UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,

and **Cases 10-RC-215878**

INTERNATIONAL ASSOCIATE OF
MACHINISTS AND AEROSPACE WORKERS

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, HR POLICY ASSOCIATION AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT FOR LEAVE TO FILE BRIEF AS *AMICI* CURIAE

Comes now the National Association of Manufacturers, HR Policy Association, and Society for Human Resource Management, by undersigned counsel and seeks leave to file, as *Amici Curaie*, the accompanying Brief in support of The Boeing Company's Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review").

1. The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's members includes a wide range of employers who employ both union-represented and unrepresented workers. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

2. Both manufacturers and their employees rely on fairness in our labor law system, and maintaining the time-tested balance between labor unions and employers is critical to economic growth and job creation. Accordingly, for decades, the NAM has participated as amicus curiae in many significant labor cases before the Supreme Court, federal courts of appeal, and the National Labor Relations Board ("NLRB" or the "Board").

3. The HR Policy Association ("HR Policy") is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. HR Policy consists of over 360 large corporations employing more than 20 million employees. HR Policy focuses primarily on the concerns of the most senior HR executives of our members.

4. The Society for Human Resource Management ("SHRM") is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, SHRM has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

5. Many members of the NAM, HR Policy, and SHRM (collectively "amici") are covered by the National Labor Relations Act ("NLRA" or "the Act"). The NAM, HR Policy, and SHRM, therefore, have direct and immediate concerns about the issue presented here: what standard the NLRB will apply to determine appropriate bargaining units under the NLRA. The test or standard to determine such a question, not only is often dispositive as to whether a petitioning party prevails in a Board election, but also has significant ramifications on the ability of petitioning labor organizations to meaningfully represent unit employees in contract negotiations and in other matters involving the union-employer relationship. Such standard or test is also extremely important for employers as the composition of a voting unit can have significant ramifications on the ability of the employer to interact with its employees and to carry

on its operations without interruption of strikes, jurisdictional disputes, and other potential impediments.

6. This case involves one of the largest manufacturing facilities in the country – The Boeing Company's ("Boeing") 787 Dreamliner manufacturing facility in South Carolina (the "Plant"), which employs approximately 3000 production and maintenance employees.

7. The Plant is a highly integrated operation that has been the subject of three union representation petitions over the last three years. The petitioner in each election was the International Association of Machinists ("IAM" or "Union"). The first petition was for all production and maintenance employees and was withdrawn by the IAM in April 2015.[1] The second petition was filed in January 2017 and again sought to organize all production and maintenance employees. An NLRB-conducted election followed, and the employees voted to reject representation by the IAM by a vote of 2,097 to 731.[2]

8. Having failed in their first two attempts to persuade Boeing employees to unionize, the IAM tried a third time, and on May 21, 2018, Regional Director of Region 10, John D. Doyle, Jr. ("Regional Director") issued a Decision and Direction of Election ("Decision") in which he directed the election of a fractured subset of employees at the Plant.

9. Specifically, the Regional Director determined that a group of flight readiness technicians ("FRTs") and flight readiness technician inspectors ("FRTIs")—two distinct positions within the Plant's production and maintenance workforce—constituted a unit "appropriate" for collective bargaining. He reached this conclusion even though the interests of the FRT and FRTI employees are virtually identical to those of other production and maintenance employees at the Plant.

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[1] Case No. 10-RC-148171.

[2] Case No. 10-RC-191563.

10. The Regional Director's Decision, however, fails to properly apply the traditional "community of interest" standard reaffirmed by the Board in *PCC Structurals,* which requires, among other things, that the Board "determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.'" 365 NLRB No. 160 at *13.

11. Furthermore, the Decision fails to apply the Board's long-standing presumption in favor of plant-wide units in the manufacturing setting, ignores a prior Board decision that addresses a nearly identical petition for a fractured unit in another Boeing operation, and disregards Board precedent holding that "testing" employees, like FRTs and FRTIs, be placed in the same bargaining unit as other maintenance and production employees.

12. Finally, the Regional Director's Decision violates Section 9(c)(5) by authorizing a bargaining unit based solely on the extent of union organizing.

13. The Decision presents significant issues for employers and their human resource departments in all industries, particularly employers engaged in operating manufacturing facilities. If allowed to stand, the Decision will cause the fracturing of integrated manufacturing facilities nationwide.

14. Fragmented units, like the one permitted by the Regional Director in this case, "erect artificial barriers separating employees and departments that can only impede an employer's ability to retain needed flexibility and respond quickly to industry change." *DPI Secuprint, Inc*., 362 NLRB No. 172 (Board Member Johnson, dissenting).

15. Furthermore, such units frustrate all employers' ability to maintain stable labor relations and undermine effective collective bargaining and industrial peace.

