UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY, Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Petitioner.	NLRB Case No. 10-RC-215878

BRIEF OF *AMICI CURIAE* THE BUSINESS ROUNDTABLE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE BOEING COMPANY'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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INTERESTS OF AMICI CURIAE

The Business Roundtable is an association of chief executive officers who lead companies with nearly 15 million employees and more than $6 trillion in annual revenues. The organization was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as an *amicus curiae* where important business interests are at stake.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Collectively, *amici* represent a wide cross-section of the employer community subject to the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 151–169. Those employers have a strong interest in fostering predictability and fairness in interpretations of the Act. They have a strong interest in fostering legal standards that are consistent with the language, structure, and purposes of the Act—such as the standards set out in *PCC Structurals Inc.*, 365 NLRB No. 160 (2017). Likewise, they have a strong interest in ensuring that decisionmakers consistently *apply* evenhanded standards, according to their terms. Where a matter involves a multi-factor test—such as the community-of-interest analysis at issue here—it

is critical that the decisionmaker identify rational connections between the standards he or she articulates and the facts found, and that the decisionmaker faithfully explain the relative weight attached to particular findings within the analysis.

That did not happen here. Instead, as in *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016), there was a significant disconnect between the legal standards that the Regional Director articulated and the analysis he conducted. This occurred, moreover, in a high-profile matter that *amici* believe has the potential to influence other cases. *Amici* have a strong interest, then, in seeing *PCC Structurals* properly applied in this matter, something that they believe will help ensure that decisionmakers consistently perform a robust community-of-interest analysis in each case.

INTRODUCTION

This case involves a representation petition by the International Association of Machinists and Aerospace Workers, AFL-CIO at Boeing's South Carolina manufacturing facility. In evaluating it, the Regional Director identified *PCC Structurals* as the controlling authority. However, his application of *PCC Structurals* went astray in much the same manner that regional directors erred when applying the previously-controlling *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011).

The Board has now recognized that *Specialty Healthcare* was "inherent[ly]" deficient. *PCC Structurals*, 365 NLRB No. 160, at *10 n.45 (2017). Among other things, while *Specialty Healthcare* "purported to apply the traditional community-of-interests standard," its two-step structure led regional directors to truncate their analyses in all but "rare case[s]." *Id.* at *6 (noting "[t]his aspect of *Specialty Healthcare* is obvious from the majority test itself"). All too often, regional directors "discount[ed]—or eliminate[ed] altogether—any assessment of whether

shared interests among employees within the petitioned-for unit are *sufficiently distinct* from the interests of excluded employees to warrant a finding that the smaller petitioned-for unit is appropriate." *Id.* (emphasis added). Regional directors applying *Specialty Healthcare* may have cited to community-of-interest principles, but in "case after case" they failed to perform the rigorous analysis that the Act, the Board, and the courts of appeals demand. *Id.* at *10 n.45; *see also Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (reversing regional director's unit determination, holding that "merely reciting or repeating the standard cannot substitute for the analysis" that community-of-interest assessments mandate).

In overruling *Specialty Healthcare*, the Board's aim was to ensure that regional directors apply a "vigorous assessment of unit appropriateness" in every case. *PCC Structurals*, NLRB No. 160, at *10; *see also Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 496 (4th Cir. 2016) (noting that the Act requires the Board to "guard against arbitrary exclusions" based on "meager differences"). Eliminating *Specialty Healthcare*'s two-step analysis structure was certainly a beneficial move in that direction. *See*, *e.g.*, *Constellation Brands*, 842 F.3d at 794 (holding that an assessment of "shared interests among members of the petitioned-for unit" and an exploration of "meaningfully distinct interests" is "step one" of a proper community of interest analysis); *Nestle Dreyer's Ice Cream*, 821 F.3d at 496 (similar); *NLRB v FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) (similar).

