ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 16-1309, 16-1353

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

UNITED AUTO WORKERS, LOCAL 42,
Intervenor.

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL RETAIL FEDERATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND HR POLICY ASSOCIATION IN SUPPORT OF VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before this Court are listed in the Brief of Petitioner, Volkswagen Group of America Chattanooga Operations, LLC (ECF#1657783) or in the Notice of Intent to Participate as *Amici Curiae* ("Notice of Intent") filed on January 25, 2017 (ECF #1657415).

B. Rulings Under Review

The rulings under review are listed in the Brief of Petitioner.

C. Related Cases

Counsel for *amici* are not aware of any related case involving substantially the same parties and the same or similar issues.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, each of the *amici* certify that they have no outstanding shares or debt securities in the hands of the public or a parent company. No publicly held company has a 10% or greater ownership interest in any of the *amici*.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Board – National Labor Relations Board

NLRA or the Act – National Labor Relations Act, as amended, 29 U.S.C. §151 et seq.

STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY

Pursuant to their Notice of Intent, the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Retail Federation, National Federation of Independent Business, National Association of Manufacturers, and HR Policy Association (collectively, "*Amici*") submit this brief supporting Petitioner. *Amici*'*s* interests are as stated in the Notice of Intent. All parties have consented to the filing of this brief.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person – other than *Amici*, their members, or their counsel – contributed money to fund preparing or submitting this brief.

ARGUMENT

I. INTRODUCTION

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom., Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Specialty*"), the National Labor Relations Board ("Board") reversed decades of precedent and established an unlawful new standard for determining the composition of a proposed bargaining unit. The legality of *Specialty's* "overwhelming community-of-interest" rule, which was "borrowed" from the Board's accretion test, has been questioned from its inception, and its application in other cases has drawn considerable criticism. *See, e.g., Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016)(denying enforcement); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016) (dissent from denial of rehearing *en banc*); *DPI Secuprint, Inc.,* 362 NLRB No. 172, slip op. at 9-19 (2015) (Johnson, dissent); *Macy's Inc.,* 361 NLRB No. 4, slip op. at 22-23 (2014) (Miscimarra, dissent); *Northrop Grumman Shipbuilding, Inc*., 357 NLRB 2015 at 2020-2023 (2011) (Hayes, dissent); *Specialty* at 948-952 (Hayes, dissent).

In practice, the *Specialty* decision allows unions to form bargaining units that reflect little more than the extent to which they have already recruited supportive employees. Its onerous standard makes it nearly impossible for an

employer to include additional employees into a proposed bargaining unit suggested by a union. Indeed, in every case that has reached the Board level in which *Specialty* has been fully applied, the party opposing the proposed unit has been unsuccessful. The Board has failed to resolve (or even address) this problem in subsequent cases.

Specialty's convoluted standard is inconsistent with the Act's express commands and contemporaneous legislative history, which demonstrates that the preference for majority rule in collective bargaining was of paramount concern to Congress when it passed the National Labor Relations Act, 29 U.S.C. §151 et. seq. ("NLRA or "the Act"). This Court should refuse to enforce the Board's order in this case and require the Board to apply the long-standing and legally required community-of-interest analysis required by the Act. The Regional Director's Decision & Direction of Election, ratified by the Board in *Volkswagen Group of America, Inc*., 364 NLRB No. 110, slip op. (Aug. 26, 2016) ("Decision"), not only failed to apply that precedent, but also approved a fragmented unit that is based primarily, if not exclusively, on the extent of organizing in violation of Section 9(c)(5) of the Act.

Amici are concerned with the precedent that this Decision establishes. Fragmented and micro-units pose substantial risks to employers' operations in all industries, including manufacturing and retail. Finally, the Decision at issue in this

case amply demonstrates that the *Specialty* standard does not foster effective collective bargaining and frustrates an employer's ability to maintain stable labor relations—important statutory objectives of the Act which this Court is mandated to consider.

