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 COALITION FOR A DEMOCRATIC WORKPLACE 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: Ronald E. Meisburg

Pursuant to 6th Cir. R. 26.1, Coalition for a Democratic Workplace (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/ Ronald E. Meisburg
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Washington, DC 20004-2533

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 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 the 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.[1]

In a closely decided decision issued on August 26, 2011, the Board held 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, slip op. at 1 (2011),

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[1] Pursuant to Federal Rule of Appellate Procedure 29, CDW certifies that all parties have consented to the filing of this brief. CDW 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 CDW, its members or its counsel made a monetary contribution to its preparation or submission. The addendum to this brief contains a list of CDW's signatory members.

App. 55 ("*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, among other things, the general standard for determining appropriate bargaining units). This innocuous-sounding standard fundamentally alters the legal framework for determining appropriate bargaining units in all industries. As a result, this case presents one of the most significant controversies to arise under the Act during its seventy-seven-year history.

The Act covers the vast majority of CDW's members. Therefore, CDW's members have a significant interest in the Board's application of the Act. This is particularly true of the Board's interpretation of what constitutes an appropriate bargaining unit. If left undisturbed, the Board's new standard will potentially burden CDW's members by causing them to have to bargain and administer a multitude of different collective-bargaining agreements in a single workplace, each covering only a limited number of employees. That, in turn, will very likely result in a constant state of bargaining, grievances and other related workplace disruptions, much to the detriment of employers, employees, the bargaining process and the general public.

SUMMARY OF ARGUMENT

The petition for review filed by Kindred Nursing Centers East, LLC ("Kindred") should be granted for the following reasons.

First, the dissenting Board Member correctly concluded that the majority abused its discretion by using adjudication instead of rulemaking to promulgate a generally applicable rule for determining appropriate bargaining units in all industries. The Board does not have absolute discretion when deciding between adjudication and rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Although neither the Supreme Court nor this Court has yet decided where the line must be drawn, this Court's sister circuits have found abuses of discretion where, for example, an agency uses adjudication as a vehicle by which to change a general policy without having to comply with the APA's rulemaking requirements and where the agency subsequently applies the product of that adjudication as a *de facto* rule. The Board majority did exactly that after using its call for *amicus* briefs to introduce *sua sponte* an issue none of the parties asked the Board to decide: whether to alter the generally applicable standard for determining appropriate bargaining units.

Second, the Board majority's decision is arbitrary and capricious. Contrary to Congress's express instruction, the majority failed to consider *all* of the rights protected by the Act. In 1947, Congress amended the Act to guarantee to employees the right to refrain from collective activities. At the same time, Congress altered the Act's original unit-determination standard to ensure that the Board considered all of the rights guaranteed by the Act. The majority below, however, ignored the right to refrain. In doing so, the majority crowned as the Act's "central" right the right to self-organization. The plain language of the Act does not permit the Board to pick and choose which rights to consider when making a bargaining-unit determination. Congress has instructed that all of the rights protected by the Act—including the right to refrain—must be considered. As with any other federal agency exercising authority delegated to it by Congress, the Board must obey Congress's policy decision.

Third, the Board's decision enunciates a rote, formulaic test that is virtually self-effectuating. A union need only request to represent an identifiable group of employees who arguably share a community of interest. If that is done (and a union is certainly in a position to know

exactly how that can be done following the Board's subsequent decision in *Odwalla, Inc.*, 357 NLRB No. 132 (2011)), the Board will only examine the union's choice if the employer can demonstrate an *overwhelming* community of interest. Thus, the Board has reduced its role to looking at what the union has requested, and has cabined its analysis based on the union's strategic formation, not the requirements of the Act. Thus, unless the employer comes forward to object and can demonstrate an *overwhelming* community of interest—a standard requiring virtually 100 percent identity of interests—then the Board simply rubber-stamps the union's choice. No longer will the Board undertake the types of analysis that Congress envisioned in requiring the Board to make a unit determination "in each case."

