NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 12-1027/1174

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KINDRED NURSING CENTERS EAST, LLC,
d/b/a Kindred Transitional Care and Rehabilitation – Mobile, f/k/a Specialty Healthcare and Rehabilitation Center of Mobile,
PETITIONER CROSS-RESPONDENT,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,
INTERVENOR.

Appeal from the National Labor Relations Board

Proposed *Amicus* Brief of HR Policy Association, Society for Human Resource Management, and the National Association of Manufacturers Supporting Petitioner Cross-Respondent's Petition for Review and Denial of Enforcement

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IDENTITIES AND INTEREST OF THE *AMICI CURIAE*

As fully set forth in the attached Motion for Leave to File an *amicus* brief filed by HR Policy Association ("HR Policy"), Society for Human Resource Management ("SHRM"), and the National Association of Manufacturers ("NAM") (collectively "proposed *Amici*"), are membership organizations and trade associations dedicated to representing employers and their chief human resources officers throughout the United States. Proposed *Amici* have consistently advocated on behalf of their members on issues related to the National Labor Relations Act ("NLRA" or "the Act"). Proposed *Amici* and their members have a significant interest in ensuring that the standards articulated by the National Labor Relations Board ("NLRB" or "the Board") are consistent with the language and purposes of the Act while, at the same time, being sound, practical, and responsive policies meeting the realities of today's workplace.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

No party's counsel authored this brief in whole or in part. No party or its counsel or other person (other than the *amici*), contributed money intended to fund the preparation or submission of this brief.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO 6TH CIR. R. 26.1

Proposed *Amici* HR Policy Association, Society for Human Resource Management, and the National Association of Manufacturers are all membership organizations advocating for their relevant constituencies. None of proposed *Amici* are a subsidiary or affiliation of a publicly owned corporation, nor do they have a financial interest in the outcome of the dispute between Kindred Health Centers East, LLC, and the National Labor Relations Board.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-1027/1174 Case Name: Kindred Nursing, etc. v. NLRB

Name of counsel: Jones Day by G. Roger King

Pursuant to 6th Cir. R. 26.1, HR Policy Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 23, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ G. Roger King

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-1027/1174 Case Name: Kindred Nursing, etc. v. NLRB

Name of counsel: Jones Day by G. Roger King

Pursuant to 6th Cir. R. 26.1, Society for Human Resource Management
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-1027/1174 Case Name: Kindred Nursing, etc. v. NLRB

Name of counsel: Jones Day by G. Roger King

Pursuant to 6th Cir. R. 26.1, the National Association of Manufacturers
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

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s/ G. Roger King

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SUMMARY OF ARGUMENT

One of the most important, if not the most important, duty of the NLRB is to decide who is eligible to vote in a representation election. Initially, representation decisions determine such questions as whether potential unit employees should be excluded due to their supervisory, managerial or independent contractor status. Further, such decisions identify which employee classifications are permitted to vote on whether they desire to be represented by the petitioning labor organization, and which classifications or groups should be excluded from the voting unit. Indeed, the Board's decision as to which employee groups should be included or excluded from the unit can have a considerable influence on how eligible employees decide to vote. Additionally, in representation elections where a majority of the unit employees vote for union representation, the Board, in such decisions, establishes the framework for the future collective bargaining relationship between the selected labor organization and the employer. This relationship through collective bargaining then determines, in contractual terms, virtually every aspect of a covered workers daily work life including their compensation and benefits. This bargaining relationship may last decades in the form of successive collective bargaining agreements with the composition of the bargaining unit covered by such agreements virtually never changed. Indeed, unlike the often changing composition of voting groups in many general election

settings, no "redistricting" or subsequent analysis of the composition of the bargaining unit is likely to ever occur.

This extremely important function of the NLRB has been undertaken from a historic perspective in a remarkably consistent manner by both Republican and Democratic Boards over the years, notwithstanding the various policy fluctuations by the Board in other areas. Indeed, with very minor exceptions, Boards over the years, have applied the "community of interest" test and its various factors in analyzing which employees should be grouped together for unit voting purposes. To be sure, there have been disputes and varying decisions as to the scope of certain voting units and varying points of view particularly regarding the supervisory and managerial status of certain employees. The Board, over the years however, has placed the initial burden on the petitioning party for an election (most frequently unions) to only include employees in a unit that have a community of interests that are sufficiently distinct from other employees and also to be in compliance with certain statutory voting unit requirements of the NLRA (e.g., separating professional employees from non-professional employees and guards from non-guards).