16. Together, on their own, or as members of a coalition, amici have submitted amicus briefs in nearly, if not all, cases at the Board and at the federal district courts of appeals in which the *Specialty Healthcare* standard has been raised. Amici and their members have, therefore, demonstrated a significant and unique interest in this area of the Board's jurisprudence. Because of this interest and experience, amici are well-suited to detail the significance of the case in a manner beyond what is set forth in the briefs of the parties.

17. At a minimum, given the substantial impact this case will have on employers generally, the Board should grant review to provide additional guidance regarding the application of the *PCC Structurals* standard.

18. The Brief being filed simultaneously with this Motion is narrowly crafted to allow for the Board's expeditious consideration of the issues raised. Further, consideration of the amici's Brief will not delay the Board's consideration of the significant issues presented.

WHEREFORE, the NAM, HR Policy, and SHRM respectfully request that the Board grant them leave to file the accompanying Amici Brief.

July 16, 2018

Respectfully Submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,

Employer,

and **NLRB Case No. 10-RC-215878**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Petitioner.

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, HR POLICY ASSOCIATION AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, HR POLICY ASSOCIATION, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Amici Curiae, the National Association of Manufacturers, HR Policy Association, and Society for Human Resource Management respectfully submit this Brief in support of The Boeing Company's Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review").

I. INTEREST OF THE AMICI CURIAE

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's members includes a wide range of employers who employ both union-represented and unrepresented workers. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

Both manufacturers and their employees rely on fairness in our labor law system, and maintaining the time-tested balance between labor unions and employers is critical to economic growth and job creation. Accordingly, for decades, the NAM has participated as *amicus curiae* in

many significant labor cases before the Supreme Court, federal courts of appeal, and the National Labor Relations Board ("NLRB" or the "Board").

The HR Policy Association ("HR Policy") is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. HR Policy consists of over 360 large corporations employing more than 20 million employees. HR Policy focuses primarily on the concerns of the most senior HR executives of our members.

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Many members of the NAM, HR Policy, and SHRM (collectively "amici") are covered by the National Labor Relations Act ("NLRA" or "the Act"). The NAM, HR Policy, and SHRM, therefore, have direct and immediate concerns about the issue presented here: what standard the NLRB will apply to determine appropriate bargaining units under the NLRA.

II. INTRODUCTION

This case presents important labor law policy issues including addressing the fundamental question of what constitutes an appropriate unit for bargaining under the National Labor Relations Act. The test or standard to determine such a question not only is often dispositive as to whether a petitioning party prevails in a Board election, but also has significant ramifications on the ability of petitioning labor organizations to meaningfully represent unit employees in contract

negotiations and in other matters involving the union-employer relationship. Such standard or test is also extremely important for employers as the composition of a voting unit can have significant ramifications on the ability of the employer to interact with its employees and to carry on its operations without interruption of strikes, jurisdictional disputes, and other potential impediments.

This case involves one of the largest manufacturing facilities in the country – The Boeing Company's ("Boeing") 787 Dreamliner manufacturing facility in South Carolina (the "Plant"), which employs approximately 3000 production and maintenance employees. The Plant is a highly integrated operation that has been the subject of three union representation petitions over the last three years. The petitioner in each election was the International Association of Machinists ("IAM" or "Union"). The first petition was for all production and maintenance employees and was withdrawn by the IAM in April 2015.[1] The second petition was filed in January 2017 and again sought to organize all production and maintenance employees. An NLRB-conducted election followed, and the employees voted to reject representation by the IAM by a vote of 2,097 to 731.[2]

Having failed in their first two attempts to persuade Boeing employees to unionize, the IAM tried a third time, and on May 21, 2018, Regional Director of Region 10, John D. Doyle, Jr. ("Regional Director") issued a Decision and Direction of Election ("Decision") in which he directed the election of a fractured subset of employees at the Plant. Specifically, the Regional Director determined that a group of flight readiness technicians ("FRTs") and flight readiness technician inspectors ("FRTIs")—two distinct positions within the Plant's production and maintenance workforce—constituted a unit "appropriate" for collective bargaining. He reached

[1] Case No. 10-RC-148171.

[2] Case No. 10-RC-191563.

this conclusion even though the interests of the FRT and FRTI employees are virtually identical to those of other production and maintenance employees at the Plant.

The Regional Director's Decision, however, fails to properly apply the traditional "community of interest" standard reaffirmed by the Board in *PCC Structurals,* which requires, among other things, that the Board "determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.'" 365 NLRB No. 160 at *13 (2017). Furthermore, the Decision fails to apply the Board's long-standing presumption in favor of plant-wide units in the manufacturing setting, ignores a prior Board decision that addresses a nearly identical petition for a fractured unit in another Boeing operation, and disregards Board precedent holding that "testing" employees, like FRTs and FRTIs, be placed in the same bargaining unit as other maintenance and production employees. Finally, the Regional Director's Decision violates Section 9(c)(5) by authorizing a bargaining unit based solely on the extent of union organizing.