Here, nevertheless, the Regional Director did not "exercise [his] power of review to ensure that the new framework was being appropriately applied in this case." *Constellation Brands*, 842 F.3d at 795 (noting that "explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation" and to avoid becoming a "rubber stamp"). As Boeing demonstrated in its papers,

the Regional Director failed to rationally explain how and why the petitioned-for employees "shared interests." *PCC Structurals*, 365 NLRB No. 160, at *9 (quoting *Constellation Brands*, 842 F.3d at 794). Instead, he repeatedly based his unit-appropriateness conclusions upon interests that the members of the petitioned-for unit do *not* share. Similarly, the Regional Director failed to rationally explain how "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *Id.* (quoting *Constellation Brands*, 842 F.3d at 794). In particular, he failed to explain why the few interests that Flight Readiness Technicians and Flight Readiness Technician Inspectors *do* share render them sufficiently distinct, given that they also share those limited interests with any number of excluded employees.

Amici respectfully submit that this case presents the opportunity for the Board to take the next logical step after *PCC Structurals*. The Board should ensure that regional directors not only recite *PCC Structurals*' controlling standards, but also that they apply them in a consistent and rational manner. To give effect to *PCC Structurals*, and to provide necessary guidance on its application, the Board should grant Boeing's Request for Review.

ARGUMENT

I. *PCC Structurals* Sought To Ensure Correct Application Of The Community-Of-Interest Test, As It Was Historically Applied By The Board And Courts Of Appeals.

A. *The Community-Of-Interest Test.*

With the Act and its various amendments, Congress sought to protect employees' right to "form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Equally importantly, it sought to protect employees' right to "refrain from any or all of such activities." *Id.* To give effect to both protections, Congress provided guidance on the mechanisms by which employees could elect or reject

representation. It directed that these determinations would be made by majorities of employees in "unit[s] appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). It further directed that, depending on circumstances, an "appropriate" unit may include an "employer unit, craft unit, plant unit, or [a] subdivision thereof." *Id.*

Congress was also clear that it was up to the Board—"in each case"—to assess the appropriateness of a proposed unit. 29 U.S.C. § 159(b); *see also Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 496 (4th Cir. 2016) (citing *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1580 (4th Cir.1995) for the proposition that "the NLRA prohibits the Board from blindly deferring to a union's proposed unit"). Congress stated, moreover, that this determination may not be based solely upon "the extent to which the employees have organized." 29 U.S.C. § 159(c)(5). Rather, the Board's role is to "guard against arbitrary exclusions" based on "meager differences." *Nestle Dreyer's Ice Cream*, 821 F.3d at 496. This was necessary, Congress believed, to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b). "Because a union will ordinarily propose a unit controlled by organized employees," *Nestle Dreyer's Ice Cream*, 821 F.3d at 496, allowing a union to unilaterally select bargaining units would risk undermining "the practical significance of the majority rule," *DPI Securprint, Inc.*, 362 NLRB No. 172, at *9 (2015) (Member Johnson, dissenting) (quotation omitted).

To carry out its congressionally mandated role in this area, the Board (with appellate court approval) has long applied community-of-interest standards. Under these standards, certain units—such as plant-wide manufacturing units—are presumptively appropriate. *See, e.g.*, *Airco, Inc.*, 273 NLRB 348, 349 (1984) ("[W]e have held that a plant-wide [manufacturing] unit is presumptively appropriate under the Act, and a community of interest inherently exists among

such employees.") (quotation and alteration omitted). To assess the appropriateness of a smaller proposed unit, the Board has historically applied a multi-factor test.[1] At their core, these factors seek to ensure that a separate bargaining unit is justifiable because: (1) "employees in the unit share common interests," and (2) these shared interests are sufficiently "distinct from those of excluded employees." *Nestle Dreyer's Ice Cream*, 821 F.3d at 495 (citing *Newton-Wellesley Hosp*., 250 NLRB 409, 411 (1980)).

B. *The Rise And Fall Of* Specialty Healthcare.

Specialty Healthcare was an attempt to "clarify[]" the Board's approach to the community-of-interest standards. 357 NLRB at 946. The majority in that case instituted a two-step analysis. At step one, the Board would determine whether employees in the petitioned-for unit "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and whether they "share a community of interest [under] the traditional criteria." *Id.* at 945. If so, the Board would deem the unit "appropriate." *Id.* At step two, an employer arguing that employees should be added to the proposed unit bore the burden to "demonstrate[] that employees in the larger unit share[d] an overwhelming community of interest with those in the petitioned-for unit." *Id.* at 945–46. To meet that burden,

[1] As described in *PCC Structurals*, 365 NLRB No. 160, at *5 (quoting *United Operations, Inc.*, 338 NLRB 123 (2002)), the factors 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 overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

the employer would have to show that the interests of the included and excluded employees "overlap[ped] almost completely." *Id.* at 944.