The Board's decision in *Specialty Healthcare* upsets decades of Board law and establishes a new rule for virtually all employers subject to the Act's jurisdiction. The Board's new rule requires an employer to establish that before

any employees can be added to a petitioned-for unit, such employees must have an "overwhelming community of interest" with the petitioned-for employees[1]. As noted above, this is a dramatic change in Board law and has been characterized by several commentators as the most far reaching Board decision in decades. The Board, in *Specialty Healthcare*, however, deliberately sidestepped its obligation to engage in formal rulemaking under the Administrative Procedure Act before proceeding to adopt this new rule, and after requesting and receiving numerous *amicus* briefs, established this new unit rule that applies not only to the parties in this case but also applies to all employers covered by the NLRA (except acute care health care providers). The Board proceeded in this fashion despite the fact – and contrary to its own rules and regulations – that the parties to this case never raised the issue of whether the community of interest test should be discarded or requested that the law in this area be "clarified."

[1] It is not clear how the new overwhelming community of interest rule will work if a non-petitioning party argues that certain of the petitioned-for employees should be excluded from the proposed unit. One could assume that such new rule would not be applied and that the traditional community of interest test still applies in this situation. If this assumption is correct, the Board will have two different approaches for unit determination purposes. Apparently, it will apply the overwhelming community of interest rule if any non-petitioning party desires to add employees to the proposed unit. Alternatively, if the non-petitioning party seeks to exclude employees from the proposed unit, apparently the traditional community of interest analysis would be utilized to determine such unit issues.

The "overwhelming community of interest" rule adopted by the Board in *Specialty Healthcare* has historically only been utilized by the Board in accretion cases where generally small groups of non-represented employees are merged or combined with a larger group of unionized employees and no secret ballot election is held. The Board's new overwhelming community of interest rule now applies in initial representation election cases and removes the critically important "sufficiently distinct" element of the community of interest test. Stated alternatively, under the long-established community of interest test, a petitioning party had the burden of initially establishing that the petitioned-for unit of employees (1) share a community of interests or commonality of wages, hours and other terms and conditions of employment and (2) that such employees' interests are sufficiently distinct from all other employees in the workplace. Although the burden to initially establish that the proposed unit is appropriate is on the petitioning party, the ultimate legal burden at all times remains on the Board to determine whether the proposed unit is compliant with the requirements of the Act. This legal duty on the Board is nondelegable. Under the new *Specialty Healthcare* rule, however, the Board now will apparently only engage in a peripheral analysis of whether the petitioned-for employees share a community of interests and, thereafter, its analysis ceases – it has delegated its statutory duty to the petitioning party, therefore, to determine the scope of the unit. Further under this new rule, the

Board then places a burden on the non-petitioning party (normally employers) to meet the requirements of its new overwhelming community of interest rule if it desires to add employees to the petitioned-for unit. This approach is not only a violation of the Act by delegating the Board's duty in unit determination cases to the petitioning party, but also imposes an impermissible duty on the non-petitioning party and will make it virtually impossible for such party (including not only employers but rival unions) to add any employees to a proposed unit. Such new rule not only is in conflict with Sections 9(b) and 9(c)(5) of the NLRA, but it will also result in the establishment of exceedingly small or micro units with a correspondingly adverse impact on the workplace for employees and employers. For example, such fragmented bargaining units no doubt will lead to increased strikes, jurisdictional disputes and wage and benefit whipsawing. Additionally, the adverse impact of such fragmented units will also result in adverse consequences for employees as they will not only suffer from missed work time due to strikes, but also will no doubt find it more difficult for upward mobility in their place of employment due to the presence of restrictive seniority clauses frequently found in collective bargaining agreements. Indeed, the adverse impact on protected class group employees could be quite significant as their ability to transfer or be promoted from entry level positions to higher paying jobs and opportunities with more responsibility will often be blocked by such restrictive seniority provisions.