II. *SPECIALTY* IGNORES THE CONTEMPORANEOUS LEGISLATIVE HISTORY OF THE ACT

In order to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act, the Board must "decide in each case" whether a petitioned-for unit is "appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). Congress carefully chose this language to ensure that bargaining unit formation would not frustrate effective bargaining in myriad business settings. Thus, Congress directed the Board to make unit determinations based not on a simplistic formula, but on the factors making up an appropriate unit "in each case."

The Board's role in bargaining unit determinations was part of a larger debate over the wisdom of majority elections and *who* should decide the appropriate unit:

> The major problem connected with the majority rule is not the rule itself, but its application . . . Section 9(b) of the Wagner bill provides that *the Board* shall decide the unit appropriate for the purpose of collective bargaining. . . . To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements

> which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups, could make it impossible for the employer to run his plant.*

Hearings on S. 1958 Before the S. Comm. On Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle), *reprinted in 1935 Legislative History* 1458 (emphases added).

Early Board decisions disregarded this guidance and essentially allowed the union to select the bargaining unit. *See, e.g., Botany Worsted Mills*, 27 NLRB 687 (1940) (unit of trappers and sorters, a single department in employer's plant, deemed appropriate); *Garden State Hosiery Co*., 74 NLRB 318 (1947)(acknowledging union preference was a principal factor in unit determinations). Dissenting from the majority in *Garden State Hosiery*, Member Reynolds commented that:

> [N]o minority group—either pro-union or anti-union—may be permitted to manipulate the boundaries of the appropriate [unit or group] for the sole purpose of constructing another [unit or group] wherein it comprises a majority. Obviously indulgence in such tactics—commonly referred to in political science as 'gerrymandering'—makes a mockery of the principle of majority rule.

Id. at 326 (Reynolds, dissent). To eliminate this early practice, Congress passed the Taft-Hartley amendments to the Act in 1947, adding Section 9(c)(5)'s proscription against allowing the extent of organization to control unit

determinations. The House Report on Section 9(c)(5) confirms it was a response to the Board's early overreliance on the extent of organization:

> Section 9[(c)(5)] strikes at the practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time . . . While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight, and as section 9 [(c)(5)] provides, is not controlling*.

1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 328 (1947) (House Report No. 245, April 11, 1947) (internal citations omitted) (emphasis added).

Thus, the plain language of the Act and its legislative history reflects Congress's intent that the Board must decide "in each case" the appropriate bargaining unit, and that in fulfilling that obligation it cannot allow the extent of union organizing to control the outcome. As discussed below, the *Specialty* standard too easily allows the Board to stray from these mandates and defer to the unit proposed by the union.

III. *SPECIALTY* IS INCONSISTENT WITH SECTION 9(c)(5) OF THE ACT

In the decades since the passage of Taft-Hartley, courts have recognized that Section 9(c)(5) of the Act "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling'

weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995) (citation omitted).

In *Lundy*, the Fourth Circuit ruled that the "overwhelming community of interest" standard was a "classic [Section] 9(c)(5) violation" because it represented a "novel legal standard" that "presumed" the proposed unit appropriate "unless an overwhelming community of interest exists between the excluded employees and the union-proposed unit." *Id.* at 1582. By presuming the petitioned-for unit to be appropriate without first analyzing whether other employees shared interests that were "sufficiently distinct" from those in the proposed unit, the *Lundy* Board "effectively accorded controlling weight to the extent of unionization." *Id*.

In *Specialty*, the Board claims to have remedied these flaws. It argues the *Specialty* standard does not accord controlling weight to union organizing preference because its "overwhelming community-of-interest" analysis must be preceded by a "threshold" finding—i.e., at "step-one" of the test—that a petitioned-for unit is "*prima facie* appropriate." *Specialty*, 357 NLRB at 944, n.25. And, to meet "step-one" of the test, the Board must conduct a "traditional" community of interest analysis. Only then will the employer be asked to demonstrate—at "step-two" of the test—that other employees excluded from the voting group have an "overwhelming community-of-interest" with those in the

group. Thus, the Board contends *Specialty* is "vastly and crucially different" from *Lundy*. *Id*. at 944 n.25.