Fourth, and relatedly, the net result of the Board's failure to make its own unit determination is that it allows the union to determine the unit based on its extent of organization. This was the practice of the Board in certain industries prior to Congress's amendment of the Act in 1947. In order to end that practice, Congress added Section 9(c)(5) to the Act, 29 U.S.C. § 159(c)(5), which specifically forbids the Board from giving the extent of organization controlling weight. Unfortunately,

that is what the Board has done now in virtually every case, building in a backstop of "overwhelming community of interest" that assures that the extent of organization will be controlling in all but the handful of cases where the union makes a mistake and fails to recognize the existence of an overwhelming community of interest between the employees in the unit requested and the employees left out of that unit.

ARGUMENT

I. THE BOARD MAJORITY ABUSED ITS DISCRETION BY USING ADJUDICATION INSTEAD OF RULEMAKING TO PROMULGATE A NEW, GENERALLY APPLICABLE STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS IN ALL INDUSTRIES

The "choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973). However, like all grants of discretion, the Supreme Court has acknowledged that there "may be situations where the Board's reliance on adjudication [instead of rulemaking] would amount to an abuse of discretion or a violation of the Act." *Id.* Although neither the Supreme Court nor this Court has examined the issue further, the dissenting Board Member in this case believed that the majority had overstepped the "bounds of its discretion in making

sweeping changes to established law through this adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the [APA] designed to safeguard the process by ensuring scrutiny and broad-based review." *Specialty Healthcare II*, slip op. at 15, App. 69 (Member Hayes, dissenting).

As set forth below, the dissenting Board Member was correct.

A. Rulemaking Versus Adjudication Generally

Congress has given the Board the authority to "make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the Act]." NLRA § 6, 29 U.S.C. § 156. First enacted in 1946, the APA was seen as a "strongly marked, long sought, and widely heralded advance in democratic government." Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at iii (1946) (statement of Sen. McCarran). Central to that advance in democratic government were the APA's rulemaking requirements, which "assure fairness and mature consideration of rules of general application." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005) (internal quotations and citation omitted). The APA's rulemaking requirements also ensure

that "affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *United States v. Utesh*, 596 F.3d 302, 310 (6th Cir. 2010) (internal quotations and citation omitted).

The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is broadly defined as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." § 551(4). To engage in rulemaking, an agency must first publish a notice of proposed rulemaking in the *Federal Register*. § 553(b). Among other things, that notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The agency must then give interested persons an opportunity to participate in the rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation." § 553(c).

"After consideration of the relevant matter presented," the agency must "incorporate in the rules adopted a concise general statement of

their basis and purpose." *Id.* Importantly, the product of the rulemaking process constitutes final agency action usually subject to immediate, broad-based judicial review by anyone aggrieved by the rule. *See, e.g.*, *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (addressing pre-enforcement challenge of Board regulations brought by trade association on behalf of its members).

Adjudication is something altogether different. As defined by the APA, "adjudication" means the agency process for formulating an "order," 5 U.S.C. § 551(7), which the APA defines as the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing," § 551(6). The APA's procedural protections for adjudication do not govern proceedings for the "certification of worker representatives." § 554(a)(6). Moreover, the agency's final order in an adjudication is not subject to immediate, broad-based attack by persons or entities who are not parties to the adjudication. Instead, one must wait until the agency order is applied to it personally or, as in this case, participate as an *amicus* in a legal challenge of the original order. *See Am. Fed'n of Lab. v. NLRB*, 308 U.S. 401, 411 (1940) (explaining Board or-

der determining appropriate bargaining unit is usually not a final order subject to immediate judicial review).

B. This Court's Sister Circuits Have Found Abuses of Discretion Under Circumstances Similar to this Case

This Court has not yet decided under what circumstances an agency's decision to use adjudication instead of rulemaking constitutes an abuse of discretion. The abuse-of-discretion question is now squarely presented by this case. A number of decisions from this Court's sister circuits are instructive for how the Court should answer that question here.