The Decision presents significant issues for employers and their human resource departments in all industries, particularly employers engaged in operating manufacturing facilities. If allowed to stand, the Decision will cause the fracturing of integrated manufacturing facilities nationwide. Fragmented units, like the one permitted by the Regional Director in this case, "erect artificial barriers separating employees and departments that can only impede an employer's ability to retain needed flexibility and respond quickly to industry change." *DPI Secuprint, Inc*., 362 NLRB No. 172 (2015) (Board Member Johnson, dissenting). Furthermore, such units frustrate all employers' ability to maintain stable labor relations and undermine effective collective bargaining and industrial peace. At a minimum, given the substantial impact this case will have on employers

generally, the Board should grant review to provide additional guidance regarding the application of the *PCC Structurals* standard.

III. ARGUMENT

A. The Regional Director's Decision Misapplies Well-Established Board Precedent.

The Board should grant review and reverse the Regional Director's Decision, as it misapplies—and, in some cases, wholly disregards—long-standing Board precedent. As discussed in further detail below, the Decision: (1) fails to properly apply the traditional "community of interest" standard reaffirmed by the Board in *PCC Structurals*; (2) fails to apply the Board's long-standing presumption in favor of plant-wide units in manufacturing settings*;* (3) ignores a prior Board decision that addresses a nearly identical petition for a fractured unit in another Boeing operation; and (4) is contrary to Board precedent holding that "testing" employees, like FRTs and FRTIs, should be placed in the same bargaining unit as other maintenance and production employees.

1. The Regional Director Failed to Properly Apply *PCC Structurals.*

The Board's 2017 decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 marked an end to six years of anomalous jurisprudence regarding the Board's unit determination standard. For decades, the Board employed a traditional "community of interest" standard that properly evaluated a variety of factors in determining whether a petitioned-for group of employees constituted an appropriate bargaining unit under the Act. However, in 2011, over the objections of then-member Hayes, the Board scrapped this long-standing standard in favor of the "overwhelming community of interest" standard in *Specialty Healthcare*, 357 NLRB 934 (2011). What followed was six years of Board jurisprudence in which labor unions' desired units largely controlled the outcome of bargaining unit determinations. Though *PCC Structurals* returned the

Board to its common-sense unit determination standard, as explained in more detail below, the Regional Director's decision in this case all but ignores *PCC Structurals* and evaluates the facts as though *Specialty Healthcare* still controls – it does not.

Specifically, in *PCC Structurals*, the Board reaffirmed the traditional "community of interest" standard that it historically applied in determining appropriate bargaining units, concluding that the "standard adopted in *Specialty Healthcare* [wa]s fundamentally flawed." 365 NLRB No. 160 at *8. *Specialty Healthcare* "borrowed" the overwhelming community of interest test from another area of Board law—the law of accretion. In accretion cases, generally, a smaller group of unrepresented employers were accreted, or added, to an existing bargaining unit without an election. The rationale for such accretion or addition was based upon the finding that the interests and terms and conditions of employment of the two groups were virtually identical. The overwhelming community of interest test before the decision in *Specialty Healthcare* had never been utilized in non-accretion cases and was not part of the Board's traditional community of interest test.

The *Specialty Healthcare* standard created a new and unprecedented two-pronged approach to evaluate the appropriateness of a petitioned-for units. *Specialty Healthcare*, 357 NLRB at 944-946. Under that new standard, when a union sought to represent virtually any unit of employees who were readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), the Board would generally defer to the petitioner and find that the petitioned-for unit was appropriate. *Id*. at 945-946. From there, the burden would shift to the proponent of a larger unit (typically the employer) to demonstrate that the petition excluded other employees who shared "an overwhelming community of interest" with the petitioned-for employees, such that there was no legitimate basis upon which to exclude them

from the petitioned-for unit. *Id.* at 944 (internal citations omitted). This so-called new unit standard proved to be virtually unobtainable for any party challenging a petitioned-for unit under the overwhelming community of interest test, and unions under such standards were virtually free to choose any subgroup of employees they desired to obtain an election.[3]