The appellate courts have, without adequately identifying and examining the camouflaged aspects of the *Specialty* standard, largely accepted this explanation. *See, e.g., Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 499 (4th Cir. 2016)(*Lundy* prohibits "overwhelming" test where Board "conducts a deficient community-of-interest analysis – that is, where the first step of [*Specialty*] fails to guard against arbitrary exclusions."); *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d at 792 ("Step one of [*Specialty*] expressly requires the [Board] to evaluate several factors relevant to whether the interests of the group sought were sufficiently distinct from those of other employees."); *NLRB v. FedEx Freight, Inc*., 832 F.3d 432, 441 (3d Cir. 2016) ("This initial community-of-interest test—and its application—reflects the standard used by the Board in prior decisions.").

The deference accorded to the *Specialty* standard is not only legally problematic, but upon close examination, at odds with the analysis that these courts have historically identified as necessary to a meaningful community-of-interest analysis. Although not recognized as such in these decisions, the *real* step-one of *Specialty* is limited to whether the proposed unit is "readily identifiable," an analysis that is by no means traditional, does not consider the interests of anyone besides those in the proposed group, and inherently dismisses commonalities that

may exist between that group and other employees. This superficial analysis fails to determine whether the proposed group has interests that are "sufficiently distinct" from other employees.

Moreover, the requirement at step-two of *Specialty* that the interests of the proposed group must "overlap almost completely" with anyone the employer seeks to add is logically and practically impossible to meet, as virtually no two groups of employees have interests that completely "overlap" with one another. This illogical approach signals to Regional Directors and petitioning unions alike that any analysis of the potential commonalities between the proposed group and other employees need only be cursory. This framework sets up a "classic" Section 9(c)(5) violation by allowing the Board to apply *Specialty* in a manner that too easily disregards commonalities between the proposed group and other employees and which in many cases—including this case—impermissibly looks "solely and in isolation" at the union's chosen unit at the threshold step. *Newton-Wellesley Hospital*, 250 NLRB 409, 411 (1980).

A. *Specialty*'s Framework Frustrates The Required Community-of-Interest Analysis

Before *Specialty*, the Board's unit determination inquiry never addressed "solely and in isolation" whether a proposed group shared a community-of-interest to itself. Instead, under *Newton-Wellesley*, the Board's inquiry would "necessarily proceed[] to a further determination whether the interests of the group sought are

sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Newton-Wellesley Hospital*, 250 NLRB at 411. Obviously, that determination cannot be made without examining the interests of employees *outside* of the proposed unit and how they relate to employees inside the unit.

The *Specialty* majority attempted to justify its "two-part" test by arguing that it incorporated at step-one the required community-of-interest analysis established in *Newton-Wellesley*. It also argued that its two-step procedure was intended to guard against giving controlling weight to the union's organizing preference: "Here, we make clear that . . . the Board must find that [the proposed unit] share[s] a community of interest using the traditional criteria before the Board applies the overwhelming-community-of-interest standard to the proposed larger group." *Specialty*, 357 NLRB at 944 n.25.

But the test articulated by the *Specialty* majority has made nothing "clear." The confusion lies in the fact that *Specialty's* first prong is actually *two separate steps masquerading as one*. That is, before application of the "traditional" criteria called for in *Newton-Wellesley* and by the courts in cases like *Constellation*, *Nestle Dreyer's* and *Fed-Ex Freight*, the Board under *Specialty* first asks whether the petitioned-for unit is "readily identifiable." The actual holding of the case betrays this fact:

> We therefore . . . make clear that, when employees or a labor organization petition for an election in a unit of employees *who are*

> *readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and* the Board finds that the employees in the group share a community of interest after considering traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit . . . unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Specialty, 357 NLRB at 945-46 (emphasis added).

This standard encourages Regional Directors to rely on job titles, departmental lines, work locations, and skills—factors that concern *only those in the proposed unit*—as a proxy for finding a "readily identifiable" group. Virtually any group of employees who share a job title, or who work in the same department, will be "readily identifiable" under this rule. And, virtually any group of employees working in the same job classification or department will also share a community-of-interest *among themselves*. In this way, the "readily identifiable" component of *Specialty* is designed to identify similarities among the employees in the proposed group that by definition constitute "distinctions" between those employees and others in the employer's plant.

