Nos. 12-1684 & 12-1783

In the United States Court of Appeals for the Fourth Circuit

NESTLÉ DREYER'S ICE CREAM COMPANY,

Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD;
INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 501, AFL-CIO,

Respondents / Cross-Petitioner.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF SAME

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, AND RETAIL LITIGATION CENTER IN SUPPORT OF PETITIONER SEEKING REVERSAL

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STATEMENTS OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over

3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases such as this one involving issues of vital concern to the nation's business community.[1]

The Coalition for a Democratic Workplace ("CDW"), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW has advocated for its members on several important legal questions, including the one at issue here: the standard used by Respondent/Cross-Petitioner National Labor Relations Board ("Board") to determine appropriate bargaining units under the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 151-169.

The International Foodservice Distributors Association ("IFDA") is the non-profit trade association that represents more than 135 compa-

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[1] The *amici* certify that no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

nies in the foodservice distribution industry. IFDA's members are found across North America and internationally and include leading broadline, system and specialty distributors who operate more than 700 distribution facilities and represent annual sales of more than $110 billion.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Wholesaler-Distributors ("NAW") is comprised of direct member companies and a federation of national, regional, state and local associations and their member firms, which collectively total approximately 40,000 companies with locations in every State. NAW members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users.

Industry firms vary widely in size, employ millions of American workers, and account for over $4 trillion in annual economic activity.

The National Council of Chain Restaurants ("NCCR") is the leading trade association exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that best serves the interests of restaurant businesses and the millions of people they employ. NCCR members include the country's most-respected quick-service and table-service chains.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents approximately 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF's global

membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants and industry partners from the United States and more than 45 countries. In the United States, NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs—one in four American jobs. The total gross domestic product impact of retail in the United States is $2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

The Retail Litigation Center ("RLC") is a public-policy organization that participates in legal proceedings affecting the retail industry. The RLC, whose members include some of the country's largest and most innovative retailers, was formed to provide courts with the retail industry's perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a tale of two cases. The first did not involve Petitioner/Cross-Respondent Nestlé Dreyer's Ice Cream Company ("Employer"), but instead a health care facility known as Specialty Health-

care and Rehabilitation Center of Mobile. In that case, the Board issued a decision establishing a sweeping new rule that

> in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.

Specialty Healthcare & Rehab. Ctr. of Mobile, 357 NLRB No. 83, at *1 (Aug. 26, 2011), *cross-appeals pending sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.).

The second case involving the Employer is the one before this Court. In it, the Board's regional director applied the *Specialty Healthcare* rule and found that a unit comprised solely of maintenance employees at the Employer's manufacturing plant constituted an appropriate bargaining unit, rejecting the Employer's argument that production employees should also be included in the unit. Pet.'s App. 263-72. The Board declined to review the regional director's decision. *Id.* at 275.

After a slender majority of the maintenance employees voted in favor of union representation, the Employer refused to bargain with Respondent International Union of Operating Engineers Local 501,

AFL-CIO ("Union") in order to challenge the regional director's unit determination. *Id.* at 276. The Employer's petition for review in this Court and the Board's cross-application for enforcement followed after the Board issued a decision finding that the Employer's refusal to bargain constituted an unfair labor practice. *Id.* at 277-79; *see also NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1579 (4th Cir. 1995) (reviewing similar unit determination after employer refused to bargain, drawing an unfair-labor-practice charge).

The Court should grant the Employer's petition for two fundamental reasons.

First, application of the *Specialty Healthcare* test to manufacturing eliminates (as it does for all industries) consideration of important, historically recognized factors in the unit-determination process that are necessary to assure a unit is appropriate given workplace realities. The Board's abandonment of its longstanding unit-determination precedent will likely disrupt the smooth operation of manufacturing processes at a time when, more than ever, American manufacturers are, like many other American employers, subject to unprecedented economic and competitive pressures. The Board's ill-advised policy decision

is made all the worse because of the negative effect it will likely have on the ability of American manufacturing and other businesses to invest, grow and create badly needed jobs in today's economy.

