Nos. 12-1027 & 12-1174

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.

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

BRIEF *AMICUS CURIAE* OF THE RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF PETITIONER/CROSS-RESPONDENT SEEKING REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Mark Theodore

Pursuant to 6th Cir. R. 26.1, Retail Industry Leaders Association (Amicus Curiae)
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/ Mark Theodore
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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.

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STATEMENT OF INTEREST

The Retail Industry Leaders Association ("RILA") promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include the largest and fastest

growing companies in the retail industry—retailers, product manufacturers and service suppliers—which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers located both domestically and abroad. The retail industry provides good jobs with flexible schedules that by their nature allow employees to learn many different functions that need to be accomplished to keep a store running. RILA members are subject to the jurisdiction of the National Labor Relations Board ("Board"), and are keenly interested in issues related to the manner in which the Board determines appropriate bargaining units under the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169.[1]

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[1] Pursuant to Federal Rule of Appellate Procedure 29, RILA certifies that all parties have consented to the filing of this brief. RILA also certifies 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 RILA, its members or its counsel made a monetary contribution to its preparation or submission.

On August 26, 2011, a three-Member majority of the Board held that

> when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), 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.

Specialty Healthcare & Rehab. Ctr. of Mobile, 357 NLRB No. 83, slip op. at 12-13 (2011), App. 66-67 (footnotes omitted) ("*Specialty Healthcare II*"); *see also Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 NLRB No. 56 (2010), App. 133 ("*Specialty Healthcare I*") (calling for *amicus* briefs to address general standard for determining appropriate bargaining units).

Despite the Board's declaration that it was only clarifying existing law, in reality the Board's decision fundamentally changes the legal framework for determining appropriate bargaining units in all industries. As a result, this case presents one of the most far-reaching controversies to arise under the Act in decades.

RILA is deeply concerned with the Board's sudden and sweeping change in the standard for determining appropriate bargaining units announced in *Specialty Healthcare II*. RILA believes that the historical "community of interests" standard developed by the Board has served as a solid basis for determining appropriate bargaining units. That standard balances the interests of all parties in organizing in a manner that allows for the productive and successful management of the business. Application of that standard also results in a structure for stable, broad-based collective bargaining between an employer and a union representing most, if not all, of the employees who share a community of interest at a particular location. The radical change in this standard announced by the Board will balkanize the structure of the employer's business, adversely impacting RILA member companies and their employees whose ability to perform multiple functions within a retail store will be severely limited, while building in delay and increasing costs in the Board's representation process. RILA is thus concerned that the Board's newly announced standard will cause massive disruption in the retail industry without any necessary precipitating purpose or improved result.

ARGUMENT

I. THE BOARD MAJORITY'S NEW STANDARD VIOLATES SECTION 9 OF THE ACT

A. The Majority's New Rule Contravenes the Obligation of the Board Under Section 9(b) of the Act to Decide the Appropriate Unit "In Each Case"

Although it was amended in 1947, certain key language of Section 9(b)—that the Board shall decide the appropriate unit "in each case"—has not changed since its original 1935 enactment: "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 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 words "shall decide in each case" have been interpreted to 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 Su-

preme Court expanded further on the Board's duties with respect to developing unit-determination rules:

> In resolving such a dispute, the Board's decision is presumably to be guided not simply by the basic policy of the Act but also by the rules that the Board develops to circumscribe and to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority.

Id. at 611-12. The rule announced in *Specialty Healthcare II* violates the principles set forth by the Supreme Court because it is a rule of general applicability that was not the product of rulemaking, and which effectively precludes case-by-case adjudication.

The legislative history behind 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 "[e]mployees 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) ("*NLRB Legislative History*").

The RLA provision is distinct from what became Section 9(b) of the Act in one very important 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 difference between the RLA and the Act in its comparison of S. 2926 (the original Senate bill proposing what was to become the Act) to S. 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 *NLRB Legislative History* 1356.

In this distinction between the RLA and the Act, 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: the virtually unlimited types of businesses, the myriad skill sets

and types of employees needed, and the size and organization of the businesses, to name but a few. In sum, Congress recognized that a "one size fits all" approach to bargaining-unit determination, accepted as appropriate under the RLA, is simply not possible or desirable for the broader range of employers and employees in the industries subject to the Act.

