UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN STEEL CONSTRUCTION, INC.
Employer,

Case No. 07-RC-269162

and

LOCAL 25, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS (IRONWORKERS), AFL-CIO
Union.

BRIEF OF CONGRESSMAN ROBERT C. "BOBBY" SCOTT, CHAIRMAN OF THE COMMITTEE ON EDUCATION AND LABOR OF THE U.S. HOUSE OF REPRESENTATIVES; CONGRESSMAN MARK DESAULNIER, CHAIRMAN OF THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS OF THE COMMITTEE ON EDUCATION AND LABOR; CONGRESSMAN MARK POCAN; CONGRESSWOMAN ILHAN OMAR; CONGRESSMAN ANDY LEVIN; CONGRESSWOMAN FREDERICA S. WILSON; CONGRESSMAN DONALD NORCROSS; CONGRESSMAN JOHN YARMUTH; CONGRESSWOMAN JAHANA HAYES; CONGRESSWOMAN PRAMILA JAYAPAL; CONGRESSWOMAN SUZANNE BONAMICI; CONGRESSWOMAN ALMA S. ADAMS PhD; CONGRESSMAN RAÚL GRIJALVA; and CONGRESSMAN JOSEPH MORELLE AS *AMICI CURIAE*

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STATEMENT OF INTEREST

Congressman Robert C. "Bobby" Scott is Chairman of the Committee on Education and Labor ("the Committee") in the United States House of Representatives; Congressman Mark DeSaulnier is Chairman of the Committee's Subcommittee on Health, Employment, Labor, and Pensions ("the Subcommittee"); Representatives Mark Pocan, Ilhan Omar, Andy Levin, Frederica S. Wilson, Donald Norcross, John Yarmuth, Jahana Hayes, Pramila Jayapal, Suzanne Bonamici, Alma S. Adams Ph.D., Raúl Grijalva, and Joseph Morelle are members of the Committee. The Rules of the House of Representatives and the Rules of the Committee provide the Committee and Subcommittee with jurisdiction over the National Labor Relations Act ("NLRA") and amendments thereto.[1]

The Committee has a strong interest in ensuring that the text and congressional intent of the NLRA are effectuated, and therefore urges the National Labor Relations Board ("NLRB" or "the Board") to return to the *Specialty Healthcare* standard for determining appropriate bargaining units.[2] Congress has explicitly directed the Board to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."[3] When workers petition the Board for a representation election, the Board faces the crucial task of "decid[ing] . . . the unit appropriate for the purposes of collective bargaining," and therefore determining which employees can vote in the representation election.[4]

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[1] Rule X(1)(e), Rules of the House of Representatives for the 117th Congress, https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf (providing the Committee with jurisdiction over "labor generally"); Rule 2, Rules of the Committee on Education and Labor for the 117th Congress, https://edlabor.house.gov/imo/media/doc/117th%20EL%20Committee%20Rules%20FINAL1.pdf (stating that the subcommittee retains jurisdiction over "[m]atters dealing with relationships between employers and employees, including but not limited to the *National Labor Relations Act*").
[2] 357 NLRB 934 (2011).
[3] 29 U.S.C. § 151.
[4] 29 U.S.C. § 159(b).

Accordingly, the Board must determine appropriate bargaining units in a manner that "assure[s] employees the fullest freedom in exercising the rights guaranteed by this Act;" the Board failed to do so when it departed from the traditional test articulated in *Specialty Healthcare*.[5] In a report detailing decisions of the previous Board majority from September 2017 to July 2021, the Committee found that the decisions in *PCC Structurals*[6] and *Boeing*[7] permitted employers to "requir[e] the inclusion of employees in the voting unit who never previously expressed interest in joining the union," thus "enabling employers to gerrymander union representation elections."[8] The Committee also marked up legislation that includes the Board's traditional unit determination standard articulated in *Specialty Healthcare*,[9] seeking to overturn *PCC Structurals* and *Boeing* and prevent future fluctuations in the standard for determining an appropriate bargaining unit.[10] The House of Representatives has twice passed this legislation.[11] In advancing such legislation, and in submitting this brief, the Committee urges a return to the Board's traditional standard articulated in *Specialty Healthcare* in order to prevent employers from gerrymandering union representation elections.