Conducting a so-called "traditional" community-of-interest analysis *only after* finding the proposed group readily identifiable is not a sufficient safeguard against the inward-looking analysis that *Newton-Wellesley* warns against. Accordingly, *Specialty* does not produce the traditional analysis the courts of

appeals require, and the supposed "vast and crucial" differences between *Specialty* and the Board's decision in *Lundy* do not exist.

Perhaps even more troubling, however—and not meaningfully addressed by the courts of appeals to date—is that even if step-one of *Specialty* is applied in a manner consistent with *Newton-Wellesley*, step-two is reduced to a non sequitur. In order to meet its "overwhelming" burden under step-two, an employer must show that the community-of-interest factors between employees inside the proposed unit "overlap almost completely" with those of employees outside of the proposed unit.

This is a practical and legal impossibility. If the Board has already found the proposed unit "readily identifiable" and that its employees have "sufficiently distinct" interests from all others under "traditional" criteria, how can an employer possibly demonstrate that other employees have interests that "overlap almost completely" with those in the proposed unit?

The answer is simple – it cannot. No group of employees with interests that are "sufficiently distinct" from other employees can simultaneously possess interests that "overlap almost completely" with them. The Board admits as much in this case: "[T]he Employer failed to demonstrate that the production employees share an 'overwhelming community of interest' with maintenance employees . . . many of the traditional community-of-interest factors differentiate the production

employees from the maintenance employees; *it is impossible to say that the factors 'overlap almost completely*.'" *Volkswagen*, slip op. at fn.1 (emphasis added).

This logical disconnect stems from the fact that *Newton-Wellesley's* "sufficiently distinct" inquiry was never intended to be a mere precursor to something else. Under *Newton-Wellesley*, once a proposed unit was shown to be "sufficiently distinct" from those an employer sought to add, the inquiry was complete. But in making that examination, the Board conducted a rigorous analysis of the interests of employees *outside the proposed group*. Reducing the *Newton-Wellesley* analysis to a mere component-part, sandwiched between the "readily identifiable" *fait accompli* and a step-two that can be reduced to the point of nonexistence by step-one, misleads Regional Directors into either relaxing the traditional analysis, or postponing it altogether and waiting to examine the interests of employees outside the proposed group until step-two.

Thus, under *Specialty*, the true threshold step—whether the proposed group is "readily identifiable"—too easily becomes the *only* step. The Board cannot have it both ways. It cannot claim to employ a two-part test, the first part of which was supposedly designed to guard against allowing union organizing preference to control, when the evidentiary standards applied in step-one effectively eliminate the need for step-two.

These irremediable flaws in *Specialty's* analytical framework have inevitably spawned further mistakes. Just last week, a Regional Director certified nine separate bargaining units consisting of teaching fellows assigned to nine different departments at Yale University. Applying *Specialty*, the Regional Director found the nine units were separate, "readily identifiable" groups because each included "all teaching fellows who teach for a specific academic department." *Yale University*, Case Nos. 01-RC-183014 *et seq*., Decision & Direction of Election at 29 (Jan. 25, 2017). Looking "solely and in isolation" at the functional integration of the fellows in each separate group, the Regional Director found the employees in each group "share a community of interest *with one another*." *Id*. at 30 (emphasis added). This analysis in no way, shape or form conforms to (let alone meets) the requirements of *Newton-Wellesley*.

Despite its clever wording and claimed homage to precedent, *Specialty* invites the same presumption of appropriateness invalidated in *Lundy*. It also accords controlling weight to the extent of organizing, an approach rejected by Congress in Taft-Hartley. As former Board Member Hayes noted, *Specialty* "cannot be reconciled with the traditional appropriate unit test identified in *Newton-Wellesley*, and provides no answer to the criticism of that test voiced by the *Lundy* court." *Specialty*, 357 NLRB at 952 (Hayes, dissent).

B. This Court's *Blue Man Vegas* Decision Does Not Support the Holding in *Specialty*

The Board's reliance on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), as support for its "overwhelming community-of-interest" standard is misplaced. For one thing, the *Blue Man Vegas* Court never condoned the "overlapping almost completely" burden placed on employers at step-two of *Specialty*. Moreover, the case is inapposite here.