In addition to the serious and numerous legal deficiencies of the Board's *Specialty Healthcare* rule and the policy arguments noted above, *amici* submit that the Court should consider the practical impact that such new rule will have on employer operations. For example, the Employer in the instant case will not only be required by the Board's Order to recognize and bargain with a separate unit of certified nurse assistants – a unit according to the Petitioner that has never been recognized by the Board (Pet. Br. 19) – but in the future, the Employer may also have to recognize and bargain with each of its other employee classifications, including activity assistants, clerks, dietary aides and cooks, housekeepers, licensed practical nurses and registered nurses. (Pet. Br. 8-9.) Similar micro unit scenarios under the Board's new *Specialty Healthcare* rule will be replicated in virtually every employer's workplace and, indeed in some instances, the Board's new rule will require even more units.

The Board stated in *Specialty Healthcare* that it was only "clarifying" the law. Further, the Board and supporters of the new overwhelming community of interest rule no doubt may argue that employers are simply being alarmists and that there will not be a plethora of smaller bargaining units. A number of cases decided since the issuance of the Board's decision in *Specialty Healthcare*, however belie this conclusion. *Amici* have identified at least five decisions of the Board and its Regional Directors that have applied the new overwhelming community of interest

rule to find the petitioned-for unit appropriate and rejected arguments by the employer to add employees to such units.[2] Make no mistake, employers have only seen the tip of the *Specialty Healthcare* "iceberg."[3] Such decisions will cause great unanticipated harm to industrial stability and effective collective bargaining.

In summary, the Board's new "overwhelming community of interest" rule is in conflict with various provisions of the NLRA, the legislative history of the Act, decades of Board case law and the underlying policies of the NLRA promoting industrial stability and efficient collective bargaining. This Court should reject the overwhelming community of interest rule established in *Specialty Healthcare* and refuse to enforce the Board's Order.

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[2] *See generally Northrup Grumman Shipbuilding, Inc.*, 357 N.L.R.B. No. 163, 2011 WL 7121890 (Dec. 30, 2011); *DTG Operations, Inc.*, 357 N.L.R.B. No. 175, 2011 WL 7052275 (Dec. 30, 2011); *First Aviation Servs., Inc. Emp'r*, Case No. 22-RC-61300, 2011 WL 4994731 (Oct. 19, 2011); *Extendicare Homes, Inc.*, Case No. 18-RC-70382, 2012 WL 252255 (Jan. 14, 2012); *Prevost Car U.S.*, Case No. 03-RC-071843, 2012 WL 928253 (Mar. 15, 2012).

[3] As explained below, the Board's *Specialty Healthcare* holding creates virtually unlimited possibilities for micro units. To the extent that the decision was limited in that it would not affect "rules applicable only in specific industries," 357 N.L.R.B. No. 83, 2011 WL 3916077, at *20 n.29 (Aug. 26, 2011) even that limit has been quickly abandoned. *See Northrup Grumman Shipbuilding, Inc.*, 2011 WL 7121890, at *23 (applying overwhelming community of interest test instead of Board precedent holding that "when technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit for a group of technicals must include all such employees similarly employed.").

ARGUMENT

Under the law of this Circuit, "the Board's discretion in unit determinations is not without constraints, and if the Board's bargaining unit determination 'oversteps the law,' it must be reversed." *NLRB v. Catherine McAuley Health Ctr.*, 885 F.2d 341, 344 (6th Cir. 1989) (quoting *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)). This Court has properly recognized that "several limitations on the Board's authority are found in the Act itself." *Id.* "First," this Court has held that "the Board's discretion is limited by the statutory requirement" in Section 9(b) of the Act, 29 U.S.C. § 159(b), "that the Board 'assure to employees the fullest freedom in exercising the rights guaranteed' by the National Labor Relations Act." *Id.* (quoting *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 368 (6th Cir. 1968)). Second, this Court has held that "[a] further statutory constraint is placed on the Board by § 9(c)(5), 29 U.S.C. § 159(c)(5), which provides that '[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.'" *Id.* (quoting 29 U.S.C. § 159(c)(5)). Third, this Court has held that "[i]n addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act's policy of efficient collective bargaining." *Id.* Finally, the Board here is attempting to promulgate an important new bargaining unit rule for virtually all employers

covered by the Act through adjudication, to avoid the requirements of the Administrative Procedure Act. Such an approach is foreclosed. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

I. THE BOARD ABUSED ITS DISCRETION BY ADOPTING A LEGAL STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS THAT VIOLATES SECTION 9(c)(5) OF THE ACT BECAUSE IT GIVES CONTROLLING WEIGHT TO THE EXTENT TO WHICH THE EMPLOYEES HAVE BEEN ORGANIZED

Section 9(c)(5) of the Act provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). While this provision does not "prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination[,] . . . the enforcing court should not overlook or ignore an evasion of the § 9(c)(5) command." *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442 (1965); *see also NLRB v. Sun Drug Co.*, 359 F.2d 408, 412 (3d Cir. 1966) ("the Board may not evade the command of § 9(c)(5) by purporting to base its decision on other factors when in truth it has been controlled by the extent of employee organization").