The specific role of the Board in making a decision "in each case" pursuant to Section 9(b) was part of a larger debate over the wisdom of majority elections, another mechanism borrowed from the pre-Act labor boards, including the NMB. This "majority rule" debate naturally led to a discussion of why the Board needed to decide *who* among the employees should be allowed to vote:

> 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. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. 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 Before the S. Comm. on Educ. & Lab. on S. 1958, 74th Cong. 82 (1935) (testimony of Francis Biddle, then-Chairman of the precursor to the Board) (emphasis added), *reprinted in* 1 *NLRB Legislative History* 1458. The rule in *Specialty Healthcare II* is contrary to virtually all the concerns raised by Congress in investing the Board with the authority to make unit determinations.[2]

B. The Majority's Decision Violates the Act's Prohibition Against Giving Controlling Weight to the Extent of Employee Organizing

Section 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5), provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall

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[2] As discussed in Section II.D, *infra*, the proliferation of bargaining units that was the object of congressional concern will now almost certainly become a reality under the standardless, result-oriented approach dictated by *Specialty Healthcare II*, and applied by the Board to that effect in *DTG Operations, Inc.*, 357 NLRB No. 175 (2011).

not be controlling." This provision "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." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995) (citing *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978)). Thus, the Act specifically prohibits what *Specialty Healthcare II* establishes as a rule—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 its extent of organizing.

In *Lundy Packing*, the Fourth Circuit held that the Board had run afoul of Section 9(c)(5) when it found a bargaining unit proposed by the union appropriate primarily because the Board had given "controlling weight" to the extent of union organization within the employer's facility. *Id.* at 1579. The Board in *Lundy Packing* had applied virtually the same standard as set forth in *Specialty Healthcare II*, and held that the unit requested by the union, which excluded quality-control employees, could only be challenged if the employer could demonstrate that the excluded quality-control employees shared an "overwhelming commu-

nity of interest" with those employees the union had included in the unit. In rejecting the Board's decision, the court stated:

> 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 (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)); *see also Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984) ("[T]he fact that . . . the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate.").

In *Lundy Packing*, the excluded employees had voted under challenge in the representation election. After the election the Regional Director conducted an investigation and determined that the challenged ballots should be counted, and that the now formerly excluded employees should—based on their shared community of interest—be included in the unit. The union appealed to the Board, which reversed the Regional Director. The Board applied the "overwhelming community of interest" standard and ruled that the ballots of the excluded quality-control and industrial-engineering employees should not be counted.

The court of appeals observed that under these circumstances, "it is 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.'" *Lundy Packing*, 68 F.3d at 1581 (quoting underlying Board decision). Thus, according to the Fourth Circuit, the Board's ruling bore "the indicia of a classic [Section] 9(c)(5) violation." *Id.*

The decision in *Lundy Packing* is instructive for another purpose. The Board in *Specialty Healthcare II* needed to distinguish *Lundy Packing* and in doing so relied exclusively on the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), discussed in detail in Section II.B, *infra*, in which the D.C. Circuit distinguished *Lundy Packing* as follows:

> The Fourth Circuit there objected to the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit: '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 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. at 423 (quoting *Lundy Packing*, 68 F.3d at 1581). This description of the *Lundy Packing* decision constitutes a distinction without a difference. The court in *Lundy Packing* was more concerned with the fact that the Board there, like the Board majority in *Specialty Healthcare II*, had changed a rule without explanation, thereby ignoring, but not explicitly discussing let alone overruling, existing precedent: "The statutory infirmity of the Board's holding is underscored when the Board's prior treatment of quality control personnel is examined. Heretofore, in an effort to avoid workplace fragmentation, the Board has consistently included quality control personnel in [production and maintenance] units." *Lundy Packing*, 68 F.3d at 1582.

The rule enunciated in *Specialty Healthcare II* begins with a presumption that the petitioned-for unit—one likely based on the extent of union organizing—is appropriate. It then effectively insulates that unit from challenge by erecting the "overwhelming community of interest" barrier. Dissenting Board Member Hayes described the effect of the new standard on the Board's establishment of bargaining units:

> 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 de-

> termining appropriate units. Next, by proposing to revise the rules governing the conduct of representation elections to expedite elections and limit evidentiary hearings and the right to Board review, the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation.

Specialty Healthcare II, slip op. at 19, App. 73 (footnote omitted).[3] This is the same problem that the *Lundy Packing* court recognized as a "classic [Section] 9(c)(5) violation." This Court should recognize the same "classic" violation here.