Second, the *Specialty Healthcare* test violates at least two provisions of the Act. Section 9(c)(5) provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). As this Court explained in *Lundy Packing*, Section 9(c)(5) prohibits the Board from assigning the extent of organizing either exclusive or controlling weight. That is effectively what the *Specialty Healthcare* test does by ensuring that, in all but the rarest cases in which an employer can establish an "overwhelming community of interest," the unit deemed appropriate by the Board will be the unit in which the union has identified based on the extent of its organizing.

The *Specialty Healthcare* test also violates Section 9(b) of the Act, which provides that the Board "shall decide in each case" whether the bargaining unit is appropriate in order to "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act. 29 U.S.C. § 159(b). In addition to abdicating the Board's responsibility to make

individualized determinations regarding the appropriate bargaining units "in each case," the *Specialty Healthcare* test is arbitrary and capricious because, in creating the test, the Board failed to consider the right of employees to refrain from collective activities. Section 9(b)'s plain language requires the Board to assure employees the fullest freedom in exercising *all* of the rights guaranteed by the Act, including the right to refrain. The Act does not permit the Board to pick and choose which rights to protect when making bargaining-unit determinations.[2]

ARGUMENT

I. *SPECIALTY HEALTHCARE*'S APPLICATION TO MANUFACTURING ELIMINATES CONSIDERATION OF THE EMPLOYER'S INTERESTS IN A UNIT DETERMINATION THAT RATIONALLY REFLECTS THE REALITY OF THE WORKPLACE

For over half a century, the Board faithfully followed the statutory injunction under Section 9(b) of the Act to make its unit determinations "in each case." 29 U.S.C. § 159(b). The resulting body of Board prece-

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[2] Some of the *amici* here have moved to intervene in *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir.), which presents the issue whether the three purportedly recess-appointed members serving on the Board at the time of that decision were improperly appointed. This case presents the same issue. *See* Employer's Br. at 17-28.

dent established a careful balancing of competing interests of employees, employers and unions, with a goal of approving units "in each case" that allow individual employers to efficiently run their respective businesses while protecting the rights of employees to engage in meaningful collective bargaining.

This case is about manufacturing—but it is also about much more. Virtually every employer subject to the Board's jurisdiction is affected by the *Specialty Healthcare* test, whether they are engaged in manufacturing, distribution, retail sales or the multitude of other activities that make up the American economy. Historically, the Board weighed carefully the potential consequences of recognizing a bargaining unit that covered only a portion of a particular facility, whether it be a plant, warehouse, retail store, restaurant or other establishment. The Board was particularly mindful of the disruption smaller or multiple units could have on business operations, stable labor relations and realistic collective bargaining.

The precedent in the manufacturing sector involved in this case is typical of the care taken by the Board. It is reflected in a series of cases decided over many decades in which the Board was consistently clear

that it would not make a unit determination without taking into consideration the realities of the particular business setting and how a given unit might affect the employer's operations so that neither bargaining rights nor industrial peace and stability were undermined. The Board articulated its mission as follows:

> As we view our obligation under the [Act], it is the mandate of Congress that this Board shall decide in each case . . . the unit appropriate for the purpose of collective bargaining. *In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of collective bargaining and of fostering industrial peace and stability*. . . . At the same time it creates the *context within which the process of* [*collective*] *bargaining must function*. Because the scope of the unit is so basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct *relevancy to the circumstances within which the collective bargaining is to take place*. 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*.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962) (internal citations and quotations omitted) (emphasis added).

In *Kalamazoo Paper*, the Board rejected an attempt to sever truck drivers from an existing production and maintenance bargaining unit at a manufacturer. In rejecting this attempt, the Board articulated the

problem with using job classifications as the basis for unit determinations, explaining:

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

Id. at 139-40 (emphasis added).

The "chaos" the Board sought to avoid is not theoretical or speculative; rather, it represents the real, negative consequences that naturally flow from unit proliferation that carves up an employer's workplace. *Specialty Healthcare* permits multiple smaller bargaining units, drawn along discrete groupings such as job title, department or similar lines, instead of larger units reflecting the employer's functional integration and the resulting community of interests shared by its employees. The employer's bargaining obligations are thus diffused among different groups that bear no relation to the way in which the employer has organized its operations.

