this test and

[12] *Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (4th Cir. 2001). *See also Burke v. Utah Transit Auth.*, 462 F.2d 1253 (10th Cir. 2006); *Safeway Stores, Inc.*, 256 NLRB 918 (1981).

[13] The 2011 Board, in announcing its *Specialty* test, stated it was not making any changes in "specialty industry and occupation" rules regarding unit determination questions. 357 NLRB 945-46 at n. 29. Application of the *Specialty* test, however, failed to follow such disclaimer. *See e.g. Macy's, Inc*., 361 NLRB 12 (2014). The Board failed to follow the long-established policy in unit cases in the retail sector that only store-wide selling units would be found appropriate.

[14] It is not clear under the *Specialty* test what standard or requirement a non-petitioning party must meet if it takes the position that certain of the petitioned-for employees should be excluded from the petitioned-for unit. This deficiency is further evidence that the *Specialty* test should not be adopted by the Board.

only has to meet the requirements of prong one. Non-petitioning parties, however, in addressing the same exact unit composition question, must satisfy an entirely different test – the overwhelming community of interest test – that is exceedingly difficult, if not impossible, to meet.

Further, the second prong of the *Specialty* test, in its application, provided no opportunity for non-petitioning employers to add employees to the union's petitioned-for units – such prong proved to be a legal fiction. Amicus cannot locate any case under the *Specialty* standard where a non-petitioning employer was successful in meeting the overwhelming community of interest test.[15]

Indeed, the experience of employers under *Specialty* is especially telling, as it evidences how prejudicial such test is to non-petitioning parties, and how such test is a subterfuge to support union gerrymandered units. Stated alternatively, it was an attempt to "work around" the various requirements of Section 9(b) and 9(c)(5) of the Act. Amicus submits that such a "legal fiction work around" should not be permitted to reoccur.

3. Prong One of the Board's *Specialty Healthcare* Test is a Significant Departure From Decades of Board Law and is a Violation of The NLRA

As noted above, before *Specialty Healthcare*, the Board never applied its traditional community of interest test in isolation. The Board also confined its review to the interests of "readily identifiable" group of employees. Rather, the Board applied the various

[15] The only case that arguably could be cited for a favorable outcome for non-petitioning employers was the Board's decision in *Odwalla, Inc.*, 357 NLRB 1608 (2011). In that case, however, the Board did not find that the petitioned-for unit was inappropriate and dismissed the petition. In fact, the petition in question was stipulated to by the parties. What the Board did do in that case was to permit certain employees not included in the initial petitioned-for unit to vote in the Board-conducted election.

community of interest factors to determine whether the petitioned-for employees have interests that are "sufficiently distinct" from other employees in the workplace "to warrant the establishment of a separate unit". *Newton-Wellesley Hosp*, 250 NLRB 409, 411 (1980). Further, as noted above, the Board weighed each of the applicable community of interest factors to determine whether the proposed unit is appropriate. *NLRB v. Purnell's Pride, Inc*., 609 F.2d 1153.

The first prong of the Board's new *Specialty Healthcare* test misses the mark on all the above points. Specifically, such test (1) only reviews the community of interest of the "identifiable" group that union's petitioned-for; (2) fails to determine whether the petitioned-for employees share interests sufficiently distinct from other employees; and (3) fails to apply the community of interest factors in a weighted manner. Indeed, the first prong of the Board's new standard can at best be described as community of interest "lite" and an approach arbitrarily developed to accommodate a union's gerrymandered organizing success.

4. The Second Prong of the Board's *Specialty* Test Placed an Unreasonable Burden on Non-petitioning Employers Who Attempt to Add Employees to the Petitioned-for Unit and the Board Will Not be Able to Provide a Reasoned Explanation Why Such Test Should be Utilized in Representation Cases.

Why should an employer have to meet a different and extremely difficult test in unit determination cases than a union? That is exactly what the second prong of the Board's *Specialty* test would do. The 2011 Board never provided any reasoned explanation for this bifurcated approach that places different burdens and tests on unions and employers in representation cases. Indeed, it is doubtful that the current Board can provide a lawful

answer to this question. If it answers this question to the effect that the desires of the petitioning union, and perhaps its most ardent employee supporters should be given preferential consideration, or weight, the Board will have violated Section 9(b) of the Act. Alternatively, if it can provide no reasoned explanation or rationale for such a dual burden test, it will have violated the NLRA and the Constitutional rights of non-petitioning parties who seek to add employees to a petitioned-for unit.