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[3] The proposed revised rules referenced by the dissenting Board Member have been promulgated in part and restrict the employer's right to litigate bargaining-unit issues by giving Regional Directors discretion to severely curtail representation case hearings. The Board originally issued a Notice of Proposed Rulemaking ("NPRM") on June 22, 2011, 76 Fed. Reg. 36,812, wherein it advocated sweeping changes to the current procedures for holding secret-ballot elections. The Final Rule was issued on December 22, 2011, 76 Fed. Reg. 80,138, and is set to become effective on April 30, 2012. The Final Rule, although somewhat narrower than the NPRM, still represents a drastic change to the way representation petitions currently are processed.

II. THE BOARD MAJORITY ABUSED ITS DISCRETION BY ADOPTING A NEW STANDARD FOR DETERMINING THE APPROPRIATENESS OF VIRTUALLY ALL BARGAINING UNITS REGARDLESS OF INDUSTRY OR PAST PRECEDENT

The new standard announced by the Board in *Specialty Healthcare II* holds that any identifiable group of employees sought by the union, who share a community of interest, is an appropriate unit, save only for those rare situations in which an employer can show that excluded employees share an overwhelming community of interest with the included employees. *Specialty Healthcare II*, slip op. at 12-13, App. 66-67. In all but the most extreme cases, this standard gives controlling weight to the unit sought by the union.

The Board asserted that it was only clarifying the law in this area. *Id.* at 1, App. 55. However, the asserted clarification is in reality an entirely new, sweeping standard that has since been used to alter decades of Board precedent, across a multitude of industries. The Board did not provide an adequate explanation as to why it made the new rule, nor did it provide an adequate explanation of how it was to be applied.

A. The Majority Offered No Adequate Reason as to the Necessity for a New, Sweeping Standard

The Board is generally entitled to deference in making decisions as to the appropriateness of a bargaining unit. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-92 (1947). In granting such deference, courts have given great weight to the factors used by the Board in making bargaining-unit determinations. *See NLRB v. 1st Union Mgmt., Inc.*, 777 F.2d 330, 333 (6th Cir. 1985).

Deference, however, is not absolute. This is particularly true when the Board announces a radical change to a previous standard. In such circumstances, it is incumbent upon the Board to be clear about both the reasons for the change and the change itself. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) ("All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it."). Indeed, "[w]hen the Board departs from its usual policies, 'it is essential that the reasons for the decisions in and distinctions among these cases be set forth to dispel any appearance of arbitrariness.'" *Bay Med. Ctr., Inc. v. NLRB*, 588 F.2d 1174,

1177 (6th Cir. 1978) (quoting *Mem'l Hosp. of Roxborough v. NLRB*, 545 F.2d 351, 357 (3d Cir. 1976)).[4]

In *Specialty Healthcare II*, the Board ignored the dictates of *Phelps Dodge* and its progeny, and gave no reason for the issuance of the new standard, refusing to acknowledge even that it was a new standard. Instead, the Board majority asserted that it was only "clarifying" a standard that has been in place, albeit made up of "slightly varying verbal formulations." *Specialty Healthcare II*, slip op. at 12, App. 66. The Board asserted further, in a footnote, that with respect to existing "special industry and occupation rules" the "holding today is not intended to disturb any rules applicable only in specific industries." *Id.* at 13 n.29, App. 67. As the Board itself has demonstrated since its decision, neither of those assertions is proving true.

Indeed, since the date of the Board's ruling in *Specialty Healthcare II*, the Board has applied the new rule in a variety of representa-

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[4] Further, as discussed below, this Court does not defer to the Board's application and interpretation of judicial precedent, such as was the principal basis for the Board majority's ruling in *Specialty Healthcare II*.

tion cases arising in myriad industries. *See, e.g.*, *Odwalla, Inc*., 357 NLRB No. 132 (2011) (beverage industry; rule in *Specialty Healthcare II* applied to determine whether a single, determinative challenged ballot should be opened); *Northrop Grumman Shipbuilding, Inc.,* 357 NLRB No. 163 (2011) (shipbuilding; Board disregarded prior decisions regarding technical employees in favor of applying new, higher standard); *DTG Operations, Inc.*, 357 NLRB No. 175 (2011) (car rental agency; Board overruled Regional Director's finding that excluded employees had an "overwhelming" community of interest with petitioned-for employees, concluding the community of interest was not overwhelming enough).