For example, in *First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984), a bank holding company argued that federal regulators had abused their discretion by using an adjudication of the bank holding company's application to offer two types of accounts at certain of the company's holdings as a means for establishing a general rule of widespread application without having to engage in rulemaking. *Id.* at 435. In granting the holding company's petition for review, the court of appeals acknowledged that, under *Bell Aerospace*, agencies have discretion in choosing whether to use adjudication instead of rulemaking. *Id.* at 437. However, "like all grants of

discretion," it could be abused. *Id.* In finding federal regulators had abused their discretion, the court of appeals paid particular attention to how federal regulators had applied the orders under review in subsequent proceedings involving different companies. *Id.* Noting that on at least three occasions federal regulators had cited the orders in question as having decided whether banks could offer both types of accounts, the appellate court concluded that the orders under review were "merely a *vehicle by which a general policy would be changed*." *Id.* (emphasis added). Therefore, the court of appeals determined that federal regulators had abused their discretion by using adjudication instead of rulemaking. *Id.* at 438; *see also Matzke v. Block*, 732 F.2d 799, 802-03 (10th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

The Ninth Circuit reached a similar conclusion in *Pfaff v. United States Department of Housing & Urban Development*, 88 F.3d 739 (9th Cir. 1996). The respondent-agency in *Pfaff* alleged that the petitioner-landlords violated federal housing laws by having a policy of refusing to rent a particular home to families of more than four people. *Id.* at 743. An administrative law judge found in favor of the respondent-agency,

using a burden-shifting scheme not unlike that at issue here. Once the agency presented a *prima facie* case that a landlord's policy had a disparate impact on families, the landlord had to demonstrate a "compelling business necessity" for the policy. *Id*. This burden-shifting scheme had been established by a recent agency decision known as "*Mountain Side*." *Id.* at 747.

The court of appeals granted the landlords' petition for review and vacated the agency's order. *Id.* at 750. Recognizing that it was an "established principle of administrative law that 'the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion,'" *id.* at 747 (quoting *Bell Aerospace*, 416 U.S. at 294) (brackets supplied by *Pfaff* court), the appellate court found that "[j]ustice" dictated the "general rule of deference to announcements of law by adjudication have its exceptions," *id.* at 748. The court explained that such a situation may present itself where, among other things, the "new standard, adopted by adjudication, *departs radically* from the agency's previous interpretation of the law" and "is very broad and general in scope and prospective in application." *Id.* (emphasis added).

Finding that the agency had abused its discretion, the court of appeals explained that there could be "no question that the *Mountain Side* [burden-shifting] standard is broad, general, and prospective in application." *Id.*; *see also Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (explaining that "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"); *Curry v. Block*, 738 F.2d 1556, 1564 (11th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

C. The Dissenting Board Member Correctly Concluded that the Majority Abused Its Discretion in this Case

Here, there is no question that, when the circumstances are considered in their totality, the Board majority abused its discretion by deciding to issue a rule of general applicability via adjudication instead of rulemaking.

First and most fundamentally, the Board majority raised *sua sponte* the issue whether to devise a new, generally applicable standard for determining appropriate bargaining units in all industries. In its

call for *amicus* briefs, the majority asked third parties to brief the following issue, among numerous others:

> Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. *Should such a unit be presumptively appropriate as a general matter*.

Specialty Healthcare I, slip op. at 2, App. 134 (emphasis added).