Blue Man Vegas concerned stage employees represented in a historically recognized unit that preexisted the Board proceeding. When the production group with which they were involved moved to another location, the stage employees became employed by a different employer. The employees' union chose to seek a Board election to establish its continued majority status. The new employer contested the petition and sought to add its musical instrument technicians to the stage employees' pre-existing unit.

This Court upheld the Board's refusal to alter the stage employees' historical unit. But the Court by no means adopted an "overwhelming community-of-interest test" as a rule of general applicability. The Board did not in its underlying ruling, and the issue was not before the Court. The Board's General Counsel therefore could not ask the Court to impose such a standard on review. *NLRB v. Metro. Life Ins. Co*., 380 U.S. 438, 444 (1965) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action."). In fact, the word "overwhelming"

did not appear, *even once*, in the General Counsel's brief. *See* Brief of Respondent/Cross Petitioner, *Blue Man Vegas, LLC v. NLRB*, Nos. 06-1328; 1341 (D.C. Cir. Jul. 30, 2007).

Instead, the Court based its ruling on well-established precedent recognizing that historical units are more likely to be found appropriate. *See, e.g., Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) ("In most cases, a historical unit will be found appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time."). Thus, much like in accretion cases where employees are added to an existing bargaining unit without an election, the burden on an employer attempting to disturb an historical bargaining unit is undeniably higher than in initial unit determination cases where there is no union.

Blue Man Vegas therefore does not illuminate the correct standard in this case. The unit approved by the Board here is not an "historical unit." Unlike the stage employees in *Blue Man Vegas*, the maintenance employees at Volkswagen's plant had never organized before. Indeed, in the only previous representation election, maintenance employees were part of a "wall to wall" production and maintenance unit.

But even if *Blue Man Vegas* could be read to articulate a generally applicable standard, it is still inapposite because this Court would not permit "the

combination of the overwhelming-community-of-interest standard and [a] presumption . . . in favor of the proposed unit." *Blue Man Vegas*, 529 F.3d at 423 (distinguishing *Lundy*); *see DPI Secuprint, Inc.,* slip op. at 11, n.7 (2015) (Johnson, dissent) (*Blue Man Vegas* requires that proposed unit is sufficiently distinct "from other employees.").

That is exactly what *Specialty* does. As explained above, its "readily identifiable" requirement introduces a *fait accompli* for determining the appropriate unit, and its relegation of meaningful analysis of the interests of employees outside of the appropriate group until later in the inquiry produces a unit resulting from the extent of union organization. It is clear that is not what this Court was endorsing in *Blue Man Vegas*.

IV. *SPECIALTY* DISREGARDS DECADES OF PRECEDENT

The *Specialty* rule additionally casts aside decades of precedent and turns its back on the statutory command of Section 9(b). Its illusory formula frustrates the "practice and procedure" of collective bargaining and the "industrial peace" it is supposedly intended to foster. Many modern enterprises such as the manufacturing enterprise involved here require the integrated effort of hundreds of employees using different skills and abilities toward a common end.

Historically, the Board avoided the disruption that multiple smaller units could have on business operations and stable labor relations. For example, the

Board long acknowledged it "does not favor organization by department or classification" in manufacturing settings. *Airco, Inc*., 273 NLRB 348, 349 (1984) (cited with approval in *International Bedding Co*., 356 NLRB No. 168 (2011)).

Indeed, for a time following the passage of Taft-Hartley, the Board refused to group employees in certain industries into separate bargaining units. Although the Board ultimately abandoned this hard-and-fast approach, it never (until *Specialty*) strayed from the notion that manufacturing operations are highly integrated and evidence of such integration carries *substantial* weight in the community-of-interest analysis. *See, e.g., Alcan Aluminum Corp*., 178 NLRB 362 (1969) (rejecting maintenance-only unit in large aluminum plant; only appropriate unit was one consisting of all production and maintenance employees in the plant).