F. WHEN NON-PETITIONING EMPLOYERS SEEK TO ADD EMPLOYEES TO A PETITIONED-FOR UNIT THE *SPECIALTY* TEST WOULD VIOLATE THEIR DUE PROCESS AND EQUAL PROTECTION RIGHTS PROVIDED FOR IN THE CONSTITUTION

1. The Fifth and Fourteenth Amendments Require That Similarly Situated Persons Be Treated Alike

The Due Process Clause of the Fifth Amendment states no person shall be "deprived of life, liberty, or property without due process of law." *U.S. Const. amend. V.* The Fourteenth Amendment provides a more explicit safeguard that states afford "any person within its jurisdiction equal protection of the laws." *U.S. Const. amend. XIV*. While the Fifth Amendment, applicable to the federal government, does not expressly require "equal protection of the laws," the Supreme Court has long recognized that the Equal Protection Clause in the Fourteenth Amendment operates equally against the federal government. *Bolling, et al. v. Sharpe*, et al., 347 U.S. 497 (1954). Accordingly, the Equal Protection Clause of the Fourteenth Amendment "has become the primary source of constitutional requirements of equal treatment." *See*, *Geoffrey R. Stone*, et al. eds., Constitutional Law (6th ed. 2009). As the Supreme Court has explained, "The Equal Protection Clause… is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985).

2. The Due Process Clause of the Fourteenth Amendment Requires That the Government Have A Rational Basis for Treating Similarly Situated Persons Disparately

Where a classification treats similarly situated individuals in a disparate manner, courts will apply varying levels of scrutiny to determine that classification's constitutionality. Although deprivations of a fundamental right or treatment of judicially established protected classes will receive the highest level of scrutiny, other classifications will also be held invalid and unconstitutional, unless "there is a rational relationship between the disparity of the treatment and some legitimate government response." *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). While "some inequality" is permitted, *Id*., at 321, a court will not uphold a classification where there is no "semblance of rationality." *Baxtrom v. Herold*, 383 U.S. 107 (1966).

Although the NLRB is given some discretion "to develop standards for ascertaining whether one bargaining unit is more appropriate than another," *NLRB v. ADT Security Servs., Inc*., 689 F.3d 628, 636 (6th Cir. 2012), there are definite limits on such discretion. Standards and tests developed by the federal government cannot be based on rationales that are not "so unreasonable as to be arbitrary and capricious." *West Coast Media, Inc. v. F.C.C*., 695 F.2d 617, 620-21 (D.C. Cir. 1982). This includes agency actions that substantially depart from standards previously provided. *Id.*

3. The *Specialty Healthcare* Test Treats Similarly Situated Employers and Unions Differently Without a Rational Basis or Legitimate Government Interest for Doing So

Actions of the NLRB are subject to the fullest scrutiny available under the Fifth and Fourteenth Amendments, in so far as the Board is a federal government agency charged

with enforcing the NLRA. In particular, as stated above, the Board's responsibilities include "[deciding] in each case whether… the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). As discussed *supra*, such a determination has numerous profound impacts on employees, employers, and unions.

Employers and unions possess no characteristics to suggest they are anything but "similarly situated" in representation cases. Parties in a unit determination case address the same community of interest factors and are to be treated equally. Congress has not given any special or protected status to any party. Therefore, given the high stakes and potential impact voting bargaining unit determinations have on employers, unions and employees, all parties in unit cases should have the same due process rights when a question of bargaining unit determination arises and be given equal protection of their respective rights under the NLRA. Indeed, that is exactly what Congress desired when it amended Sec. 9(b) of the NLRA in 1947.

The Board's *Specialty Healthcare* decision failed to provide a rational basis to support a disparate treatment of similarly situated parties. There is no rational relationship between the *Specialty* test and any legitimate government objective. Such test was created arbitrarily by the 2011 Board. The Board's only stated rationale for its heightened interest standard for employers was a conclusion that employers have greater access to relevant information in unit determination proceedings. 357 N.L.R.B. No. 83 at FN 28. Potential increased access to workplace information by an employer is not a sufficient or legitimate justification for placing a different and extremely rigorous test on a non-petitioning party. In any event, both a petitioning union and the Board also have considerable access to such

work-related information through various sources including Board-issued subpoenas.

G. THE D.C. CIRCUIT'S *BLUE MAN VEGAS* DECISION WAS WRONGLY DECIDED

The Board admits in its *Specialty Healthcare* decision that it is imposing a "heightened showing to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees."[16] The Board stated that there was both historic support in its decisions and decisions of courts of appeal for such heightened showing. The Board, however, could only cite two of its previous decisions to support such a flawed conclusion, one of which was the Fourth Circuit-rejected decision in *Lundy Packing*. The second case that it cited, *Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1049 (2003), does not stand for such proposition. In *Laneco*, the employer made an unsuccessful argument based on an overwhelming community of interest rationale to attempt to add employees to the petitioned-for unit. Therefore, it was an employer-initiated argument, not a new Board standard.