In *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), for example, the Fourth Circuit held that the Board's adoption of "a novel legal standard" violated Section 9(c)(5) because it "effectively accorded controlling weight to the

extent of union organization" by presuming "the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees." *Id.* at 1581. "This is because[,]" as the Fourth and Seventh Circuits have acknowledged, "'the union will propose the unit it has organized.'" *Id.* (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). This Court has correctly characterized the *Lundy* rule as prohibiting the Board from finding a union's proposed unit "presumptively appropriate unless the employer produce[s] 'overwhelming' evidence on the issue of community of interest to rebut this presumption." *NLRB v. Magnetic Specialty, Inc.*, No. 96-6115, 1997 WL 650821, at *4 (6th Cir. Oct. 17, 1997).

The "overwhelming interest" rule adopted by the Board in this case is the same "novel legal standard" resoundingly rejected in *Lundy*. As in *Lundy*, the rule adopted here presumes that the union's proposed unit is appropriate unless the employer shows "that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *20. The Board seeks to evade this inescapable conclusion by arguing that "the rule disapproved by the court in *Lundy* . . . is vastly and crucially different from the standard we apply here" because "[h]ere, we make clear that employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of

interest using the traditional criteria before the Board applies the overwhelming-community-of-interest standard to the proposed larger group." *Id.* at *20 n.25. In other words, the Board argues that *Lundy* is factually distinguishable because there the Board simply presumed "*any union-proposed unit*" appropriate whereas here the Board determined whether the employees in the proposed unit shared a community of interest among themselves before presuming the unit appropriate. *Id.* (emphasis in original).

Lundy cannot be distinguished on this basis. While the Fourth Circuit did not explicitly say so, the Board in that case *did* apply the traditional community of interest factors before presuming the proposed unit appropriate. The *Lundy* Board did not simply presume the proposed unit appropriate because the union had proposed it. Rather, the *Lundy* Board determined that the employees in the proposed production and maintenance unit shared a community of interest sufficiently distinct from the excluded technicians:

> The technicians are separately supervised, are paid differently than the petitioned-for employees, and interchange with each other but not with production and maintenance employees. Although technicians do perform some of the same function as performed by the petitioned-for employees, the majority of their functions, albeit related to the production process, are generally different from those performed by production and maintenance employees. In addition, although there is some contact between technicians and the petitioned-for employees, this contact is not so substantial and regular as to compel their inclusion in the unit.

Lundy Packing Co., Inc., 314 N.L.R.B. 1042, 1043 (1994). Similarly, the Board found that the employees in the proposed production and maintenance unit shared a community of interest sufficiently distinct from the excluded industrial engineers. *Id.* at 1045. Accordingly, the Board errs in attempting to distinguish *Lundy* on the basis that there the Board presumed "*any union-proposed unit*" appropriate without regard to community of interest factors. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *20 n.25 (emphasis in original).

What, then, did the Fourth Circuit mean when it used the word "presume"? There can be only one answer. What the Fourth Circuit found determinative in *Lundy* was the Board's use of a presumption that shifted the burden to the employer to prove that the union's proposed unit was *actually inappropriate*. *See Lundy*, 68 F.3d at 1581 ("By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization."). As shown above, the court's use of the word "presume" did not mean that the *Lundy* Board blindly accepted the union's proposed unit without analysis. Rather, it meant that the Board alleviated the union of its burden of having to show that the proposed unit was *actually – as opposed to presumptively – appropriate*. As this Court has recognized, it was that presumption which the Fourth Circuit found violated Section 9(c)(5). *See Magnetic Specialty*, 1997 WL

650821, at *4 (the *Lundy* rule prohibits the Board from finding a union's proposed unit "presumptively appropriate unless the employer produce[s] 'overwhelming' evidence on the issue of community of interest to rebut this presumption"). Therefore, *Lundy* holds that the Board violates Section 9(c)(5) where, as here, it requires the employer to rebut a presumption that the union's proposed unit is appropriate by proving that the unit is actually inappropriate.