There was significant debate as to whether the revised *Specialty Healthcare* standard effectively allowed consideration of excluded employees' interests. For example, the Fourth Circuit found *Specialty Healthcare*'s language imprecise, noting that it could be read to "mean that the Board no longer determines for itself whether employees are arbitrarily excluded from the petitioned-for unit." *Nestle Dreyer's Ice Cream*, 821 F.3d at 500. The Third Circuit expressed similar concerns. *See NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) (citing the Fourth Circuit's *Nestle Dreyer's Ice Cream* case).

Generally, though, the courts of appeals found *Specialty Healthcare*'s approach "permissible on its face"—*assuming* that the regional directors actually considered excluded employees' interests at step one.[2] The courts of appeals repeatedly emphasized that an evaluation of "shared interests both within and outside the petitioned-for unit" must remain "an essential part" of the community-of-interest analysis. *PCC Structurals*, 365 NLRB No. 160, at

[2] *See Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 101 (D.C. Cir. 2017) (noting that a "proposed unit" would be inappropriate if the employees in it "did not perform *distinct* work under *distinct* terms and conditions of employment") (emphasis added); *FedEx Freight, Inc. v. NLRB.*, 839 F.3d 636, 637 (7th Cir. 2016) ("[W]hether the [proposed] unit is appropriate for collective bargaining . . . requires a determination that the members of the unit have common employment concerns – a 'community of interest' – different from the concerns of the company's other employees[.]"); *FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) (providing that step one "reflects" the traditional community-of-interest test and "does not look only at the commonalities within the petitioned-for unit"); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 568 (5th Cir. 2016) (concluding that step one of the Specialty Healthcare formulation "did not look only at the commonalities within the petitioned-for unit"), *cert. denied*, 137 S. Ct. 2265 (2017); *Nestle Dreyer's Ice Cream*, 821 F.3d at 495–96 (4th Cir. 2016) (describing "step one" as "the traditional community-of-interest test," in which the Board must "determine that the included employees share a community of interest and are unlike all the other employees the [e]mployer would include in the unit") (quotations omitted); *Kindred Nursing Centers E., LLC v. NLRB*, 727 F.3d 552, 561 (6th Cir. 2013) (characterizing *Specialty Healthcare* as no "material change in the law").

*9. And, in *Constellation Brands, U.S. Operations Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016), the Second Circuit reversed a unit determination, concluding that the regional director had misapplied *Specialty Healthcare* by failing to determine "whether members of the proposed unit have an interest that is 'separate and distinct' from all other employees." *Id.* at 793; *see also id.* at 794 (stating that the community-of-interest test requires an identification of "shared interests among members of the petitioned-for unit," and an explanation of "why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members").

In *PCC Structurals*, however, the Board recognized that *Constellation Brands* was no aberration. "In case after case applying the *Specialty Healthcare* standard, [the Board] conducted precisely the type of analysis that the Second Circuit has deemed a misapplication of that standard." *PCC Structurals*, 365 NLRB No. 160, at *9 n.45. The problem, the Board determined, lay in that the two-step structure was "fundamentally flawed." *Id.* at *7. In practice, regional directors viewed the first stage of the *Specialty Healthcare* test as entirely "inward-looking," asking only whether the members of the proposed unit "share a community of interests among themselves . . . regardless of the interests of excluded employees." *Id.* at *6. They likewise concluded that, at the second stage, *Specialty Healthcare* allowed consideration of excluded employees' interests only in "the rare instance where it can be proven that [they] share an 'overwhelming' community of interests with employees in the petitioned-for unit." *Id.* Thus, in the majority of cases, the interests of employees that unions sought to exclude from a bargaining unit were never considered. *See id.* at *9 n.45.

II. The Board Should Use This Case To Give Full Effect To *PCC Structurals* And Ensure That Regional Directors Follow The Requirements Of The Act.