These Board decisions are typical of the care the Board used to take in making unit determinations. In those cases, the Board would not make a unit determination without considering the realities of the particular business setting. Hence, in *Kalamazoo Paper Box Corp.* the Board articulated its charge as follows:

> [T]he Board must maintain the two-fold objective of insuring to employees their *rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability* . . . each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, *efficient and stable collective bargaining is undermined rather than fostered.*

136 NLRB 134, 137 (1962) (emphases added) (internal citations omitted). The Board also expressed concern over relying only on factors like job title as the basis for unit determinations, explaining:

> [P]ermitting severance . . . based upon a traditional title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining.

Id. at 139-40.

Thus, the Board historically applied the community-of-interest analysis mindful of the employer's business and whether industrial stability and effective bargaining are functionally served by the proposed unit. *See, e.g.*, *Int'l Paper Co.*, 96 NLRB 295, 298, n.7 (1951)("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force . . . [is] an important consideration in any unit determination."); *American Cyanamid Co.*, 131 NLRB 909, 911 (1961)("[E]ach unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place.").

Similarly, the Board has long-adhered to the notion that in the retail industry, the "optimum" bargaining unit was a storewide unit. *See, e.g., May Department Stores Co.*, 97 NLRB 1007 (1952)(storewide unit "optimum unit for purposes of collective bargaining."); *I. Magnin & Co.*, 119 NLRB 642 (1957)

(storewide unit "basically appropriate unit" in retail); *Sears, Roebuck and Co*., 184 NLRB 343 (1970) (storewide unit "presumptively appropriate.").

But the Board in *Specialty* abandoned this well-developed precedent. Despite claiming its holding was "not intended to disturb" established industry standards such as those in manufacturing and retail, *see Specialty* 357 NLRB at 946 n.29, the Board has used *Specialty* to cast aside precedent in industry after industry. *See, e.g., Macy's Inc.*, 361 NLRB No. 4, slip op. (2014)(disregarding store-wide precedent in retail department store); *Northrop Grumman Shipbuilding, Inc*., 357 NLRB 2015 (2011)(rejecting precedent finding only appropriate unit of technical employees is all such employees working for employer).

Moreover, the *Specialty* rule eliminates consideration "in each case" of the "circumstances within which collective bargaining is to take place." 29 U.S.C. § 159(b). Instead *Specialty's* "readily identifiable" framework slavishly pays heed to job titles, departments, or classifications without regard to how bargaining in such a unit would occur in the context of daily business operations. As a consequence, an employer's resulting bargaining obligation may be diffused among different groups that bear little relation to the way in which the business actually functions.

Specialty also causes the odd result of empowering a union based on which portion of the employer's business it happens to represent, while disenfranchising employees in other parts of the operation. Normally dependent on the solidarity of

its membership, the strength of the union under *Specialty* now largely depends on whether it controls mere pockets of employees in areas most crucial to the operation of the employer's business.

V. RATIFYING *SPECIALTY* WILL HAVE AN ADVERSE IMPACT ON A WIDE RANGE OF INDUSTRIES

The adverse impact of the rule announced in *Specialty* and its application in this and other cases raises serious issues for employers in a wide range of industries. The *Specialty* rule encourages unions to file for fragmented and micro-units in other manufacturing and retail settings—among many others—and threatens to spawn a proliferation of bargaining units that could cripple employers with endless negotiations, conflicting union demands and contract obligations, and burdensome administrative duties. Effective collective bargaining and industrial peace are undermined, not enhanced, in such a regime.

For example, in many manufacturing and retail settings, employees work in a variety of departments and settings. If a business is saddled with different bargaining units for each business segment, each perhaps represented by a different, competing union, union rules will prevent—or at a minimum greatly complicate—the ability to cross-train employees and meet customer and client expectations via flexible staffing, as employees generally may not and cannot perform work assigned to another unit. Employees would be limited to micro-units

and the job duties assigned to that particular unit, thus reducing skill building, training, and job opportunities.

Employers would also lose operational flexibility as workers from one department might not be able to pick up shifts in another if different unions represented the different departments. The impact on business productivity and competitiveness would be substantial. Today's economic environment is challenging enough for employers without artificial, government-imposed barriers that hamper productivity and opportunities for skill and career development.