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[5] 29 U.S.C. § 159(b).
[6] 365 NLRB No. 160 (2017).
[7] 368 NLRB No. 67 (2019).
[8] *Corruption, Conflicts, and Crisis: The NLRB's Assault on Workers' Rights Under the Trump Administration*, Comm. on Educ. and Lab., 4 (Oct. 2020), https://edlabor.house.gov/imo/media/doc/NLRB%20Report%20(Final).pdf.
[9] H.R. Rep. No. 116-347, at 25 (2019).
[10] Although it is outside the scope of the Board's Notice and Invitation to File Briefs, the only difference between *Specialty Healthcare* and this provision of the *Protecting the Right to Organize* ("*PRO*") *Act* is that in *Specialty Healthcare* "the burden is on the party [seeking a larger unit] to demonstrate that the excluded employees share an overwhelming community of interest." *Specialty Healthcare*, 357 NLRB at 934. In the *PRO Act*, employers do not have standing as parties before the Board, leaving the Board to make this determination based on the record in the representation case. *See generally* H.R. Rep. No. 116-347, at 23-25 (detailing how the NLRA as written does not require employer standing in representation cases, and how the *PRO Act* would invalidate procedures that granted employers party status only after enactment of the Act).
[11] *PRO Act*, H.R. 842, 117th Cong. § 105 (2021) (passed in the House of Representatives Mar. 9, 2021); H.R. 2474, 116th Cong. § 2(e) (2019) (passed in the House of Representatives Feb. 6, 2020). During the time Republicans held a majority on the Committee from the 112th through the 115th Congresses, the Committee twice marked up a bill to replace the traditional standard with one more similar to the standard articulated in *PCC Structurals* and *Boeing*. *Workforce Democracy and Fairness Act*, H.R. 2776, 115th Cong. (2017) (marked up June 29, 2019); H.R. 3094, 112th Cong. (2011) (passed in the House of Representatives Nov. 30, 2011).

ARGUMENT

I. The Board's Traditional Test Articulated in *Specialty Healthcare* Advances the Policies of the National Labor Relations Act, and the Board's Departure from *Specialty Healthcare* Undermines Those Policies

Section 9(a) of the NLRA provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining."[12] Section 9(b) authorizes the Board to "decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by th[e NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[13] It is long-settled that "employees may seek to organize a unit that is appropriate – not necessarily *the* single most appropriate unit."[14] Moreover, as courts have recognized, "section 9(a) 'implies that the initiative in selecting an appropriate unit resides with the employees.'"[15]

In 2011, the Board's *Specialty Healthcare* decision reiterated its traditional two-step standard for resolving disputes regarding whether a bargaining unit petitioned for by the union is appropriate.[16] First, the Board under this standard determines whether the unit is a readily identifiable group sharing a "community of interest," using factors such as similarity of wages, hours, terms and conditions of employment, and supervision.[17] Second, if the employer contends

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[12] 29 U.S.C. § 159(a).
[13] 20 U.S.C. § 159(b).
[14] *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991) (quotations omitted); *see also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D. C. Cir. 2008) ("That the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit."); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) (stating that nothing in the NLRA requires that the unit be "the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.'").
[15] *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016) (quoting *Am. Hosp. Ass'n*, 499 U.S. at 610).
[16] *Specialty Healthcare*, 357 NLRB 934 (2011), *enforced sub nom Kindred Nursing Centers East, LLC v. NLRB* 727 F.3d 552 (6th Cir. 2013).
[17] Other factors can include "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job

additional employees should be added to the unit, then the Board looks at whether the employees in the unit share an "overwhelming community of interest" such that there "is no legitimate basis upon which to exclude certain employees from it."[18]