As highlighted in an atypical dissent from the Board's call for *amicus* briefs, none of the parties asked the Board to revise the general standard for making bargaining-unit determinations. "This was a simple case," the dissenting Board Member explained. *Specialty Healthcare I*, slip op. at 4, App. 136 (Member Hayes, dissenting). "The majority, however, . . . seizes upon this case as an occasion for reviewing not only . . . the standard for unit determinations in nonacute health care facilities, but also for reviewing 'the procedures and standards for determining whether proposed units are appropriate in all industries.'" *Id.* (quoting *Specialty Healthcare I*, slip op. at 1, App. 133). As a consequence, the dissent concluded, "[t]his is no longer a simple case." *Id.*

Second, it cannot be denied that the majority's decision creates a rule of general applicability designed to implement policy outside the

factual context presented by this case, thereby making the majority's decision a "rule," not an "order." *See* 5 U.S.C. § 551(4), (6). In subsequent bargaining-unit controversies having nothing to do with nonacute health care facilities, a majority of the Board has issued published decisions relying on the governing "principles" established by the majority's decision in this case. *See DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving a rental-car facility: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one."); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving technicians at a defense contractor making submarines and aircraft carriers: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in this type of case."); *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4 (2011) (explaining, in the context of a bargaining-unit dispute involving a producer of juice drinks and

fruit bars: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one.").[2]

That these published decisions involved rental cars, submarines, aircraft carriers, juice drinks and fruit bars was of no consequence to the Board majority. *Specialty Healthcare II*, the majority explained, established a rule of general applicability that was to be obeyed. That, in turn, is a hallmark of rulemaking, not adjudication. *See First Bancorporation*, 728 F.2d at 437 (finding agency abused its discretion in using adjudication instead of rulemaking where federal regulators had cited the orders under review as having definitively decided a broad

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[2] The Board has done the same thing in numerous unpublished orders. *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 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 because majority believed request did not present substantial issues in light of *Specialty Healthcare II*), *and 1st Aviation Servs., Inc.*, No. 22-RC-61300, 2011 WL 4994731 (NLRB Oct. 19, 2011) (denying review in bargaining-unit dispute involving aviation company).

question, such that the court concluded that the orders were "merely a vehicle by which a general policy would be changed").

Third, the participation of numerous *amici* in this case at the administrative level counsels that the Board majority should have reconsidered whether to use adjudication instead of rulemaking to revise a key standard for applying the Act. No less than thirteen separate *amicus* briefs were filed in response to the majority's call for such briefs. *See Specialty Healthcare II*, slip op. at 1 n.1, App. 55 (listing *amicus* briefs filed by various members of Congress, unions and associations representing employers). While the extraordinary number of *amici* and their breadth of interest supplied some perspective, such participation in an individual adjudication does not substitute for the wide participation occasioned by an APA rulemaking process and the requirement of the agency to consider and respond to comments.

Moreover, the public was not clearly informed of the Board majority's intent to promulgate a new, generally applicable standard for determining appropriate bargaining units in all industries. The majority's call for *amicus* briefs listed eight questions, the first six of which focused on issues specific to nonacute health care facilities. *See Specialty*

Healthcare I, slip op. at 1-2, App. 133-34. Only the last two questions used language suggesting to those conversant with this specialized area of the law that the majority might use this case to alter the standard applied in all industries. *See id.* at 2, App. 134. Had the majority been more forthright in this regard, it undoubtedly would have resulted in greater public participation. *Cf.* 1 C.F.R. § 18.12(a) (explaining that a proposed rule must include a preamble that will "inform the reader, *who is not an expert in the subject area*, of the basis and purpose for the rule or proposal") (emphasis added).

Fourth, that the Board majority chose to use adjudication in this case while engaging in rulemaking on various other important issues supports the conclusion that the Board majority abused its discretion by spurning rulemaking here. At the time of the majority's decision, the majority had recently issued proposed rules altering significantly the Board's procedures for conducting representation elections and requiring employers to post notices regarding employees' rights under the Act. *See* Proposed Rule, Representation—Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011); Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg.