Against that backdrop, the Board rightly abandoned *Specialty Healthcare*'s two-step framework. Consistent with instruction from the courts of appeals, the Board rightly reaffirmed that in each case, it must evaluate proposed bargaining units based on "a careful examination of the community of interests of employees both within and outside the proposed unit." *PCC Structurals*, 365 NLRB No. 160, at *7. It rightly mandated that regional directors should assess both whether the members of the proposed unit share interests, and whether those shared interests are "sufficiently distinct from those of other [excluded] employees to warrant establishment of a separate unit." *Id.* (quoting *Wheeling Island Gaming*, 355 NLRB 637 (2010)).

Announcing a standard and ensuring that regional directors apply that standard in a consistent, predictable, and rational manner are different matters, however. As Boeing's Petition for Review detailed, the Regional Director's application of *PCC Structurals* remained fundamentally inconsistent with the community-of-interest test as articulated by the Board and approved by the courts of appeals. To effectuate *PCC Structurals*, the Board should correct the Regional Director's error, and it should provide further guidance on the application of the governing community-of-interest standards.

A. *Clarity And Predictability Are Particularly Important In Cases Involving The Appropriateness Of A Proposed Bargaining Unit.*

The Board has a clear responsibility to "provid[e] meaningful and predictable standards for the adjudication of future cases and the benefit of the Board's constituents." *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 293 (5th Cir. 2015) (quoting *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006)). Clear and predictable standards are a key to reducing the need for litigation under the Act, and fulfilling the Board's statutory mission of promoting and

maintaining industrial peace. *See* 29 U.S.C. § 151 (stating that the Act's purpose is to avoid "industrial strife or unrest"); *see also, e.g.*, *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of [the NLRA] is industrial peace.").

Where the Board has announced a multi-factor test—as it has with its community-of-interest standards—the Board's duty to provide meaningful guidance necessarily extends to ensuring that the test is applied consistently and rationally. Multi-factor tests "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Otherwise, the public may rightfully view a multi-factor test as "simply a cloak for agency whim." *Id.*[3] Moreover, "the significance of neutral rationales for inclusion or exclusion of particular employees in collective bargaining units cannot be overstated." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995). The courts of appeals have stated that they will uphold a unit determination "only if the Board has indicated clearly how the facts of the case, analyzed in light of the policies underlying the

[3] The courts of appeals have often criticized the Board for saying one thing and doing another. *See, e.g.*, *Constellation Brands*, 842 F.3d at 793–95 (remanding where the Board failed to "exercise its power of review" over a regional director's errant approval of a petitioned-for micro-unit even though the director "merely recit[ed]" and "repeat[ed]" the community-of-interest standards but failed to in fact engage in the required analysis); *see also, e.g.*, *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812, 821 (8th Cir. 2017) (criticizing the Board for "always purporting to apply" a precedent while in fact "migrat[ing] to a severely constrained interpretation of that decision"); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 871 (9th Cir. 2011) ("We . . . reject the Board's attempt to veil its [substantive] argument in procedural formalities."); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997) (describing the Board as "disingenuous" because the "Board claim[ed]" that it applied court precedent even though the "Board ha[d] not"); *In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982) ("reject[ing]" formulation of legal standards "pressed" by the Board because while the Board "purport[ed] to follow the rule" of controlling precedent, it "instead replace[d]" that rule with another test of its own), *aff'd sub nom. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

community of interest test, support its appraisal of the significance of each factor." *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156–57 (5th Cir. 1980).

B. *The Regional Director's Flawed Application Of* PCC Structurals.

The Regional Director's approach to *PCC Structurals* was not consistent with the forgoing principles, or the community-of-interest analysis required by the Board and the courts of appeals. First, the Regional Director failed to assess whether the petitioned-for employees (Flight Readiness Technicians and Flight Readiness Technician Inspectors) share significant interests. *See*, *e.g.*, *Nestle Dreyer's Ice Cream*, 821 F.3d at 495 (requiring consideration of whether "employees in the unit share common interests"). Instead, the Regional Director based his assessments on "interests" that Flight Readiness Technicians and Flight Readiness Technician Inspectors do *not* share. For example:[4]

- *Separate Departments*: The Regional Director concluded that "the factor of a separate department weights in favor of the appropriateness of the proposed unit." DDE 26. But Flight Readiness Technicians and Flight Readiness Technician Inspectors are in *different* departments. DDE 6–7. And while they do share "codes" in the Human Resources Management System, DDE 5, the Regional Director failed to explain the relevance of this, let alone how or why it outweighs the fact that the two are in different departments. *See Airco*, 273 NLRB at 349 (noting that the "Board does not favor organization by . . . classification"); *cf. Constellation Brands*, 842 F.3d at 794 ("reciting the legal framework does not substitute for analysis of differences between unit-members and other employees").