The *Specialty Healthcare* standard properly abides by Section 9's command "to assure employees the fullest freedom in exercising" their rights by examining the petitioner's proposed unit as the starting point for the Board's analysis, applying the traditional community of interest test, and then placing an increased burden on any effort to expand the bargaining unit beyond the petitioned-for unit.[19] Consistent with the NLRA's limitation that "the extent to which the employees have organized shall not be controlling,"[20] the Board applied the *Specialty Healthcare* test to find that a proposed unit was inappropriate if it did "not track any lines drawn by the Employer, such as classification, department, or function."[21] In articulating this longstanding test, the Board relied on the D.C. Circuit's analysis confirming that the Board traditionally places an increased burden on employers seeking to expand the bargaining unit, once the Board has found that employees in the unit share a community of interest.[22] "As long as the Board applies the overwhelming community-of-interest standard . . . the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight."[23] Moreover, the *Specialty Healthcare* standard was approved by every U.S. Court of Appeals where the standard was challenged and, contrary to the Board's claim in *PCC Structurals* that

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overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; [and] interchange with other employees." *Specialty Healthcare*, 357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

[18] *Id.* at 944.

[19] 29 U.S.C. § 159(b).

[20] 29 U.S.C. § 159(c)(5).

[21] *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011).

[22] *Specialty Healthcare*, 357 NLRB at 944 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D. C. Cir. 2008)).

[23] *Blue Man Vegas, LLC*, 529 F.3d at 423.

Specialty Healthcare departed from longstanding precedent,[24] each of those Courts of Appeals confirmed that it was the traditional standard.[25]

Despite this unanimous approval by reviewing courts, the Board upset settled law with its *PCC Structurals* decision in 2017 by lowering the employer's burden to demonstrate that excluded employees share an overwhelming community of interest with the proposed bargaining unit.[26] The Board in *PCC Structurals* claimed that "considering the interests of excluded employees along with those in the petitioned-for unit . . . better effectuates the [requirement to] 'assure to employees the fullest freedom in exercising'" their rights.[27] However, the decision makes no mention of considering whether the excluded employees expressed any interest in joining a union. In purporting to consider the interests of excluded employees at the request of the employer, even when the request would effectively gerrymander the election against the petitioning union, *PCC Structurals* ignored the Supreme Court's warning that "[t]he Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion . . . ."[28]

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[24] *PCC Structurals*, 365 NLRB No. 160 slip op. at 7.
[25] *Rhino Nw., LLC v. NLRB*, 867 F.3d 95, 100–01 (D.C. Cir. 2017) ("Throughout, the Board's approach has remained fundamentally the same . . . We thus join seven of our sister circuits in concluding that *Specialty Healthcare* worked no departure from prior Board decisions."); *Macy's Inc. v. NLRB*, 824 F.3d 557, 567 (5th Cir. 2016) (stating that *Specialty Healthcare* "laid out the traditional standard"); *Constellation Brands, Inc. v. NLRB*, 842 F.3d 784, 792 (2d Cir. 2016) (finding that the standard is "consistent with earlier Board precedents"); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 638 (7th Cir. 2016) (confirming that the standard is "not the invention of the *Specialty Healthcare* case"); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 442 (3d Cir. 2016) ("The Board's citation to and approval of the D.C. Circuit's understanding of Board precedent was not the adoption of new law . . ."); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. 2016) ("[T]he Board clarified—rather than overhauled—its unit-determination analysis."); *FedEx Freight, Inc.*, 816 F.3d at 523 (8th Cir. 2016) ("The precedents relied on by the Board in *Specialty Healthcare* make clear that the Board does not look at the proposed unit in isolation."), reh'g and reh'g en banc denied (May 26, 2016); *Kindred Nursing Centers East, LLC*, 727 F.3d 552, 561 (6th Cir. 2013) ("The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* is not new.").
[26] 365 NLRB No. 160 (2017).
[27] *Id.*, slip op. at 8.
[28] *Auciello Iron Works*, 517 U.S. 781, 790 (1996) (internal quotations omitted).