80,410 (Dec. 22, 2010). Thus, despite using rulemaking contemporaneously on two other issues of widespread importance that drew tens of thousands of public comments, *see, e.g.*, Final Rule, Representation—Case Procedures, 76 Fed. Reg. 80,138, 80,140 (Dec. 22, 2011) (explaining that the Board received over 65,000 public comments), the majority—for reasons known only to it—chose adjudication in this case to alter the general standard for determining appropriate bargaining units. That, in turn, constitutes an abuse of discretion. *See Pfaff*, 88 F.3d at 748 (finding agency abused its discretion in using adjudication to promulgate a burden-shifting standard that was "broad, general, and prospective in application"); *Ford Motor Co.*, 673 F.2d at 1010 (finding agency abused its discretion in using adjudication and citing agency's recent rulemaking as opportunity to use same instead of adjudication).

D. The Board Majority's Abuse of Discretion Constitutes Prejudicial Error

The APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. As this Court recently explained in rejecting a harmless-error argument made by an agency that failed to comply with the APA's rulemaking requirements, a "reviewing court must focus not merely on the ultimate rule but on the process of an ad-

ministrative rulemaking; otherwise, an agency could always violate the APA's procedural requirements based on the representation that it would have adopted the same rule had the proper process been followed." *United States v. Utesh*, 596 F.3d 302, 312 (6th Cir. 2010) (citation omitted).

In this case, the language of the Board's call for *amicus* briefs suggested that the majority believed that any error in using adjudication instead of rulemaking would be harmless. *See Specialty Healthcare I*, slip op. at 3, App. 135 (claiming it was "evident" that "adjudication, which is subject to judicial review, provides for no less scrutiny and broad-based review than does rulemaking, especially where interested parties are given clear notice of the issues and invited to file briefs") (internal quotations omitted). In response, at least two of the many *amicus* briefs filed with the Board challenged the majority's harmless-error suggestion. *See* Br. of *Amici Curiae* Senators Enzi, Hatch & Isakson at 1-2; Br. of *Amicus Curiae* Retail Indus. Leaders Ass'n at 26-28. Numerous other *amici*—including CDW—agreed with the dissenting Board Member's conclusion that the Board would abuse its discretion by using adjudication instead of rulemaking to promulgate a new, gener-

ally applicable standard for determining appropriate bargaining units. *See* Br. of *Amici Curiae* Coal. for a Democratic Workplace & HR Policy Ass'n at 4-6; Br. of *Amici Curiae* Am. Hosp. Ass'n & Am. Soc'y for Healthcare Human Res. Admin. at 4; Br. of *Amicus Curiae* Nat'l Ass'n of Waterfront Employers at 1-2; *see also* Employer's Response to Notice & Invitation to File Briefs at 30-31, App. 192-93.

The Board majority's ultimate decision in *Specialty Healthcare II*, however, did not address the harmless-error issue, nor did the majority make any effort to address concerns that its choice of adjudication instead of rulemaking was an abuse of discretion. The failure to do so provides significant evidence of the majority's fundamental misunderstanding of the difference between adjudication and rulemaking. Contrary to the majority's suggestion in *Specialty Healthcare I* that judicial review of adjudication and rulemaking are interchangeable, they are not. For example, in the rulemaking context, an agency's final rule must be accompanied by a response to all significant comments in order to permit meaningful judicial review. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam). Therefore, the Board majority would have been required to respond to comments challenging the

majority's reliance on adjudication, as well as its harmless-error suggestion. The majority did neither.

Nor can the Board be heard to argue that if it had engaged in rulemaking instead of adjudication, the end result—a new, generally applicable rule for determining appropriate bargaining units—would have been the same. The law of this Circuit precludes such an argument. *See Utesh*, 596 F.3d at 312; *accord Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (rejecting agency's claim that failure to comply with APA's rulemaking requirements constituted harmless error because such a failure "cannot be considered harmless if there is any uncertainty at all as to the effect of that failure"); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979) (rejected agency's assertion that solicitation and receipt of comments using procedure other than that prescribed by APA constituted harmless error because agency's APA violation "plainly affected the procedure used" such that the appellate court refused to "assume that there was no prejudice to petitioners").