The new standard also has been applied in several cases in which the Board has either granted review but not yet issued a decision, or denied review altogether. *Compare, e.g.*, *Grace Indus., LLC*, Nos. 29-RC-12031 & 29-RC-12043, 2011 WL 6122778 (NLRB Dec. 8, 2011) (granting request for review in bargaining-unit dispute involving road construction company and remanding to Regional Director for reconsideration in light of *Specialty Healthcare II*); *and Performance of Brentwood LP*, No. 26-RC-63405, 2011 WL 5288439 (NLRB Nov. 4, 2011)

(doing same in bargaining-unit dispute involving car dealership), *with Prevost Car U.S.*, No. 03-RC-71843, 2012 WL 928253 (NLRB Mar. 15, 2012) (denying bus manufacturer's request for review of Regional Director's application of new standard), *and 1st Aviation Servs., Inc.*, No. 22-RC-61300, 2011 WL 4994731 (NLRB Oct. 19, 2011) (denying review of Regional Director's application of new standard in bargaining-unit dispute involving aviation services company).

B. The Majority's Reliance on the D.C. Circuit's Decision In *Blue Man Vegas LLC v. NLRB* Is Not Entitled to Any Deference

Furthermore, the Board is owed no deference in *Specialty Healthcare II* because the principal foundation of the Board's decision is its reliance on judicial precedent. Moreover, the precedent upon which the Board relied is in itself flawed.

This Court's position with respect to Board interpretations of judicial decisions is clear. The Court "give[s] no deference to the Board's interpretation of Supreme Court and Sixth Circuit decisions, reviewing those holdings *de novo*." *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003) (citing *Albertson's Inc. v. NLRB*, 301 F.3d 441, 448 (6th Cir. 2002)). Indeed, the Court "do[es] not defer to the Board with respect to the in-

terpretation of judicial precedent" generally. *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001).

Further, the *Blue Man Vegas* decision, which serves as the principal pillar of the Board's decision in *Specialty Healthcare II*, itself misreads and misapplies Board precedent. *See Specialty Healthcare II*, slip op. at 19 n.17, App. 73 (Member Hayes, dissenting). In *Blue Man Vegas*, the court used the terminology "overwhelming community of interest" to describe what it wrongly considered to be the "consistent analytic" framework used by the Board and courts. 529 F.3d at 421. In making this determination, the *Blue Man Vegas* court cited only two Board decisions (*Jewish Hospital Ass'n of Cincinnati*, 223 NLRB 614 (1976), and *Lodgian, Inc.*, 332 NLRB 1246 (2000)), but not for the proposition that the Board routinely utilizes the "overwhelming" community of interest standard.[5]

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[5] This is not surprising, because both *Jewish Hospital* and *Lodgian* actually demonstrate the use and importance of discrete, specific analyses historically employed by the Board to find the appropriate unit "in each case" as required by Section 9(b) of the Act.

Rather, the court in *Blue Man Vegas* cited the Board's *Jewish Hospital* decision for the proposition that a "unit limited to service employees [is] inappropriate because of [the] 'overwhelming community of interest' with maintenance employees." 529 F.3d at 422. However, the language quoted by the D.C. Circuit was *not a conclusion of the Board*, but instead was the Board's characterization of the *employer's position* in that case. Thus, in *Jewish Hospital*, the Board had said: "Employer *asserts*, *inter alia*, that there is *such an* overwhelming community of interest between the service employees sought and the maintenance and technical employees that the only appropriate unit is an overall unit of service, maintenance, and technical employees." *Jewish Hospital*, 223 NLRB at 617 (emphasis added). It was this purported assertion that the *Blue Man Vegas* court relied upon, but it was not what the Board actually found.

What the Board actually found in *Jewish Hospital* was the opposite of "overwhelming community of interest" among the various employees. The Board concluded there was no basis to fragment a particular grouping of employees into smaller bargaining units, as was sought in varying forms by three competing unions. Specifically, the Board

determined that the smaller units sought by each of the petitioning unions did not "comprise a homogeneous grouping of employees possessed of interests *sufficiently distinct* from the other employees to constitute a separate unit." *Id.* at 617 (emphasis added). In other words, far from endorsing an "overwhelming community of interest" standard, in *Jewish Hospital* the Board instead required the opposite: that where employees share a simple community of interest, the burden is on the moving party to demonstrate that a smaller group is nevertheless "sufficiently distinct" to warrant constituting a stand-alone unit. The court in *Blue Man Vegas* simply misread Board precedent.[6]