For the same reasons, the D.C. Circuit also erred in finding *Lundy* "consistent with the framework set out" in its decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 423 (D.C. Cir. 2008). In *Blue Man*, the D.C. Circuit attempted to distinguish the *Lundy* rule on the basis that "[a]s long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." *Id.* Like the Board here, the *Blue Man* court mischaracterized *Lundy* as a case in which the Board simply presumed, without regard to community of interest factors, that the proposed unit was appropriate. *See id.* (finding that the *Blue Man* Board "did not presume the Union's proposed unit was valid, as it had done in *Lundy I*"). As shown above, that was not the case. *See Lundy*, 314 N.L.R.B. at 1043, 1045. Therefore, *Lundy* is not "consistent with the framework set out" in *Blue Man* and adopted by the Board in this case, and this

Court must decide whether to follow *Lundy* or *Blue Man*. For the reasons explained below, this Court should follow *Lundy*.

The premise of *Blue Man* – if "the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit" – is plainly correct. *Blue Man*, 529 F.3d at 421. As the *Blue Man* court correctly noted, such "[a] unit is truly inappropriate." *Id.* The flaw lies in the court's recitation of the analytic framework, which confused the judicial standard for reviewing the Board's unit determination with the Board's standard for making unit determinations in the first instance. According to the *Blue Man* court:

> If the employees in the proposed unit share a community of interest, then the unit is *prima facie* appropriate. In order successfully to challenge that unit, the employer must do more than show there is another appropriate unit because more than one appropriate bargaining unit logically can be defined in any particular factual setting. Rather, as the Board emphasizes, the employer's burden is to show the *prima facie* appropriate unit is truly inappropriate.

Id. (internal quotation marks & citations omitted). The Board adopted the same standard here. *See Specialty Healthcare & Rehab. Ctr. of Mobile,* 2011 WL 3916077, at *15. It is true that, on review of the Board's unit determination in a court of appeals, the employer bears the burden of showing that the Board's unit determination is inappropriate, but that has never been the standard applied by the Board in making initial unit determinations. Tellingly, the cases cited by the court

are all court cases reviewing a unit determination already made by the Board, *see Blue Man*, 529 F.3d at 421, and the Board itself concedes that "prior Board decisions do not expressly impose the burden of proof on the party arguing that the petitioned-for unit is inappropriate." *See Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *20 n.28. As explained above, it was because of this presumption – shifting the burden of proof to the employer to show actual unit inappropriateness – that the Fourth Circuit found Section 9(c)(5) violated in *Lundy*. *See Magnetic Specialty*, 1997 WL 650821, at *4.

II. THE BOARD ABUSED ITS DISCRETION BY ADOPTING A LEGAL STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS THAT VIOLATES SECTION 9(b) OF THE ACT BECAUSE IT ABDICATES THE BOARD'S DUTY TO DETERMINE THE APPROPRIATE UNIT IN EACH CASE

Section 9(b) of the Act provides, in relevant part, 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 the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). As the Supreme Court has explained, in Section 9(b):

> Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave that decision up to employees or employers alone. Instead, the decision 'in each case' in which a dispute arises is to be made by the Board.

Am. Hosp. Ass'n v. N.L.R.B., 499 U.S. 606, 611 (1991). While "[t]he requirement that the Board exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case[,]" *id.* at 612, the Board must "give a 'clear indication that it has exercised the discretion with which Congress has empowered it.'" *NLRB v. Guardian Armored Assets, LLC, Inc.*, 201 F. App'x 298, 302 (6th Cir. 2006) (quoting *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 443 (1965)). This is because "[b]y exercising its discretion under section 9(b), the Board insures the protection of individual employees' rights to self-organization and freedom of choice." *NLRB v. Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 156 (3d Cir. 1983).

Thus, "the Board abdicates its statutory duty when it fails to exercise its discretion under section 9(b)." *Id.* at 153; *accord NLRB v. Indianapolis Mack Sales & Serv. Inc.*, 802 F.2d 280, 283 (7th Cir. 1986) (Because Section 9(b) "imposes a nondelegable obligation" on the Board, "the NLRB fails to perform its statutory duty when it does not exercise its discretion under that section."). The Board's nondelegable Section 9(b) duties include the duty "to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter." 29 U.S.C. § 159(b). That provision guards against the establishment of a unit "which does not adequately protect the rights of all the workers in the workplace." *Cardox*, 699 F.2d at 156.