Moreover, had the Board used rulemaking instead of adjudication, its proposed rule would have been subject to scrutiny under the Con-

gressional Review Act, 5 U.S.C. §§ 801-808, which requires agencies promulgating a rule to, among other things, submit a report to each House of Congress containing a copy of the rule, § 801. Congress then has sixty days in which to reject the rule via a joint resolution. § 802. No such procedure exists for *de facto* "rules" promulgated through adjudication.[3]

Therefore, the dissenting Board Member correctly concluded that the majority abused its discretion by choosing to use adjudication to promulgate a new, generally applicable rule for determining appropriate bargaining units in all industries.

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[3] The absence of such a procedure has not stopped many members of Congress from voicing their displeasure with the Board majority's decision. On November 30, 2011, the House of Representatives passed stand-alone legislation rejecting the Board majority's new rule for determining appropriate bargaining units. *See* Workforce Democracy and Fairness Act, H.R. 3094, 112th Cong. § 2 (2011); *see also* H.R. Rep. No. 112-276 (2011) (describing need for legislation); *H.R. 3094, the Workforce Democracy and Fairness Act: Hearing Before the H. Comm. on Educ. & the Workforce*, 112th Cong. (2011) (same). The Senate has yet to take substantive action on the legislation. Had the Board complied with the APA's rulemaking requirements, a simple majority vote by both Houses of Congress would have been sufficient to pass a joint resolution of disapproval via a process not subject to filibuster in the Senate. *See* 5 U.S.C. § 802(d)(1).

II. THE BOARD MAJORITY FAILED TO CONSIDER THE STATUTORY RIGHT OF EMPLOYEES TO REFRAIN FROM COLLECTIVE ACTIVITIES

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). Instead, 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). Moreover, agency action can be arbitrary and capricious even if it is supported by substantial evidence. *Bowman Transp., Inc. v. Ark. Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974).

A. When Making Bargaining-Unit Determinations, the Act Requires the Board to Assure Employees the Fullest Freedom in Exercising All of the Rights Guaranteed by the Act, Including the Right to Refrain from Collective Activities

In relevant part, 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 pur-

poses of collective bargaining . . . ." NLRA § 9(a), 29 U.S.C. § 159(a) (emphasis added). However, in cases where the employer disagrees with the proposed bargaining unit, Section 9(b) of the Act 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 granted 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. In Devising a New, Generally Applicable Standard for Determining Appropriate Bargaining Units, the Board Majority Ignored Employees' 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 II*, slip op. at 8, App. 62 (emphasis added), the Board majority explained 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 misinterpreted Section 9(b)'s command—that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter" when making bargaining-unit determinations—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 we determine 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 majority ever consider the right of employees to *refrain* from activities protected by the Act. Instead, the language of the majority's decision demonstrates that the majority 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 sixty-five years ago, Congress made a policy decision the Board was bound to respect. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (explaining agencies "may play the sorcerer's apprentice but not the sorcerer himself," the latter role being Congress's sole prerogative).

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 II* 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 by the majority below, 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 below relegates those individuals to an artificial minority position, much as exists in political gerrymandering. Except that in the political context, there exists no analogue to the "right to refrain," and gerrymandering is tolerated. Here, however, 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. The Board majority's failure to even consider, much less address, how the right to refrain may be impacted by its new rule is grounds for vacating the Board's decision.