The court in *Blue Man Vegas* also cited *Lodgian, Inc.*, 332 NLRB 1246, finding it to require the "inclusion in unit of employees who 'share

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[6] *Jewish Hospital* also was distinguishable from the proposition cited as it involved bargaining units in the acute health care industry in the 1970s, and little or no precedent existed. The Board noted the special nature of the case in that it "presented issues of importance" in the health care industry warranting oral argument. 223 NLRB at 614. The Board was fashioning an analytical framework for the health care industry where a specific need existed (i.e., the lack of precedent). This is in contrast to *Specialty Healthcare II*, which involves an employer in the nonacute health care industry, where there was ample precedent that the Board has simply overruled.

an overwhelming community of interest with the employees whom the [union] seeks to represent.'" *Blue Man Vegas*, 529 F.3d at 422. However, this statement refers to a Regional Director's analysis, as adopted by the Board, of whether two concierge employees could be excluded (as sought by the employer) from a larger unit. This factor alone makes the *Lodgian* case completely different from the situation addressed in *Specialty Healthcare II*, in which the union sought to *exclude* employees from a unit, not to include them.

But even that crucial difference aside, the two concierge employees in the *Lodgian* case had been formally assigned by the employer to the front-office department. Front-office employees were traditionally excluded by the Board from service-employee units in hotels. In his analysis, the Regional Director determined that the concierge employees had been "artificially placed in the front office department." He further determined that, instead, "their *primary* community of interest is with the room server attendants and other employees whom the Petitioner seeks to represent." 332 NLRB at 1255 (emphasis added). The Regional Director further found "highly significant" the "area practice in the hotel industry in Columbus, Ohio, which the Board has long rec-

ognized, of excluding front office employees, like those here, from other groups of hotel employees." *Id.* at 1253. These findings—the "primary" community of interest with service workers and the practice of excluding front-office employees from other groups of hotel employees—demonstrate that the Board's decision in *Lodgian* was not based on an "overwhelming community of interest" standard. Thus, *Lodgian* cannot have been correctly relied upon by the Court in *Blue Man Vegas* as support for the higher level "overwhelming community of interest" standard.

Simply put, the principal foundation for the Board's decision in *Specialty Healthcare II* is based on its reading of a judicial decision, *Blue Man Vegas*. The Board's reading and interpretation of *Blue Man Vegas* is not entitled to any deference from this Court, both because of this Court's policy of not deferring to the Board's interpretation of other judicial decisions, and also because the decision in *Blue Man Vegas* was itself an incorrect application of Board precedent. Indeed, the D.C. Circuit could hardly have picked more narrow and discrete examples of Board analyses as it attempted to distill over seventy years of Board precedent. As such, a fundamental pillar upon which the Board relied

to fashion the new rule it articulated in *Specialty Healthcare II* is inherently unreliable and should not be given any deference by this Court.

C. The Dissent Correctly Concluded the New Rule Constitutes an Abuse of Discretion

In *Specialty Healthcare II*, the dissent highlighted the fact that the Board majority had created a rule of general applicability through its decision, which is a clear abuse of discretion. "Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction. . . . This decision is the culmination of an ill-considered journey. The parties involved did not request any broad inquiry." *Specialty Healthcare II*, slip op. at 15, App. 69 (Member Hayes, dissenting). The dissent is well taken.

There is nothing about the facts of the case or the Regional Director's underlying decision that suggested the need for a complete overhaul of the traditional community-of-interest standard for all employers falling under the Board's jurisdiction. No fact or circumstance existed that warranted changing the rule for all bargaining-unit determinations. The underlying factual situation in *Specialty Healthcare II* con-

cerned a nonacute health care facility, a very specific type of business, governed by a very specific bargaining-unit analysis set forth in *Park Manor Care Center, Inc.*, 305 NLRB 872 (1991). That analysis, in turn, was derived from a then-singular occurrence in Board history: "background information gathered during rulemaking"[7] as well as "prior precedent." *Id*. at 875. The petitioned-for employees in *Specialty Healthcare*, certified nursing assistants ("CNAs"), are a particular type of employee common only to health care related industries.