Such smaller and/or multiple units disrupt both the efficient operation of the business and effective collective bargaining. More time must be spent bargaining contracts and more resources deployed to keep the artificially separated groups of employees functioning efficiently. An employer's operations, once divided into units that bear little or no relationship to the function of the business, will tend to evolve in different directions as each unit's terms and conditions of employment develop through separate bargaining, spurred on by employee and union rivalry to outpace the other groups at the bargaining table. Employer flexibility and employee advancement lose out as separate bargaining units isolate employees in different seniority systems and job classifications, and the opportunities to move to other jobs with the employer are blocked by separate bidding systems and seniority rights.

These negative consequences also cause the odd result of empowering a union based on which portion of the employer's business it happens to represent, while disenfranchising employees in other parts of the operation. Normally dependent on the solidarity of its membership, the strength of the union under *Specialty Healthcare* will now largely depend on whether it controls a unit consisting of "employees identifi-

able as a group" in the portion most crucial to the operation of the employer's business. If, for example, a smaller yet operationally crucial bargaining unit calls for a boycott of the employer or work stoppage at the facility, the employer may find itself at the mercy of a fraction of its overall complement of employees. Of equal importance, many if not most employees will not have any say in the matter even though it could result in a work stoppage by default for them.

As discussed in Section II, below, Section 9(b) of the Act also requires the Board to approve units that assure employees the "fullest freedom in exercising rights guaranteed by" the Act. 29 U.S.C. § 159(b). Units that recognize the functional integration of a business process provide employees with a means for exercising all of the rights guaranteed by the Act. For these reasons, Board policy for decades has been to look beyond the groupings of title, department and the like—which are given virtually controlling weight under *Specialty Healthcare*—to consider and evaluate how the requested unit might affect the employer's business.

Indeed, the "context" the Board referred to in *Kalamazoo Paper* is the functional *integration of employees in a business process*. The Board

had stressed that all community-of-interest factors necessarily should be viewed through the lens of the employer's business and whether both industrial stability and effective collective bargaining are served by the unit deemed "appropriate." For example, in *International Paper Co.*, 96 NLRB 295 (1971), the Board refused to assign welders to a particular craft unit. In doing so, the Board noted that the welders were assigned to work throughout the plant, explaining: "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *Id.* at 298 n.7.

The Board has acknowledged that this principle, by its nature, must be applied in a variety of manufacturing and other business settings and always must take into consideration the ever-changing workplace as technology and other business applications and processes are adopted:

> The Board must hold fast to the objectives of the [Act] using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees. To be effective for that

> purpose, each unit determination *must have a direct relevancy to the circumstances within which collective bargaining is to take place*. While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination *will vary from industry to industry and from plant to plant*. We are therefore convinced that collective-bargaining units *must be based upon all the relevant evidence in each individual case*.

Am. Cyanamid Co., 131 NLRB 909, 911 (1961) (emphasis added).

Since *Kalamazoo Paper*, *International Paper* and *American Cyanamid* were decided, the Board had continued to consider the nature of how the employer has organized its business, taking care to avoid units that would destroy the functional integration of an employer's manufacturing operations. *See, e.g.*, *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Avon Products, Inc.*, 250 NLRB 1479, 1482 (1979) (reversing regional director's decision that failed to account for employer's "highly integrated process").

It is this well-developed and highly rational body of case law that has now been disrupted by *Specialty Healthcare*. Inexplicably and without warrant, *Specialty Healthcare* eliminates consideration of the context of the unit sought as it relates to the employer's overall operations

in favor of an "employees readily identifiable as a group" framework that slavishly pays heed to job titles, departments or classifications, without regard to how such a unit integrates into the daily practicalities of operating the business in the individual case before the Board.