For example, in *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363 (6th Cir. 1968), this Court held that the Board violated Section 9(b) by failing "to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter" when it allowed the union to exclude from the proposed unit six part-time employees receiving Social Security benefits. This Court reasoned that "[w]hile the Board has wide discretion in determining the appropriate unit, the exercise of that discretion is limited by the requirement that the Board 'assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter'" and that "[i]n disfranchising these regular part-time employees solely on the basis of their status as recipients of Social Security the Board has violated this statutory directive." *Id.* at 368 (quoting 29 U.S.C. § 159(b)). As *Indianapolis Glove* demonstrates, the Board cannot, in deciding whether the union's proposed unit is appropriate, abdicate its statutory directive to assure employees – including those excluded from the union's proposed unit – the fullest freedom in exercising their collective bargaining rights.

The Board's new rule fails to heed Section 9(b)'s command that the Board decide unit appropriateness on the basis of assuring all employees – including those excluded from the unit – the fullest freedom in exercising their rights protected by the Act. In other words, the Board's new legal standard permits unions to exclude – or in the *Indianapolis Glove* Court's words, "disfranchise" –

employees who share a community of interest with employees in the petitioned-for unit solely on the basis of the union's choice of who it wants to represent without any determination by the Board as to whether the proposed unit assures to employees as a whole the fullest freedom in exercising the rights guaranteed by the Act. The danger is that "unions could gerrymander the bargaining units (corresponding to electoral districts in political elections) to their hearts' content" and that many employees might be "left out of the collective bargaining process." *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090, 1093 (7th Cir. 1984).

Section 9(b) does not permit the Board to foist its statutory responsibilities onto employers. When the appropriateness of a petitioned-for unit is in dispute, the Board has an independent statutory duty to resolve that dispute. Under Section 9(b), "the Board is required, with or without arguments from the parties, to determine the appropriateness of a bargaining unit." *Indianapolis Mack*, 802 F.2d at 283. "[T]he NLRB cannot discharge that obligation by simply finding that the parties did not vigorously pursue the issue." *Id.* at 284.

Before finding a petitioned-for unit appropriate, the Board must find that the included employees have interests that are sufficiently distinct from the excluded employees who share an overwhelming community of interest with the included employees. *See Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127, 2010 WL 3406423, at *1 (Aug. 27, 2010) (Section 9(b) requires the Board to "determin[e]

whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit") (internal quotation omitted) (emphasis in original); *Accord Seaboard Marine, Ltd.*, 327 N.L.R.B. 556 (1999) (petitioned-for unit inappropriate because "the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit").

The Board may not abdicate its Section 9(b) obligation to determine that the interests of the employees in the petitioned-for unit are sufficiently distinct from the interests of employees excluded from the unit. The Board's new rule violates Section 9(b) because it jettisons the sufficiently distinct component of the traditional community of interest test and puts the onus on employers to satisfy "a heightened showing to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *16.

III. THE BOARD ABUSED ITS DISCRETION BY ADOPTING A LEGAL STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS THAT FAILS TO EFFECTUATE THE ACT'S POLICY OF EFFICIENT COLLECTIVE BARGAINING

While there is no express provision in the Act requiring the Board to effectuate the Act's policy of efficient collective bargaining, the Supreme Court has held that "[a]s a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of

efficient collective bargaining." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165, *reh'g denied*, 313 U.S. 599 (1941); *see also Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) (same). Similarly, this Court has recognized that "[i]n addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act's policy of efficient collective bargaining." *NLRB v. Catherine McAuley Health Ctr.*, 885 F.2d 341, 344 (6th Cir. 1989); *see also NLRB v. Spring Arbor Distrib. Co.*, 59 F.3d 600, 604 (6th Cir. 1995) (same).

Central to effectuating the Act's policy of efficient collective bargaining is that the Board group together "employees who have substantial mutual interests in wages, hours, and other conditions of employment." *Allied Chemical*, 404 U.S. at 172. "Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit." *Id.* at 172-73 (internal quotation omitted).

The results of piece-meal unionization include inefficient collective bargaining. "It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing

costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers." *Cont'l Web Press*, 742 F.2d at 1090. For these reasons, "the Board cannot divide the work force into as many bargaining units as there are differentiable tasks." *Id.* at 1091-92.