Despite the narrow and unique situation it had before it, the Board nevertheless took the opportunity to ask the parties and interested *amici* to address by brief questions that had nothing whatsoever to do with the facts before it. There was no clamor for a broad change in the unit-determination standard, and no real indication in the questions that the Board would make such a radical change in the unit-

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[7] The Board's rulemaking with respect to health care bargaining units expressly excluded nonacute health care facilities. *See* Final Rule, Collective-Bargaining Units In the Health Care Industry, 54 Fed. Reg. 16,336, 16,347 (Apr. 21, 1989).

determination standards that had been followed for decades. *See Specialty Healthcare I*, slip op. at 2, App. 134.

The dissenting Board member summarized the majority's departure from the case before it into completely new territory, unasked by the labor or management communities:

> In sum, despite being given every opportunity to do so, the parties and *amici*, with perhaps a single exception, did not express support for a strikingly new unit determination standard within or outside of the health care industry. Nevertheless, my colleagues respond not only by overruling *Park Manor* but also by redefining the test for determining an appropriate unit in both nonacute healthcare facilities and all other nonhealth care industries. This is perhaps the most glaring example in cases decided recently of my colleagues initiating a purported empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any factual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American work force.

Specialty Healthcare II, slip op. at 16, App. 70 (footnote omitted). The dissent thus illustrates the Board's failure to fully articulate the reasons behind its new standard, and its consequent abuse of discretion.

D. The Majority's Failure to Define "Overwhelming" Community of Interest Is an Abuse of Discretion

The Board created a new standard yet did not provide any guidance as to what "overwhelming" means or exactly how the standard

should be applied. As noted above, the judicial underpinnings of the rule do not support it. The Board's failure to define "overwhelming community of interest" constitutes another abuse of discretion, and has led to confusing and contradictory results.

The Board's decision in *DTG Operations, Inc.*, 357 NLRB No. 175 (2011), is illustrative of how *Specialty Healthcare II* has become a result-oriented bargaining-unit analysis. In *DTG*, the union petitioned for a unit at an automobile rental agency consisting of the rental service agents ("RSAs") and Lead RSAs. The employer sought to include all employees working at the car rental agency, on the basis that they all shared a community of interest. The Regional Director, after noting that the Board "has employed a traditional community of interest analysis" that has seen "various combinations"[8] of employees in the rental car industry, found that the "unit proposed by Petitioner consisting solely of RSAs and lead RSAs is not an appropriate unit because of

[8] Yet another indication that even in the rental car industry the Board analyzed each case individually.

the overwhelming community of interest" with the remainder of employees working at the facility. *Id.* at 26-27.

On appeal, the Board reversed the Regional Director. Although the Board agreed that the Regional Director had applied the "proper standard," it reversed her decision in favor of the petitioned-for unit. The Board's reversal was based on some confusing logic, *viz*., that because the Regional Director "found that there *was* an overwhelming community of interest, rather than finding that there *was not*, we need not determine whether she placed the burden of proof on the proper party." *Id.* at 10 n.19. The Board majority reversed the finding because it determined the employer had not carried the burden.

Member Hayes dissented, noting this outcome was a predictable result of the change in the bargaining-unit standard announced in *Specialty Healthcare II*. His dissent noted that if the petitioned-for unit has a community of interest, it will be deemed the "appropriate" unit in virtually every situation:

> One would think that the Regional Director's factual findings under the very test espoused by my colleagues would not be susceptible to reversal under the Board's 'clearly erroneous' request for review standard. Unfortunately, one would be wrong. There is no need to examine the particular inter-classification distinctions drawn by my colleagues in

> reversing the Regional Director. The larger truth is that it is difficult to imagine a multiclassification, multifunction workplace where the jobs of all workers are nevertheless so homogeneous that such distinctions cannot be drawn.

Id. at 11 (footnote omitted). In agreement with Member Hayes, we submit that—even though the Regional Director's decision in *DTG* predated the Board's ruling in *Specialty Healthcare II*—the Board's acknowledgement that the "proper" standard had been applied by the Regional Director, yet her decision warranted reversal, is an example that the presumptive rule requiring an "overwhelming community of interest" is so result-oriented as to be meaningless to any effort to resist the union-requested unit in clear defiance of Section 9(b), as discussed *supra* at I.A.

III. THE NEW RULE ANNOUNCED BY THE BOARD MAJORITY WILL HAVE A PARTICULARLY UNWARRANTED, ADVERSE IMPACT ON THE RETAIL INDUSTRY AND ITS EMPLOYEES

The adverse impact of the new rule in *Specialty Healthcare II* is potentially devastating for retail employers and their employees. Applying the new standard to the facts of existing precedent in the retail industry is illustrative. For example, the Board found three broad units of selling, non-selling and restaurant employees appropriate in *Stern's*

Paramus, 150 NLRB 799 (1965), which involved a large department store. Under the newly enunciated *Specialty Healthcare II* standard, however, a union could petition for, and the Board could find appropriate, 130 separate units—one for each department in the *Stern's Paramus* store.