The primary judicial authority the Board cited to support its *Specialty* test is *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). The D.C. Circuit decision in *Blue Man Vegas* is not reliable authority. First, the decision in *Blue Man* involved a preexisting bargaining unit where an employer was attempting to add a new group of employees. Accordingly, *Blue Man Vegas* was more analogous to an accretion case where parties, as noted above, bear the burden on establishing why a historical unit should be increased in number. Further, a circuit court's appellate review standard is substantially

[16] *Specialty Healthcare*, at 11. *See also*, *Kindred Nursing Cntrs. East, LLC v. NLRB*, 727 F.3d 552, 562 (6th Cir. 2013) (the Board… [acknowledged] that it had used some variation of a heightened standard when a party (usually an employer) [argued] that the bargaining unit should include more employees).

different from the statutory requirements under the NLRA imposed upon the Board in unit determination cases. Stated alternatively, the Board cannot escape its responsibility under Sections 9(b) and 9(c) of the Act by relying upon a wholly different appellate review standard.

Second, this decision did not provide any rationale to support the use of the overwhelming community of interest standard in unit determination cases. Third, the D.C. Circuit decision in *Blue Man* improperly analogized initial unit determinations to the Board's accretion doctrine case law. As noted above, the accretion doctrine and its related overwhelming community of interest test had never been successfully utilized prior to the *Specialty Healthcare* decision to make initial unit determination decisions. Fourth, the D.C. Circuit's decision in *Blue Man* is plainly wrong. At first reading, the D.C. Circuit's decision in *Blue Man* and its novel use of Venn diagrams may have some appeal to support the Board's position. The critical flaw in the court's reasoning, however, is that such sterile utilization of Venn diagrams fails to give any type of weight whatsoever to the application of the applicable community of interest factors. As noted in *Purnell's Pride* and other circuit court decisions, the Board is required to explain the weight it gives to such factors when making unit determination decisions and also explain why it provided such weight to the applied factors. The D.C. Circuit Court's decision in *Blue Man* completely misses the mark on such important weighting factor analysis. Use of Venn diagrams in isolation (assuming such diagrams properly include all of the important community of interest factors) does not come close to satisfying the statutory obligation required of the Board in Section 9(b) of the Act to find "in each case" what is an appropriate unit for collective bargaining.

H. CIRCUIT COURT DECISIONS THAT CONSIDERED THE *SPECIALTY* TEST DO NOT SUPPORT THE BOARD RETURNING TO THE SPECIALTY TEST.

After the 2011 Board adopted its *Specialty* test, such test was subject to review in a number of circuit court cases.[17] Supporters of a return to the *Specialty* test will no doubt cite such cases and submit that they stand for the proposition that the Board's test was not directly rejected but was, in fact, embraced by such courts. When examining the actual holdings in such decisions, however, it is apparent that in each of these cases the court was suggesting that the *Specialty* test itself required the Board to apply its traditional community of interests test.. For example, the Second Circuit in its decision in *Constellation Brands, US Operations, Inc.,* NLRB, 842 F. 2d. (2016), specifically stated that it was interpreting the Board's *Specialty* test to require the Board to find in unit determination cases that the interest of all employees must be considered and only if employees have "separate and distinct" interests from all other employees should such a unit be accepted. 842 F. 3d. at 793. The Circuit Court went on to find that the unit that was found appropriate by the Board was inappropriate because the Board did not explain why the fact that employees working in separate work locations outweighed the similarity of their job functions and duties. Thus, courts, such as in *Constellation*, were in fact requiring the Board to apply its traditional community of interests, with "the focus of the analysis…on the similarity or dissimilarity in working conditions across different groups of workers." *FedEx* at 637. Nowhere in such decisions is the second prong of *Specialty* affirmed.

[17] *See, e.g. Contstellation Brands., U.S. Ops., Inc. v. NLRB*, 842 F.3d at 793 (2016); *FedEx Freight, Inc. v. NLRB*, 842 F.3d 636 (7th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

I. THE BOARD'S APPROACH UNDER *PCC STRUCTURALS* AND *BOEING* IS SUFFICIENT

To put it succinctly, there is no need to change the Board's current approach under *PCC Structurals* and *Boeing*. This standard for evaluating bargaining unit appropriateness both complies with statutory requirements under Sections 3(b), 9(b), and 9(c)(5) and furthers the Act's goals of promoting industrial peace and harmonious labor relations. Specifically, this traditional community of interests approach requires the Board to consider interests of employees both included in and excluded from a petitioned-for unit in each case, as the Act contemplates, and gives both parties an equal chance in showing why or not a unit is appropriate in furtherance of industrial peace. There is simply no need to change an approach that has been utilized successfully by the Board for decades.

IV. CONCLUSION

For all of the foregoing reasons, the Board should adhere to its traditional standards for determining appropriate bargaining units, as articulated in *PCC Structurals* and *The Boeing Co*.

Respectfully submitted January 21, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Brief in Case 07-RC-269162 was electronically filed via NLRB E-Filing system with the National Labor Relations Board and served via email on the following parties or counsel on January 21, 2022:

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