Two years later, the Board provided even greater deference to employers seeking to add employees to the proposed bargaining unit. In *Boeing*, the Board held that, after deciding whether the petitioned-for employees shared a community of interest among themselves, it would consider "whether the employees excluded have meaningfully distinct interests . . . that outweigh similarities with unit members," and would find the unit inappropriate if the "distinct interests do not outweigh the similarities."[29] In effect, this balancing test would find a unit inappropriate simply because the employer may propose a more appropriate unit, directly contradicting settled precedent that "it is not enough for the employer to suggest a more suitable unit; it must show that the Board's unit is clearly inappropriate."[30]

Critics of *Specialty Healthcare* have emphasized fears that the 2011 decision would shrink the size of bargaining units, but these concerns have proven to be without merit. In a hearing held by Committee Republicans in 2017, when they were the Committee's majority, *Specialty Healthcare* was described as "a micro-union scheme"[31] and as "open[ing] the door to so-called microunit organizing, whereby unions…cherry-pick smaller units best suited to organizing success."[32] Such claims have not materialized. As Table 1 illustrates, the median bargaining unit size was 26 employees three years before *Specialty Healthcare*, it was 26 when

[29] *Boeing*, 368 NLRB No. 67, slip op 4 (2019) (internal quotations omitted).
[30] *Dunbar Armored, Inc.*, 186 F.3d 844, 846 (7th Cir. 1999) (internal quotations omitted); *see also Am. Hosp. Ass'n*, 499 U.S. at 610 ("[T]he language [of Section 9] suggests that employees may seek to organize "a unit" that is "appropriate" – not necessarily the single most appropriate unit"); *Blue Man Vegas, LLC*, 529 F.3d at 421 ("In order successfully to challenge that unit, the employer must do more than show that there is another appropriate unit because more than one appropriate bargaining unit logically can be defined in any particular factual setting.") (quotation marks omitted).
[31] *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and H.R. 2723, Employee Rights Act, Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and Lab.*, 115th Cong. YouTube (June 14, 2017), https://www.youtube.com/watch?v=xkBj7LpZ2FI (statement by Chairman Tim Walberg at 30:00) (reprinted as Serial 115-18).
[32] *Id.* (statement of Seth Borden, Partner, McGuireWoods LLP at 59:57).

the decision was decided in 2011, and remained unchanged at 26 in 2016, five years later.[33] Ironically, median unit size decreased modestly to 23 in the past two years, invalidating the assumption that median unit size would grow after overturning *Specialty Healthcare*.[34]

TABLE 1	
Fiscal Year	**Median Bargaining Unit Size Approved by NLRB (Source: NLRB)**
FY 2007	24
FY 2008	26
FY 2009	24
FY 2010	27
FY 2011	26
FY 2012	28
FY 2013	24
FY 2014	26
FY 2015	25
FY 2016	26
FY 2017	24
FY 2018	26
FY 2019	24
FY 2020	23
FY 2021	23

Departing from the NLRA's *Specialty Healthcare* standard conflicted with the Board's requirement to "assure employees the fullest freedom in exercising the rights guaranteed by this Act," enabling employers to effectively gerrymander representation elections to prevent unions from winning certification.[35] In a Committee hearing on March 26, 2019, examining labor law, practitioner Devki Virk testified regarding the ways that employers can undermine employees' right to a fair election:

[33] Median Size of Bargaining Units in Elections, NLRB https://nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections (last accessed Jan. 20, 2022 via https://web.archive.org) (median bargaining unit size for FY 2007-2019).
[34] Email from Staff, National Labor Relations Board, to Staff, House of Representative Committee on Education and Labor (Dec. 16, 2021) (median bargaining unit size for FY 2020-2021) (on file with author).
[35] 29 U.S.C. § 159(b).