Such an absurd result is not only possible, but probable, under the rule announced in *Specialty Healthcare II*. Unions will not be able to resist the Board's invitation to organize by cherry-picking a bargaining unit composed of a small subset of employees with little regard for whether those employees constitute a practical bargaining unit. As a result, unions will often organize by forming smaller bargaining units that exclude those similarly situated employees who oppose unionization, effectively disenfranchising them.

For example, a union may choose to organize sales associates from the men's shoe department of a department store, rather than sales associates throughout the store, because it has determined that the majority of the employees in men's shoes support the union, while the sales associates in women's shoes, men's and women's clothing and other departments may not. Or a union may organize just the "greet-

ers," rather than all employees interacting with customers, such as cashiers and floor associates, because the non-greeters do not want a union.

Similarly, a union may organize the receiving department at a retailer's distribution center rather than the shipping employees working alongside them or other employees in the center, because the excluded employees do not want union representation. This may be the case even though other employees of the distribution center or the retail store have similar compensation, hours, duties and other indicia of community of interest.

The negative impact on skill development is easy to envision. Currently, in most retail settings, employees perform tasks in a variety of different departments and settings in order to develop their skills and knowledge base and to provide a high level of customer service throughout the store. In a situation where a business is faced with multiple units as contemplated under *Specialty Healthcare II*, each perhaps represented by a different, competing union, union rules will prevent the employer from cross-training employees and meeting customer and client expectations via flexible staffing as employees generally cannot per-

form work assigned to another unit.[9] As a result, employees would be limited to siloed micro-units and the job duties assigned to that particular unit. This in turn would result in reduced skill building, training and job opportunities as cross-training, promotions and transfers would be hindered by barriers created by multiple smaller bargaining units.

Employees and employers would also lose flexibility as workers from one store location or one department could not pick up shifts at another if different units represented the different departments or stores in the different locations. For example, those working as a fitting-room associate could not be reassigned to the sales floor, if that was where more staff was needed. A greeter could not cover for an absent cashier if they were in separate units. Similarly, hardware store workers assigned to the gardening center might not be able to service customers in the plumbing department if such work is assigned to a different bargaining unit. The impact of this on business productivity and competitiveness would be significant. Today's economic environ-

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[9] Unions typically insist that members of a unit have exclusive rights to perform their work and establish rigid work rules that dictate what tasks bargaining-unit members may and may not perform.

ment is challenging enough for workers without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

Under *Specialty Healthcare II*, in addition to multiple balkanized units, businesses will have to contend with multiple collective bargaining agreements (e.g., different agreements for cashiers and stockers, employees in men's shoes, women's shoes, men's clothing, women's clothing, etc.), in which the unions may insist on different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance processes and layoff and recall procedures. Juggling the administrative tasks associated with multiple bargaining agreements could overwhelm businesses, particularly in retail, where a store may have dozens of departments and possibly dozens of different units.

Finally, multiple unions representing multiple bargaining units within a single store could lead to rivalry and tension among employees, not to mention rivalry among unions competing among themselves to provide higher wages and benefits. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages, creating a situation where a union representing only a handful of em-

ployees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families. For example, if the cashiers go on strike, the rest of a store might be shut down, leaving all employees without work.

In sum, under *Specialty Healthcare II*, the bargaining-unit proliferation and balkanization that Congress has discouraged and the Board has heretofore rejected is now a reality that will unnecessarily and improperly impact the retail industry to the detriment of both employers and employees, and the economic well-being of families and communities who depend on them.

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CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that the Brief *Amicus Curiae* of the Retail Industry Leaders Association in Support of Petitioner/Cross-Respondent Seeking Reversal contains 6,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced, roman typeface (14-point New Century Schoolbook) using Microsoft Word 2003.

s/Mark Theodore
Mark Theodore

CERTIFICATE OF SERVICE

The undersigned certifies that on this twenty-third day of April, 2012, he caused the Brief *Amicus Curiae* of the Retail Industry Leaders Association in Support of Petitioner/Cross-Respondent Seeking Reversal 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.

s/Mark Theodore
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