Under *Specialty*, employers also now have to contend with the prospect of multiple collective bargaining agreements in which competing unions may insist on conflicting work rules, pay scales, benefits, schedules, vacations and holidays, grievance processes, and layoff and recall procedures. Juggling the administrative tasks associated with multiple agreements could overwhelm businesses to the point of paralysis.

Finally, multiple unions representing multiple bargaining units in a single facility could lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages or other job actions, creating a situation where a union representing only a handful of employees could threaten

the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

In sum, *Specialty* fosters the bargaining-unit proliferation and balkanization that Congress discouraged decades ago when it incorporated the concept of majority rule into the Wagner Act. If allowed to stand, *Specialty* will unnecessarily and improperly affect the industries represented by *Amici* to the detriment of both employers and employees.

VI. THE BOARD HERE RATIFIED A FRACTURED UNIT THAT FAILS EVEN TO COMPLY WITH *SPECIALTY*

Even if *Specialty's* general approach to unit formation were consistent with *Newton-Wellesley*, the Court must reject the Board's hopelessly flawed Decision. All of the concerns discussed throughout are on full display in this case. Moreover, it is clear the Regional Director did not conduct a traditional community-of-interest analysis *at any point* in his application of "step-one" of *Specialty*. For that reason alone, enforcement should be denied. *See Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 787 (Board "did not analyze at step one of the *Specialty Healthcare* framework whether the excluded employees had meaningfully distinct interests from members of the petitioned-for unit.").

A. The Board's Decision Fails To Consider The Realities of Volkswagen's Workplace

Traditional Board precedent required a thoughtful analysis in this case of Volkswagen's operation and a reasoned explanation why anything besides a full production and maintenance unit would reflect the business realities of its highly integrated workplace. But the Board did no such thing here. The Decision does not include a meaningful discussion of the highly integrated nature of Volkswagen's overall production operation and each individual production shop. It also omits any evaluation of how the Regional Director's bargaining unit determination impacts the workplace.

Instead, the Board approved the proposed unit without any meaningful consideration of factors beyond job classification. This simply does not provide a reasoned or legally supportable basis for the Regional Director's finding that the maintenance employees constitute a separate appropriate bargaining unit.

Member Johnson warned against organizing on this basis in *DPI Secuprint*:

> Daisy chaining a number of distinct job classifications together, *simply because they are distinct job classifications*, cannot logically create an organizational or departmental line in order to define a legitimate 'bargaining unit' any more than aggregating any group of distinct cells will then result, biologically, in a functioning 'organ.'

DPI Secuprint, Inc., slip op. at 11, n.6 (emphasis in original). Member Johnson also noted that approving units based on job title, without consideration as to

whether the group is sufficiently distinct to warrant the establishment of a separate unit, conflicts with precedent on which the *Specialty* majority claimed to rely. *See Id.* at 11, n.7. By disregarding the realities of Volkswagen's highly integrated operation, the Regional Director's determination in this case plainly "fails to relate to the factual situation with which the parties must deal," *Kalamazoo Paper Box Corp.,* 136 NLRB at 137. The Regional Director's rote (and incorrect) application of *Specialty* surrenders to the Union his obligation to decide "in each case" whether the petitioned-for unit is appropriate.

Member Hayes noted the negative consequences of this type of bargaining unit determination in his *Northrop Grumman* dissent: "[T]his new standard will encourage petitioning for small, single classification and/or single department groups of employees . . . lead[ing] to the balkanization of an employer's unionized workforce, creating an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units." *Northrop Grumman*, slip op. at 9 (Hayes, dissent); *see also DPI Secuprint, Inc*., slip op. at 11 (Johnson, dissent) ("*Specialty Healthcare* fairly well guarantees the proliferation of fractured units that can only hobble a unionized employer's ability to manage production and to retain a necessary flexibility to respond to industry change.").

This is precisely the situation Volkswagen is now in. The Board has opened the door to a "balkanization" of Volkswagen's workforce that plainly is inconsistent with the policies underlying the Act.