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* rights guaranteed to employees by the Act, at a minimum, this case should be remanded with instructions for the Board to obey Con-

gress's unambiguous command, for the Board's discretion does not extend "to the point where the boundaries of the Act are plainly breached." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995).[4]

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[4] The Board majority's failure to accord equal status to employees' right to refrain has not been limited to this proceeding. *See, e.g.*, Final Rule, Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,020 (Aug. 30, 2011) (responding to criticism that Board's proposed poster advising employees of their rights under the Act did not adequately explain employees' right to refrain). Nor is the failure a recent phenomenon. *See, e.g.*, Harry H. Rains, *Determination of the Appropriate Bargaining Unit by the NLRB: A Lack of Objectivity Perceived*, 8 B.C. Indus. & Com. L. Rev. 175, 179 (1967) (concluding that the Board's insistence that it need only determine "an" appropriate bargaining unit as opposed to the most appropriate bargaining unit fails to take into account Congress's 1947 addition of the right to refrain).

CONCLUSION

For the foregoing reasons and those contained in Kindred's opening brief, the Court should grant Kindred's petition for review and deny the Board's cross-application for enforcement.

Dated: April 23, 2012

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 Coalition for a Democratic Workplace in Support of Petitioner/Cross-Respondent Seeking Reversal contains 6,405 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/Ronald E. Meisburg
Ronald E. Meisburg

CERTIFICATE OF SERVICE

The undersigned certifies that on this twenty-third day of April, 2012, he caused the Brief *Amicus Curiae* of the Coalition for a Democratic Workplace 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/Ronald E. Meisburg
Ronald E. Meisburg

ADDENDUM

SIGNATORY MEMBERS,
COALITION FOR A DEMOCRATIC WORKPLACE

National Organizations (49)

American Bakers Association
American Fire Sprinkler Association
American Foundry Society
American Hospital Association
American Hotel and Lodging Association
American Meat Institute
American Pipeline Contractors Association
American Seniors Housing Association
American Trucking Associations
Assisted Living Federation of America
Associated Builders and Contractors
Associated General Contractors of America
Brick Industry Association
Center for the Defense of Free Enterprise
College and University Professional Association for Human Resources
Federation of American Hospitals
Food Marketing Institute
Forging Industry Association
Heating, Air-conditioning & Refrigeration Distributors International
Independent Electrical Contractors
Industrial Fasteners Institute
International Association of Amusement Parks and Attractions
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
Metals Service Center Institute
Modular Building Institute
National Association of Chemical Distributors
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants

National Council of Farmer Cooperatives
National Council of Textile Organizations
National Federation of Independent Business
National Grocers Association
National Mining Association
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
North American Die Casting Association
Printing Industries of America
Retail Industry Leaders Association
Snack Food Association
Society for Human Resource Management
Truck Renting and Leasing Association

State and Local Organizations (28)

Arkansas State Chamber of Commerce/Associated Industries of AR
Associated Builders and Contractors, Inc., Greater Houston Chapter
Associated Builders and Contractors, Inc., Central Ohio Chapter
Associated Builders and Contractors, Inc., Central Pennsylvania Chapter
Associated Builders and Contractors, Inc., Delaware Chapter
Associated Builders and Contractors, Inc., Eastern Pennsylvania Chapter
Associated Builders and Contractors, Inc., Heart of America Chapter
Associated Builders and Contractors, Inc., Inland Pacific Chapter
Associated Builders and Contractors, Inc., Keystone Chapter
Associated Builders and Contractors, Inc., Michigan Chapter
Associated Builders and Contractors, Inc., Mississippi Chapter
Associated Builders and Contractors, Inc., Nevada Chapter
Associated Builders and Contractors, Inc., Rhode Island Chapter
Associated Builders and Contractors, Inc., Rocky Mountain Chapter
Associated Builders and Contractors, Inc., Southeast Texas Chapter
Associated Industries of Massachusetts
Capital Associated Industries, Inc., Raleigh and Greensboro, NC

Charleston Metro Chamber of Commerce
Flagstaff Chamber of Commerce
Kansas Chamber
Little Rock Regional Chamber of Commerce
Management Association of Illinois
Montana Chamber of Commerce
Nevada Manufacturers Association
New Jersey Motor Truck Association
Texas Hospital Association
Virginia Trucking Association
West Virginia Chamber of Commerce