Rather, as this Court has recognized, "each unit determination, in order to further effective expression of the statutory purpose, must have a direct relevancy to the circumstances within which collective bargaining is to take place." *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 482 (6th Cir. 1970) (internal quotation omitted). "For, 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." *Id.* (internal quotation omitted).

Here, the Board did not even purport to consider whether its new unit determination standard effectuates the Act's policy of efficient collective bargaining. The Board simply created "a fictional mold within which the parties would be required to force their bargaining relationship" in all future cases. *Id.* at 482 (internal quotation omitted). "Such a determination could only create a state of chaos rather than foster stable collective bargaining." *Id.* (quoting *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 139 (1962)).

IV. THE BOARD ABUSED ITS DISCRETION AND VIOLATED THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT BY IMPROPERLY PROMULGATING A NEW "RULE" FOR DETERMINING APPROPRIATE BARGAINING UNITS IN ALL CASES NOT GOVERNED BY THE BOARD'S HEALTH CARE RULE

The Supreme Court has articulated "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973). While the Board has a degree of discretion to choose between rulemaking and adjudication in the first instance, the Court acknowledged that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion." *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974). One such "abuse of discretion" situation recognized by the Court is where the Board "in fact improperly promulgate[s] a 'rule'" in the context of an adjudication. *Id.* at 291. That occurs where the Board formulates "a basically legislative-type judgment" that is "generalized [in] nature" and of "prospective application" but not actually presented by the "particular set of disputed facts" in the adjudicatory record. *Fla. E. Coast Ry.*, 410 U.S. at 246.

In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), for example, the Court found that the Board had in fact improperly promulgated a "rule" in

Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966), a case, like this one, presented to the Board as an adjudication of a union representation dispute. *Wyman-Gordon*, 394 U.S. at 763-66. There, like here, the Board seized upon a straightforward adjudication as a vehicle to announce broad policy changes to Board law and invited interested parties to file *amicus* briefs on questions drawn *sua sponte* by the Board. There, like here, the Board's questions demonstrated that the Board was intent on making broad policy for future cases, not simply resolving the disputed questions presented by the facts of the particular adjudication. Finally, there, like here, the Board purported to establish a rule "that will be applied in all election cases." *Excelsior Underwear*, 156 N.L.R.B. at 1239.

Reviewing the *Excelsior* rule in *Wyman-Gordon*, the Supreme Court first declined to hold that the Board "has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act," 5 U.S.C. §§ 551 *et seq.*, finding "no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention." *Wyman-Gordon*, 394 U.S. at 764. Next, the Court dismissed the argument that the *Excelsior* rule "is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it [in] the *Excelsior* proceeding, in which the requirements for valid adjudication had been met." *Id.* at 765. The Court found that this argument "misses the point" because:

> There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i.e.*, to exercise its quasi-legislative power.

Id. (emphasis added); *see also First Bancorp. v. Bd. of Governors of the Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (agency "abused its discretion" under *Bell Aerospace* "by improperly attempting to propose legislative policy by an adjudicative order").

There can be no doubt that the Board here in fact improperly promulgated a "rule" insofar as it purported to "hold that the traditional community of interest test . . . will apply as the starting point for unit determinations *in all cases* not governed by the Board's Health Care Rule (*including* cases formerly controlled by *Park Manor*)[4]" and that "*for those cases* in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees . . . the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *20 (emphasis added). As to these rulings, what the Board did here is no different than what it did in *Excelsior*; in both it "singled out individual cases as vehicles in which to consider and

[4] *Park Manor Care Ctr.*, 305 N.L.R.B. 872 (1991).

promulgate general policy rules which are largely independent of the facts and issues of the particular case." Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 512 (1970).

As this Court has recognized, the Board's Rules and Regulations that govern Board review of the Regional Director's decision in this case "severely limit the scope of review." *NLRB v. Difco Labs., Inc.*, 389 F.2d 663, 668 (6th Cir. 1968). The employer here requested – and the Board granted – review on the sole ground that "a substantial question of law or policy is raised because of . . . a departure from[] officially reported Board precedent." 29 C.F.R. § 102.67(c)(1). Importantly, the union did not seek review on the alternative ground that "there are compelling reasons for reconsideration of an important Board rule or policy." *Id.* § 102.67(c)(4); *cf. Bloom & Meyer Constr. Co.*, 230 N.L.R.B. 370 n.1 (1977) (issue not raised in request for review "not before us" and finding it "unwise to raise the issue *sua sponte*" because Section 102.67 "has never been interpreted to require that the Board review every issue decided by the Regional Director, whether contested by the parties or not"). The applicable regulation limited briefing "to the issues raised in the request for review" and limited the Board's review to consideration of "the entire record in the light of the grounds relied on for review." 29 C.F.R. § 102.67(g). The applicable regulation authorized the Board only "to

decide the issues referred to it or to review the decision of the regional director" and to "affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate." *Id.* § 102.67(j).