The inevitable result of *Specialty Healthcare* will be a proliferation of smaller, multiple units that can only cause disruption in the workplace. Indeed, this process has already begun. *See, e.g.*, *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, at *3 (Dec. 30, 2011) (approving bargaining unit limited to small subset of technical employees working in single department of employer's Newport News shipbuilding facility); *Gen. Elec. Co.*, No. 14-RC-073765, slip op. at 45-46 (Mar. 12, 2012) (rejecting functionally integrated plant-wide unit in favor of smaller unit requested by union), *perm. app. denied*, 2012 WL 2046932 (NLRB June 6, 2012); *Prevost Car U.S.*, No. 3-RC-071843, slip op. at 31-32 (Feb. 17, 2012) (approving bargaining unit at transit bus assembly plant limited to assemblers and excluding mechanics, technicians and material handlers), *perm. app. denied*, 2012 WL 928253 (NLRB Mar. 15, 2012).

Application of the *Specialty Healthcare* test has not been limited to manufacturing or even to the health care context in which it arose. Rather, the *Specialty Healthcare* test is being applied broadly throughout other sectors of the American economy. *See*, *e.g.*, *Neiman Marcus Group, Inc.*, No. 02-RC-076954 (May 4, 2012) (applying "overwhelming community of interest" test to approve bargaining unit limited to 46 women's shoe department employees in large department store with over 400 sales employees), *perm. app. granted*, 2012 WL 1951475 (NLRB May 30, 2012); *DTG Operations, Inc.*, 357 NLRB No. 175, at *3 (Dec. 30, 2011) (applying test to approve bargaining unit limited to 31 car rental agency employees and exclude 78 employees); *1st Aviation Servs., Inc.*, No. 22-RC-061300, slip op. at 24-25 (Sept. 13, 2011) (applying test to approve bargaining unit limited to 34 aviation-services employees and exclude 74 employees), *perm. app. denied*, 2011 WL 4994731 (NLRB Oct. 19, 2011).

The Board's abandonment of its longstanding unit-determination precedent is, in itself, an unwise policy choice because of its disruptive effect on the smooth operation of businesses that today, more than ever, are subject to extreme economic and competitive pressures. The Board's

poor policy choice is compounded because of the negative effect it will have not only on business efficiency and profitability, but on the ability of businesses to invest, grow and create badly needed jobs in today's economy. What is worst, however, is that the *Specialty Healthcare* test violates the Act, as demonstrated below.

II. REGARDLESS OF THE CONTEXT IN WHICH IT IS APPLIED, *SPECIALTY HEALTHCARE* CONTRAVENES AT LEAST TWO PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

A. *Specialty Healthcare* Violates Section 9(c)(5)

Section 9(c)(5) of the Act provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). As this Court has explained, Section 9(c)(5)'s prohibition "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *Lundy Packing*, 68 F.3d at 1580. Thus, Section 9(c)(5) specifically prohibits, and *Lundy Packing* specifically rejected, what *Specialty Healthcare* establishes as a rule, i.e., Board "determined" bargaining units that in all but the rarest of

cases will be the exact one requested by the petitioning union on the basis of the union's extent of organizing.

In *Lundy Packing*, the union requested a unit that excluded certain quality-control, laboratory, industrial-engineering and other employees. 68 F.3d at 1579. The Board's regional director presumed that the petitioned-for unit was appropriate but allowed the excluded employees to vote in the election under challenge. *Id.* On review, the Board held that the excluded employees' ballots should not be counted because they did not share an "overwhelming community of interest" with the employees included in the unit. *Id.* at 1581.

Following the employer's refusal to bargain with the pared-down unit and the Board's finding that refusal to be an unfair labor practice, the employer petitioned this Court claiming that the unit approved by the Board was inappropriately based on the extent of union organization. *Id.* at 1579. The Court agreed, holding that the Board violated Section 9(c)(5) because it had given "controlling weight" to the extent of union organization within the employer's facility. *Id.*

Key to the Court's decision in *Lundy Packing* was the Board's holding that the unit requested by the union could only be challenged if

the employer could demonstrate that the excluded employees shared an "overwhelming community of interest" with those employees the union had included in the unit. In rejecting the Board's use of this standard in *Lundy Packing*, the Court explained: "By presuming the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. *This is because the union will propose the unit it has organized*." *Id.* at 1581 (internal quotations and citation omitted) (emphasis added).