- *Job Functions and Work*: The Regional Director found that "the factor of job functions and work weighs in favor of the proposed unit." DDE 28. Here, he noted that petitioned-for employees' work is different from that of other employees because it "deals with assuring airworthiness in order to deliver the airplane to the customer." *Id.* But the Regional Director all but ignored the fact that Flight Readiness Technicians and Flight Readiness Technician Inspectors perform *different* functions. The former are responsible for mechanical production work; the latter are responsible for inspection work. RFR 16, 17. That said, each of the two titles perform countless tasks that are *identical* to tasks performed by employees outside the proposed unit. RFR 29–31; *see also Constellation*

[4] Boeing thoroughly discussed the Regional Director's errors in its Request for Review. *Amici*, therefore, will be brief in describing those errors.

Brands, 842 F.3d at 794 (reversing where the Regional Director "never explained the weight or relevance of [his] findings").

- Supervision: The Regional Director concluded that "supervision weighs in favor of the proposed unit" because (with some exception) the supervisors of unit employees "do not supervise any other production or maintenance employees." DDE 31. But Flight Readiness Technicians and Flight Readiness Technician Inspectors report to *different* supervisors. *See* RFR 16. The Regional Director noted that these supervisors sometimes hold meetings, but once again failed to explain the significance of this or how it purportedly outweighs the different lines of supervision. DDE 31; *see also Constellation Brands*, 842 F.3d at 794.

- Interchange: The Regional Director deemed this factor "neutral" because outside employees have never transferred into Flight Readiness Technician and Flight Readiness Technician Inspector positions. DDE 32–33. But there is no interchange between the two positions either. RFR 17. Again, the significance that the Regional Director attached to any of this is a mystery. *See Constellation Brands*, 842 F.3d at 794.

Second, the Regional Director invoked "differences" between petitioned-for and excluded employees that instead demonstrate significant commonality between the two groups. *See, e.g.*, *Nestle Dreyer's Ice Cream*, 821 F.3d at 495 (requiring consideration of whether interests shared by petitioned-for employees are sufficiently "distinct from those of excluded employees"). To illustrate:

- Terms and Conditions of Employment: The Regional Director noted that petitioned-for employees have higher average pay than other production and maintenance employees. *See* DDE 29–30. But there are numerous other employees on the higher end of the pay scale. *See* RFR 41. The Regional Director failed utterly to explain, then, how pay alone renders Flight Readiness Technicians and Flight Readiness Technician Inspectors separate and distinct, particularly since nearly[5] *all* of their other terms and conditions of employment are common to production and maintenance employees. RFR 40–43.

- Training: The Regional Director found it significant that petitioned-for employees are required to obtain a certain Federal Aviation Administration license, but *roughly the same number* of excluded employees carry this same license. *See* DDE 26–27; RFR 28.

[5] The Regional Director also pointed out that, unlike other production and maintenance employees, Flight Readiness Technicians and Flight Readiness Technician Inspectors are permitted to wear shorts. DDE 30. But this difference in "uniforms" is, at most, "marginal" and does not render these employees so sufficiently distinct as to warrant a separate bargaining unit. *See FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 638 (7th Cir. 2016).

The record reflects significant overlap in training among included and excluded employees. *See* RFR 26–27.

- *Functional Integration*: The Regional Director concedes that this factor weighs in favor of a wall-to-wall unit, since Boeing "has an integrated manufacturing process that is coordinated across departments[.]" DDE 31. Nevertheless, the Regional Director suggested that petitioned-for employees are more integrated with each other than they are with other production and maintenance employees, because they "work hand in hand, side by side." DDE 32. But petitioned-for employees also work "side by side" with other excluded employees in the Delivery Center and traveling employees from other parts of the facility. RFR 23–33.