Because "the party seeking review sought to apply *Park Manor*" under Section 102.67(c)(1), "not to 'clarify' or overrule it" under Section 102.67(c)(4), under the applicable regulation governing the scope of Board review in this case the Board had three decisional options: "(1) remand for the Regional Director to apply *Park Manor*; (2) without remanding, apply *Park Manor* and find that the CNA unit is not appropriate; (3) without remanding, apply *Park Manor* and agree with the Regional Director's finding that the CNA unit is appropriate." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 N.L.R.B. No. 56, 2010 WL 5195445, at *6 (Dec. 22, 2010) (Member Hayes, dissenting). As neither the employer nor the union here argued for a different standard either to the Regional Director or to the Board, reconsideration of *Park Manor* was outside the limited scope of review and the Board abused its discretion in overruling it on this record. *See Difco Labs.*, 389 F.2d at 668 (applicable regulation "severely limit[s] the scope of review"); *Bloom & Meyer Constr. Co.*, 230 N.L.R.B. 370 n.1 (issue not raised in request for review "not before us").

Even if reconsideration of *Park Manor* was properly before the Board – it had no authority on this record to review "the procedures and standards for

determining whether proposed units are appropriate in *all* industries." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2010 WL 5195445, at *2 (emphasis added). Since *sua sponte* soliciting briefs about whether the Board should (1) "as a general matter" find "a unit of all employees performing the same job at a single facility is presumptively appropriate" and (2) "find a proposed unit appropriate if, . . . the employees in the proposed unit are 'readily identifiable as a group whose similarity of function and skills create a community of interest[,]'" *id.*, the purpose of the proceeding ceased to be about adjudicating the specific issues actually in dispute in this case and broadened substantially to the promulgation of "policy-type rules or standards" to be applied in all future unit determination cases. *Fla. E. Coast Ry. Co.*, 410 U.S. at 245.

To be sure, in *Excelsior* the Board did not even apply its rule to the parties in the adjudicatory proceeding (although the union there did request that the Board make such a rule, unlike the union here), but the "real trouble" of *Excelsior* and the instant case is that both "have been manipulated or at least distorted for the ulterior ends of rulemaking." Robinson, *The Making of Administrative Policy*, 118 U. Pa. L. Rev. at 512. Where, as here and in *Excelsior*, the Board failed "to develop its policy rules as an incident to its litigation of cases," *id.*, the adjudication is "merely a vehicle by which a general policy would be changed" and an impermissible "attempt to construct policy by adjudication." *First Bancorp.*, 728 F.2d at 437-38.

In other words, the adjudication is really a "rule." *See* 5 U.S.C. § 551(4).

Because the Administrative Procedure Act "may not be avoided by the process of making rules in the course of adjudicatory proceedings," *Wyman-Gordon*, 394 U.S. at 764, to the extent the Board here purported to rule on the unit determination standard that will apply "in *all* cases not governed by the Board's Health Care Rule (*including* cases formerly controlled by *Park Manor*)[,]" *Specialty Healthcare & Rehab. Ctr. of Mobile*, 2011 WL 3916077, at *20 (emphasis added), the Board's 'Order' constitutes an abuse of discretion and should be denied enforcement.

CONCLUSION

For the foregoing reasons, the Court should deny enforcement of the Board's Order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 6,832 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

Dated: April 23, 2012

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CERTIFICATE OF SERVICE

The undersigned certifies that on this twenty-third day of April, 2012, he caused the Proposed *Amicus* Brief of HR Policy Association, Society for Human Resource Management, and the National Association of Manufacturers Supporting Petitioner Cross-Respondent's Petition for Review and Denial of Enforcement to be filed using the Court's Electronic Case File system, which will automatically generate and send by e-mail a Notice of Docket Activity to counsel for all parties.

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