> [T]he main way that they can [undermine elections] is by contesting the composition of what they call the bargaining unit, which is the group of workers who is entitled to vote for union representation. And employers often do this by adding groups of employees *who may bear only an attenuated relationship* to the group of employees who want to unionize and who the union has been working with, and employers attempt to add those additional groups into the group that will have the ability to vote on unionization in the workplace. . . . It is still a substantial issue partly because Board doctrine since the Trump administration appointees have a majority has also decided some cases that make this adding in of additional groups into the bargaining unit by employers a much more routine practice. That case is called *PCC Structurals* . . . .[36]

PCC Structurals and *Boeing* have undermined the promise of the NLRA by replacing the "overwhelming community of interest" standard with an opaque balancing test that lacks any basis in the NLRA and adds employees to the voting pool upon the request of the employer to dilute support for the union. The Board should therefore reinstate *Specialty Healthcare* because it effectuates the NLRA's policies and was upheld by every one of the eight U.S. Courts of Appeals that considered a challenge to the standard.

II. Legislative History Confirms that Congress Both Intended for the Board to Find Small Bargaining Units Appropriate and Sought to Reduce the Board's Discretion to Enlarge Bargaining Units

Congress made clear that the Board did not need to reject a proposed bargaining unit as inappropriate due to its size. As originally enacted prior to its amendments in 1947, Section 9(b) of the NLRA stated:

> The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.[37]

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[36] *Protecting Workers' Right to Organize: The Need for Labor Law Reform, Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and Lab.*, 116th Cong. YouTube (March 26, 2019) https://www.youtube.com/watch?v=T9FPVr5-umY (question and answer between Congressman Andy Levin and Devki Virk, Member, Bredhoff & Kaiser, PLLC, at 1:20:40) (reprinted as Serial 116-11) (emphasis added).

[37] Pub. L. No. 74-198, 49 Stat. 449 (1935).

In amending Section 9(b), Congress's primary aim was "to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining."[38] The Senate Report stated that representation disputes greatly increased in the years prior to 1947, noting "it is of the utmost importance that the regulations and rules and decisions by which [representation cases] are governed be drawn so as to insure to employees the fullest freedom of choice."[39]

Specifically, the 80th Congress raised concerns about cases in which the Board placed professional personnel or skilled craft members into general units despite having particular needs.[40] Even as the same Congress added Sections 9(b)(1) and 9(b)(2) to specify procedures for professional and craft units to organize separately, it did not amend the NLRA's text stating that the bargaining unit could be "the employer unit, craft unit, plant unit, *or subdivision thereof*" with respect to other employees.[41] This demonstrates that Congress did not intend for the Board to expand an appropriate proposed unit simply because a larger unit may also be appropriate.

Although the 1947 amendments to the NLRA included Section 9(c)(5), which states that the extent to which employees have organized cannot be controlling, Senator Robert A. Taft cautioned that "the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., *any one of which may justify the finding of a small unit*."[42] Further, when the Supreme Court examined the text of Section 9(c)(5), it concluded:

> Although it is clear that . . . Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, both the language and legislative history of § 9(c)(5) demonstrate

[38] S. Rep. 80-105 at 431 (1947).
[39] *Id.* at 416.
[40] *Id.* at 417-18 ("[R]epresentatives of various professional associations appeared before the committee to protest against the occasional practice of the Board of covering professional personnel into general units of production and maintenance employees, despite the fact that their interests in common with such groups was extremely limited"); *see also* 29 U.S.C. § 159 (b)(1)-(2).
[41] 29 U.S.C. § 159(b) (emphasis added).
[42] 93 Cong. Rec. 6860 (June 12, 1947) (emphasis added).