B. The Board's Decision Is Contrary To Its Own Precedent Against Approving Fractured Units

By failing to consider the impact a maintenance-only unit would have on Volkswagen's integrated workplace, the Board allowed for the creation of a truly fractured unit, gerrymandered by the Union based *solely* on the extent of its organization. The unit requested by the Union—a fragmented grouping of maintenance employees who share little besides a job title—is not "appropriate" under the Act, even under the *Specialty* rule.

Indeed, the Board in *Specialty* regarded it as "highly significant" that "except in situations where there is a prior bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure the workplace." 357 NLRB 934 at 942, n.19; *see also Bergdorf Goodman.*, 361 NLRB No. 11, slip op. at 3 (2014) (group consisting of women's shoes salespersons not "readily identifiable" in part because the unit "does not resemble any administrative or operational lines drawn by the Employer."). Under this standard, the maintenance employees are not even "readily identifiable as a group" and do not share a sufficient community of interest under the traditional

factors. They are but an "arbitrary segment of what would be an appropriate unit." *Odwalla, Inc.*, 357 NLRB 1608 at 1611, n.29 (Dec. 9, 2011) (citing *Specialty*).

The Board sidestepped these facts and ignored Volkswagen's operational integration of the maintenance employees, instead finding them readily identifiable because they "share a unique function." According to the Regional Director, "maintenance employees *share a job title* and perform distinct functions – they all perform preventative maintenance and repairs." *Id*. (emphasis added). This kind of rationale is *precisely* the problem with rigid application of *Specialty*—it allows units based simply on the fact that the employees share the same job title or classification.

The Regional Director opined that the petitioned-for unit in this case is "distinct" from the unit rejected by the Board in *Bergdorf Goodman* primarily because: "Unlike the two groups of shoe sales employees [in *Bergdorf Goodman*], one of which contained all of the employees in a single department, while the other was only part of a larger department, all three of [VW's] shops have both production and maintenance employees." Decision at 19. But that does not adequately explain how the maintenance employees in this case are "readily identifiable as a group."

The Board found the women's shoe associates in *Bergdorf Goodman* to be an inappropriate unit because their combination did not track any organizational

structure drawn by the employer. That is *exactly* the case here, and the Board's supposed "distinction" reads like "a post-hoc justification . . . so strained that it is difficult to track the actual rationale being applied." *DPI Secuprint, Inc*., slip op. at 10 (Johnson, dissent).

If the illogic of the Board's finding is not reason enough to overturn the Decision, the procedural history of the case establishes beyond question that the unit is drawn based on one overriding factor the extent of organization. The Union tried, and failed, to organize the entire plant. It specifically agreed in Case No. 10-RM-121704 that the production and maintenance employees together comprised an appropriate unit.

Not until after the Union lost that election did it adjust its focus to the maintenance employees. Even then, when the Union continued its organizing attempts at the plant, it claimed to include both production and maintenance employees among its ranks. It is clear from the record the Union's intention is to organize the entire plant. Yet, the petition is limited to a gerrymandered group that does not track Volkswagen's departmental lines and which plainly does not share a separate community of interest. If these facts do not establish that the petitioned-for unit is drawn primarily on the extent of the Union's organization, it is difficult to imagine a set of facts that would.

Ultimately, the fractured unit approved by the Regional Director and ratified by the Board is not only contrary to Board law—it also clearly demonstrates that it is in reality based on the "extent to which the employees have organized," which is the "controlling" factor. The Board's Decision represents a profound disregard of both the Board's disapproval of fractured units and the plain language and congressional intent underlying the Act.

VII. CONCLUSION

For all of the reasons discussed above, the Court should grant Volkswagen's petition for review and deny the Board's cross-petition.

Dated: February 2, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the limitations of Fed. R. App. P. 29(a)(5) because it contains 6,181 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief 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 typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2017, a true and correct copy of the foregoing Brief of Amici Curiae the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Retail Federation, National Federation of Independent Business, National Association of Manufacturers, and HR Policy Association was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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ADDENDUM
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Addendum

A

National Labor Relations Act, 29 U.S.C. §151, et. seq.

Sec. 9 [§ 159.] (b) [Determination of bargaining unit by Board] 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 [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Sec. 9 [§ 159.] (c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional

office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.