The Court further observed that under these circumstances, the Board's ruling made it "impossible to escape the conclusion that the . . . ballots [of the quality-control and industrial-engineering employees] were excluded [by the Board] 'in large part because the Petitioners do not seek to represent them.'" *Id.* (quoting underlying Board decision). Thus, the Board's ruling bore "the indicia of a classic [Section] 9(c)(5) violation." *Id.*

The Board's decision in *Specialty Healthcare* and its application in this case violates Section 9(c)(5) in an even more egregious way than it

did in *Lundy Packing*. In *Specialty Healthcare*, the Board announced a new, short-hand test for determining an appropriate unit, stating:

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

357 NLRB No. 83, at *12-13 (emphasis added and footnote omitted).

This test requires a unit to meet two criteria. First, it must be composed of "employees who are readily identifiable as a group." Second, it must be established that the employees *in the group* share a community of interest with one another. Once these two criteria are met, a challenging employer (or rival union) can only expand the requested unit if it can show that employees excluded from the petitioned-for unit share an "overwhelming community of interest" with the employees in the proposed unit.

The *Specialty Healthcare* test effectively gives controlling weight to the "employees . . . identifiable as a group" in a way that is even more

egregious than in *Lundy Packing*. First, *no* unit could be appropriate in which its members do not share a community of interest. Thus, what really governs the appropriate unit under *Specialty Healthcare* is the employees "identifiable as a group." Such a group will almost certainly be chosen by the union based on the extent to which employees have organized. *See Lundy Packing*, 68 F.3d at 1581 (explaining that the "union will propose the unit it has organized"). Upon what other basis would a readily identifiable group of employees be chosen by the union? Under *Specialty Healthcare* and its growing progeny, this question is never asked and never answered.[3]

Second, as in *Lundy Packing*, the union's requested unit is elevated to controlling status save only if an employer or a rival union can show an overwhelming community of interest with excluded employees. The petitioned-for unit is thus insulated from alteration in all but the

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[3] In *Lundy Packing*, this Court observed that the Board had "generally avoided § 9(c)(5) violations" by applying community-of-interest factors "sufficiently independent of the extent of union organization." 68 F.3d at 1580. The *Specialty Healthcare* test destroys the "independent" community-of-interest analysis by limiting it to the group of employees identified by the union.

rarest of cases, with the result being that extent of organizing is effectively given controlling weight.

In sum, the *Specialty Healthcare* test begins with a presumption that the petitioned-for unit—one almost certainly based on the extent of union organizing—is appropriate simply because the members of the unit share a community of interests among themselves, without regard to any other factors. It then effectively insulates that unit from challenge by erecting the "overwhelming community of interest" barrier.

Dissenting Board Member Hayes accurately described the effect of the new test on the Board's establishment of bargaining units, explaining: "This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units." *Specialty Healthcare*, 357 NLRB No. 83, at *19 (Member Hayes, dissenting) (footnote omitted). This is the same problem that this Court in *Lundy Packing* recognized as a "classic [Section] 9(c)(5) violation." 68 F.3d at 1581.

B. *Specialty Healthcare* Violates Section 9(b)

As discussed above, the Board's historical approach in determining the propriety of bargaining units considered "in each case" the interests not only of those in the petitioned-for unit, but all of the factors necessary to protect the "rights guaranteed by" the Act. This decades-long policy was grounded in the plain language of Section 9(b) of the Act. As demonstrated below, the rejection of that approach through the Board's decision in, and continued application of, *Specialty Healthcare* violates Section 9(b).

1. The Board Violated Section 9(b)'s Command to Decide the Appropriate Bargaining Unit "In Each Case"

Section 9(b) of the Act provides that the 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). The words "shall decide in each case" mean that "whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that

would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991).

The legislative history of Section 9(b) demonstrates Congress's belief that the Board must have discretion to determine unit issues based on the circumstances before it. Section 9(b) is based on Section 2(4) of the Railway Labor Act of 1934 ("RLA"), which provides that employees "shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act." *Comparison of S. 2926 and S. 1958*, at 30 (Comm. Print 1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949) ("*1935 Legislative History*").