> that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor . . . .[43]

While the Board in *PCC Structurals* claimed that "the Board's role 'in each case' should be to undertake a broader and more refined analysis, and to play a more active role" than permitted in *Specialty Healthcare*,[44] its doing so ignores congressional intent "to limit the Board's discretion" to expand the bargaining unit.[45] Further, the Board's decision in *Boeing* to include additional employees at the employer's request, on the basis of "meaningfully distinct interests" of the additional employees failing to outweigh similarities with the petitioned-for unit members,[46] ignores that Congress assigned "the utmost importance" to employees' freedom of choice and fails to consider whether the excluded employees have any interest in organizing.[47] *Specialty Healthcare*, in contrast, limits the Board's discretion to whether the proposed unit is *an* appropriate unit as required by the statute.[48]

III. The *Specialty Healthcare* Standard Would Improve Compliance with the United States' Obligation Under International Law to Respect, Promote, and Realize the Principles Concerning the Fundamental Rights of Freedom of Association and Collective Bargaining

Because *Specialty Healthcare* is more closely aligned with the NLRA's obligation to "assure to employees the fullest freedom" of association[49] than *PCC Structurals* and *Boeing*, reinstating this standard would comport with the United States' obligations under international law. As a founding member of the International Labor Organization ("ILO") and a signatory to the Declaration on Fundamental Rights and Principles at Work ("the Declaration"),[50] the United

[43] *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-442 (1965).
[44] *PCC Structurals*, 365 NLRB No. 160, slip op. at 8 (quoting 29 U.S.C. § 159(b)).
[45] S. Rep. 80-105 at 431 (1947).
[46] *Boeing*, 368 NLRB No. 67 slip op. 4-6.
[47] S. Rep. 80-105 at 431 (1947).
[48] 357 NLRB at 943-44 (adding that Section 9(c)(5) does not "in any way favor larger units").
[49] 20 U.S.C. § 159(b).
[50] Int'l Lab. Org., Declaration on Fundamental Principles and Rights at Work, Section 2 (June 18, 1998), https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

States has "an obligation" to "respect, to promote, and to realize . . . the principles concerning the fundamental rights [of] freedom of association and the effective recognition of the right to collective bargaining."[51]

In applying the principles of freedom of association, the ILO's Committee on Freedom of Association has found that "the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions,"[52] and that "[q]uestions of trade union structure and organization are matters for the workers themselves."[53] Moreover, the ILO has cautioned against government actions that "might be liable to deprive workers in small bargaining units . . . of the right to form organizations capable of fully exercising trade union activities . . . ."[54] Taken together, these principles indicate that the Board should defer to workers' preferences in resolving questions concerning the structure of a bargaining unit, to the extent permitted by the NLRA.

The standard for determining an appropriate bargaining unit articulated in *Specialty Healthcare* best aligns with these ILO principles because it provides the appropriate weight to

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[51] *Id.* The United States has not formally ratified ILO Convention No. 87 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, 68 U.N.T.S. 17 (1948), or Convention No. 98 Concerning Right to Organize and Collective Bargaining, 96 U.N.T.S. 257 (1949). However, the Declaration states "that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization" to "respect, to promote, and to realize" the principles concerning this Convention. ILO Declaration, Section 2.

[52] Int'l Lab. Off., Compilation of Decisions of the Committee on Freedom of Association, P 502 (last accessed Jan. 12, 2022) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3944462,1; *see also* David Weissbrodt and Matthew Mason, *Compliance of the United States with International Labor Law*, 98 U. Minn. L. Rev. 1842, 1850-51 (2014) ("The ILO is flexible in determining an appropriate bargaining unit, essentially granting the union free determination of their structure and composition.").

[53] Int'l Lab. Off., Compilation of Decisions of the Committee on Freedom of Association, P 503 (last accessed Jan. 12, 2022).

[54] Int'l Lab. Off., Compilation of Decisions of the Committee on Freedom of Association, P 1375 (last accessed Jan. 12, 2022) (citing Case No. 2378 (Uganda), Report in which the Committee Requests to be Kept Informed of Developments, ILO Committee on Freedom of Association, Nov. 2005, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2909026) (concluding that a "minimum membership requirement of 1,000…for the granting of exclusive bargaining rights" would undermine the freedom of association for workers in small bargaining units)).