- *Contact*: The Regional Director found that petitioned-for employees spend most of their time physically located on one geographic end of the facility in the Delivery Center. *See* DDE 28–29. But excluded employees also work in the Delivery Center, either as part of their regular assignment or as part of travelled work. *See* RFR 33–34.

These analytical errors (and others) were at least as significant as the errors that regional directors routinely committed in attempting to apply *Specialty Healthcare*. That is, under *Specialty Healthcare*, regional directors too often truncated their community-of-interest analysis without consideration of excluded employees' interests. Here, the Regional Director likewise truncated his analysis, albeit in a slightly different direction, by failing to give meaningful consideration to the extent to which included employees *share* interests and by relying on "distinguishing" factors that establish *similarity* between included and excluded employees. If the Regional Director's misapplication of *PCC Structurals* in this high-profile matter is allowed to stand as an example for other cases, it risks undermining the value of *PCC Structurals*.

III. This Case Squarely Presents A Micro-Unit And All The Associated Pitfalls.

In prior papers, the Union chided Boeing for suggesting that this is a micro-unit case. Rather, the Union contends, its proposed unit is larger than the median bargaining unit in recent elections. Opp. to Stay 11–12. This argument, *amici* submit, is misdirection that distracts from the significance of this case. It merits a brief response.

First, the Union's proposed unit constitutes *less than seven percent* of the approximately 2,700 production and maintenance employees in Boeing's highly integrated manufacturing workforce. There is no Board precedent for approving a stand-alone unit consisting of such a small fraction of an integrated manufacturing facility, particularly when that unit was stitched together from employees in *different departments*. On that basis alone, the petitioned-for unit qualifies as a micro-unit.

Second, and more importantly, the Union's proposed unit embodies the inherent dangers of a micro-unit. Most notably, it would trample the "Section 7 rights of excluded employees," denying them a vote in a representation election involving employees with whom they "share a substantial . . . community of interests." *PCC Structurals*, 365 NLRB No. 160, at *5. The Union twice failed to certify a wall-to-wall unit of production and maintenance employees at Boeing's South Carolina facility. RFR 7. In the Union's round three, all production and maintenance employees—who share core terms and conditions of employment at this highly integrated facility—should be permitted to vote. *See*, *e.g.*, 29 U.S.C. § 159(c)(5) (providing that "the extent to which the employees have organized" does not control unit appropriateness).

Similarly, the Union's proposed micro-unit threatens Boeing's "ability to manage production." *DPI Securprint, Inc.*, 362 NLRB No. 172, at *11–12 (2015) (Johnson, dissenting). In "a functionally integrated workplace with a linear production process," a certified micro-unit "erect[s] artificial barriers separating employees and departments," thereby "imped[ing] an employer's ability to retain needed flexibility and respond quickly to industry change." *Id.* A unit consisting solely of Flight Readiness Technicians and Flight Readiness Technician Inspectors likely would limit *existing* integration and interchange between those employees and (i) excluded employees in the Delivery Center, (ii) excluded employees in their respective

departments, (iii) excluded traveling employees, and (iv) various other excluded production and maintenance employees. *See also NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980) ("[T]he designation of a small unit that excludes employees with common skills, attitudes, and economic interests may unnecessarily . . . generate destructive factionalization and in-fighting among employees.").

Further, to the extent that the Union were someday able to certify multiple micro-units akin to the one it proposed here, it would "balkaniz[e]" Boeing's workforce. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2023 (2011) (Member Hayes, dissenting). Multiple micro-units "creat[e] an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units," something that "cannot be reconciled with the statutory goal of facilitating labor relations stability." *Id.* at 2023; *see also Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984) (noting that "different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers").

CONCLUSION

For these reasons, *amici* Business Roundtable and the Chamber respectfully request that the Board grant Boeing's Request for Review, vacate the Decision and Direction of Election, and hold that the petitioned-for unit is not appropriate.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2018, an electronic copy of this Brief of *Amici Curiae* the Business Roundtable and the Chamber of Commerce of the United States of America in Support of the Boeing Company's Request for Review of the Regional Director's Decision and Direction of Election was filed electronically with the Board through the Board's website. In addition, true and correct copies of the brief were served by e-mail and by overnight delivery, addressed as follows:

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