This RLA provision is different from what became Section 9(b) of the Act in a critical respect: the RLA does *not* contain language mandating a decision by the National Mediation Board ("NMB") as to the appropriate unit "in each case." Congress explained this fundamental dif-

ference in its comparison of Senate Bill 2926 (the original Senate bill proposing the Act) to Senate Bill 1958 (what ultimately was enacted as the Act): "The same necessity for unit determinations is embraced in the definition of majority rule in the [RLA] as set out above, *although in that industry the nature of the department or craft alinement* [sic] *is so clearly defined as to require no express elaboration*." *Id.* (emphasis added), *reprinted in* 1 *1935 Legislative History* 1356.

In making this distinction, Congress recognized that the range of employers and areas of commerce that fall under the jurisdiction of the Act are vastly broader than, and different from, the railroad (and now airline) industry in any number of material respects. Unlike the RLA, the Act covers virtually unlimited types of businesses, employing individuals with myriad levels of skill sets, ranging in size from but a few employees to hundreds of thousands of employees, having but a single location to having hundreds or thousands of locations around the country, all following multiple lines of ownership, organization and business purpose.

While Congress recognized that a "one size fits all" approach to bargaining-unit determination might be acceptable in the more homo-

geneous business types covered by the RLA, that approach would be neither possible nor desirable for the far broader range of employers and employees in the industries subject to the Act. For that reason, the Board was directed to make its determinations not on the basis of a simplistic formula, but to consider the factors making up an appropriate unit "in each case."

The specific role of the Board in making a decision "in each case" under Section 9(b) was part of a larger debate over the wisdom of majority elections. This "majority rule" debate naturally led to a discussion of why the Board needed to decide in what *unit* the majority would be determined:

> The major problem connected with the majority rule is not the rule itself, but its application. *The important question is to what unit the majority rule applies*. . . . Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. . . . The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any

> given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups, could make it impossible for the employer to run his plant*.

Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to the Board) (emphasis added), *reprinted in* 1 *1935 Legislative History* 1458. The rule in *Specialty Healthcare* is contrary to concerns raised by Congress in investing the Board with the authority to make unit determinations "in each case."

2. The Board Ignored Section 9(b)'s Command to Assure Employees the Fullest Freedom in Exercising All of the Rights Guaranteed by the Act

The presumption of regularity that accompanies agency action does not shield it from a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). As is relevant here, agency action is subject to reversal as being "arbitrary" and "capricious," 5 U.S.C. § 706(2)(A), if the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

When Congress amended the Act in 1947, one of the key changes made to Section 7 of the Act, 29 U.S.C. § 157, was the addition of a

"right to refrain" from being represented by a union for collective bargaining. This language was added to ensure that employees could exercise free choice on the important question of union representation. It was considered so important that Congress also amended Section 9(b) of the Act to assure that in making unit determinations, the Board took into account not just the right to organize for collective bargaining, but all of the rights guaranteed under the Act, including the right to refrain. As demonstrated below, however, the Board failed to fulfill its statutory obligation to consider the right to refrain in developing the *Specialty Healthcare* test.

a. Section 9(b) Requires the Board to Consider the Right of Employees To Refrain From Collective Activities

The Board's bargaining-unit determination has significant ramifications for employees included in the unit who do not wish to be represented by a union. In relevant part, Section 9(a) of the Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive* representatives of *all* the employees in such unit for the purposes of collective bargaining . . . ." 29 U.S.C.

§ 159(a) (emphasis added). Section 9(b) of the Act therefore instructs that the 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) (emphasis added).

The "rights guaranteed by this subchapter" include not only the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. Importantly, the "rights guaranteed by this subchapter" also include the "right to refrain from any or all" of the foregoing activities. *Id.*

When Congress added the right to refrain to the Act in 1947, it did so using language demonstrating that the newly added right should not be accorded second-class status by the Board. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 7, 61 Stat. 136, 140. For example, at the same time that it added the right to refrain to the Act, Congress amended what had been a pro-unionization

unit-determination standard and replaced it with a neutral standard requiring the Board to respect *all* of the rights guaranteed to employees under the Act, including the right to refrain.