the desires of the group of employees, rather than to those of the employer, on a question that is central to their freedom of association and right to bargain collectively. Through *PCC Structurals* and *Boeing*, the Board has hampered freedom of association in the United States by enabling the employer to require the addition of employees who expressed no prior interest in organizing. In doing so, the Board "contradict[ed] the accepted principle that 'it is not the Board's function to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist.'"[55] Section 9(b) of the NLRA aligns with the ILO's principles of deference to workers in organizational questions when it instructs the Board "assure to employees the fullest freedom" in deciding questions of the scope of an appropriate unit.[56] Consistent with Section 9(c)(5)'s limitation that "the extent to which the employees have organized shall not be controlling,"[57] *Specialty Healthcare* finds a proposed unit inappropriate only when such employees do not share a community of interest with each other, or when the petition excludes other employees "such that there 'is no legitimate basis upon which to exclude'" them.[58] The Board's decisions in *PCC Structurals* and *Boeing* departed from the ILO's principles concerning freedom of association. Moreover, the policies of the NLRA call for a standard that is more consistent with the United States' obligations under international law because it requires a standard that assures to employees the fullest freedom in exercising their rights. Therefore, the Board should move to restore such a standard.

[55] *Boeing*, 368 NLRB No. 67, slip op. at 12 (Member McFerran dissenting) (quoting *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967)).
[56] 29 U.S.C. § 159(b).
[57] 29 U.S.C. § 159(c)(5).
[58] *Specialty Healthcare*, 357 NLRB at 944 (citing *Blue Man Vegas*, 529 F.3d at 421).

CONCLUSION

For the foregoing reasons, the amici curiae urge the Board to return to the standard it articulated in *Specialty Healthcare*.

Dated: January 21, 2022

Respectfully submitted,

ROBERT C. "BOBBY" SCOTT
Chair
Committee on Education and Labor

MARK DESAULNIER
Chair
Subcommittee on Health, Employment, Labor, and Pensions

MARK POCAN
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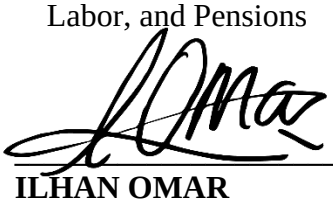

ILHAN OMAR
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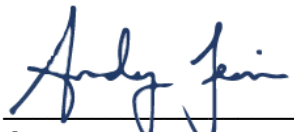
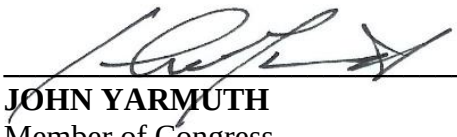


ANDY LEVIN
Member of Congress

FREDERICA S. WILSON
Member of Congress

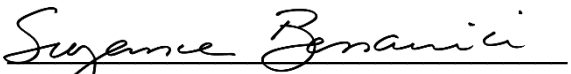
DONALD NORCROSS
Member of Congress



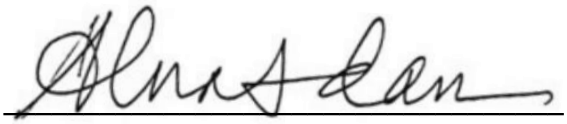
JOHN YARMUTH
Member of Congress

JAHANA HAYES
Member of Congress

PRAMILA JAYAPAL
Member of Congress



SUZANNE BONAMICI
Member of Congress



ALMA S. ADAMS PH.D.
Member of Congress

RAÚL M. GRIJALVA
Member of Congress

JOESEPH D. MORELLE
Member of Congress

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, I caused a true and correct copy of the Brief of Amici Curiae Chairman Robert C. "Bobby" Scott, Chairman Mark DeSaulnier, Congressman Mark Pocan, Congresswoman Ilhan Omar, Congressman Andy Levin, Congresswoman Frederica S. Wilson, Congressman Donald Norcross, Congressman John Yarmuth, Congresswoman Jahana Hayes, Congresswoman Pramila Jayapal, Congresswoman Suzanne Bonamici, Congresswoman Alma S. Adams, Congressman Raúl M. Grijalva, and Congressman Joseph Morelle to be filed electronically using the National Labor Relations Board's Electronic Filing System and served via email on the following:

Via Electronic Filing

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