In its original form, Section 9(b) required the Board to "decide in each case whether, in order to insure to employees *the full benefit of their right to self-organization and collective bargaining*, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." National Labor Relations Act (Wagner Act), ch. 372, § 9(b), 49 Stat. 449, 453 (1935) (emphasis added). In 1947, Congress deleted Section 9(b)'s "right to self-organization and collective bargaining" language and replaced it with the Act's current, neutral language, which reads, in relevant part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Taft-Hartley Act, sec. 101, § 9(b), 61 Stat. at 143; *see also* 29 U.S.C. § 159(b) (codifying the

Taft-Hartley Act's language and replacing the phrase "this Act" with "this subchapter").

Accordingly, Congress's modification of the Act in 1947 "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 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (emphasis added). By guaranteeing "in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so," Congress believed it would "result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." *Id.*

b. The Board Ignored the Right To Refrain

Claiming that the "right to self-organization" is the "first *and central* right set forth in Section 7 of the Act," *Specialty Healthcare*, 357 NLRB No. 83, at *8 (emphasis added), the *Specialty Healthcare* majority asserted that employees "exercise their [Section] 7 rights not merely by petitioning to be represented, but by petitioning to be represented in

a particular unit," *id.* at *8 n.18. "A key aspect of the right to 'self-organization,'" the majority believed, "is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Id.* The majority therefore interpreted Section 9(b)'s command as requiring the Board to assure employees the fullest freedom in exercising the "right to self-organization" by protecting the "right to choose whom to associate with, when [the Board] determine[s] whether their proposed unit is an appropriate one." *Id.*

At no point in devising a new standard for determining appropriate bargaining units did the Board ever consider the right of employees to *refrain* from activities protected by the Act. Instead, the language of the majority's decision demonstrates that it deemed the "right to self-organization" as more important than all other Section 7 rights. That policy decision, however, was not for the Board to make. In adding the right to refrain to the Act and enacting a facially neutral unit-determination standard 65 years ago, Congress made a policy decision the Board was bound to respect.

In view of the importance that Congress attached to the right to refrain and its relevance during the unit-determination process, it is

telling that nowhere did the Board address how this right might be affected by the rule announced. Nor is it difficult to see how the rule announced could adversely impact the right to refrain.

For example, under the Board's traditional, pre-*Specialty Healthcare* standard for determining appropriate bargaining units, a union seeking to organize would have to contend with the fact that a majority of individuals in a presumptively appropriate unit might not want to be represented by a union that would, if elected, become their exclusive agent for purposes of collective bargaining. The union could respond to this reality either by foregoing the organizing effort or by initiating a campaign to win over those employees who did not wish to be represented. Under the regime announced in *Specialty Healthcare*, however, the union now has a third option: organize in a gerrymandered unit in which the union knows it has majority support. In such a gerrymandered unit, the union does not have to worry about convincing those individuals who may wish to exercise their right to refrain, because they are outnumbered. The rule established thus relegates those individuals to an artificial minority position.

Congress enshrined the right to refrain in the Act itself so that it would be recognized and protected by the Board, particularly during the unit-determination process. Because agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and because the Act requires the Board to consider all of the rights guaranteed by the Act, at a minimum, this case should be remanded with instructions for the Board to obey Congress's unambiguous command, for the Board's discretion does not extend "to the point where the boundaries of the Act are plainly breached," *Lundy Packing*, 68 F.3d at 1583.

CONCLUSION

For the foregoing reasons, the Court should grant the Employer's petition for review and deny the Board's cross-application for enforcement.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1684 **Caption:** Nestle Dreyer's Ice Cream Co. v. NLRB

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(s) s/Ronald E. Meisburg

Attorney for U.S. Chamber of Commerce, et al.

Dated: July 10, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that on this tenth day of July, 2012, he caused the foregoing Brief *Amici Curiae* 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. The undersigned also certifies that, as required by Local Rule 31(d), he caused eight (8) true and correct copies of the foregoing *amicus* brief to be transmitted to the Clerk of Court by third-party commercial carrier for next-day delivery.

s/Ronald E. Meisburg
Ronald E. Meisburg

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