In *PCC Structurals*, the Board rejected the *Specialty Healthcare* standard because it improperly "gave controlling weight" and "all-but-conclusive deference to every petitioned-for 'subdivision' unit, without attaching any weight to the interest of the excluded employees…." 365 NLRB No. 160 at *3 and *8. The Board noted that the first prong of the *Specialty Healthcare* standard required the Board to consider the interests of the petitioned-for unit in a vacuum, which was "obviously" contrary to the NLRA. *Id.* at *12. Furthermore, the Board held that *Specialty Healthcare*'s second prong placed an inappropriate and, as stated above, "next-to-impossible" burden on the employer to overcome the "extraordinary deference" given to the petitioned-for bargaining unit by showing an "overwhelming community of interest" between the petitioned-for unit and the excluded employees. *Id*. at *9. The *PCC Structurals* Board explained that "Congress did not intend that the petitioned-for unit would be controlling in all but those extraordinary cases when the evidence of overlapping interests between included and excluded employees is overwhelming…[instead,] Congress intended that the Board 'in each case' would carefully consider the interests of all employees." *Id.* at *6 and *7. By "creat[ing] a regime under which

[3] *See DPI Secuprint, Inc*., 362 NLRB No. 172, at 5 (Aug. 20, 2015) (applying *Specialty Healthcare* rule to approve bargaining unit limited to approximately 13 pre-press, digital press, offset, and digital bindery employees and excluding 7 offset-press employees); *Macy's, Inc*., 361 NLRB No. 4, at 19 (July 22, 2014) (applying rule to approve bargaining unit limited to 41 cosmetics and fragrances employees and excluding 80 other sales employees); *Guide Dogs for the Blind, Inc*., 359 NLRB No. 151, at 7-10 (July 3, 2013) (applying rule to approve bargaining unit limited to 12 canine welfare technicians and 21 instructors and excluding 55 employees in the other "dog handling" classifications in the same facility); *see also Fraser Eng'g*, 359 NLRB No. 80 (Mar. 20, 2013); *Grace Indus*., LLC, 358 NLRB No. 62 (June 18, 2012*)*; *Northrop Grumman Shipbuilding Co*., 357 NLRB 2015 (Dec. 30, 2011); *DTG Operations, Inc*., 357 NLRB No. 175, at 1-3 (Dec. 30, 2011); *Nestle Dreyer's Ice Cream*, 31-RC- 66625 (Dec. 28, 2011) (unpublished).

the petitioned-for unit is controlling in all but narrow and highly unusual circumstances," *Specialty Healthcare* had improperly "shifted [the burden of proof] to the employer." *Id*. at *12.

In overturning *Specialty Healthcare*, the *PCC Structurals* Board acknowledged that it is the Board's burden "to determine which unit configuration(s) satisfy the requirement of assuring employees their 'fullest freedom' in exercising protected rights …. taking into consideration the interest of employees both within and outside the petitioned-for unit…." *Id.* at *6 and *12. *PCC Structurals* expressly rejected the lopsided *Specialty Healthcare* inquiry that did not account for the community of interest between the petitioned-for employees and the excluded employees, unless the employer carried an insurmountable burden of showing that the community of interest was "overwhelming" such that the factors overlap "almost completely." 357 NLRB at 944. *PCC Structurals* corrected that error by requiring a determination of "whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.'" *Id*. at *11 (quoting *Constellation Brands v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)); *see also Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980) ("Numerous groups of employees fairly can be said to possess employment conditions or interests 'in common.' Our inquiry—though perhaps not articulated in every case—necessarily proceeds 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.").

As Boeing argues in its Request for Review, the Regional Director's analysis in this case is irreconcilable with the controlling standard set forth in *PCC Structurals*. *See* Request for Review, pp. 14-44. First, the Decision fails to properly apply "step one" of *PCC Structurals*, which requires "'identify[ing] shared interests among members of the petitioned-for unit.'" 365 NLRB No. 160, at *11 (endorsing the quoted analysis from *Constellation Brands*, 842 F.3d at

794). For the reasons stated by Boeing in its brief, there is an insufficient "shared interest" within the petitioned-for unit. *See* Request for Review, pp. 14-18. Among other factors, the Plant's FRTs perform entirely different job functions than the FRTIs, the two positions work in completely separate departments, share no common supervision, and there is no interchange among and between the two positions. *Id.*

Furthermore, the Regional Director wholly ignored the second step of *PCC Structurals, i.e.*, the "weighing [of] both the shared and the distinct interests of petitioned-for and excluded employees," 365 NLRB No. 160 at *13. At the hearing, Boeing presented undisputed evidence that all production and maintenance employees at the Plant function as part of a fully integrated process, coordinated across departments, to achieve a single goal of producing 787 aircraft. Boeing also presented evidence that FRTs and FRTIs work closely with other production and maintenance employees, and are regularly transferred to other production stages to perform the same work as employees excluded by the proposed bargaining unit. The Regional Director conceded these facts but nonetheless focused on a limited number of similarities between FRTs and FRTIs, such as slightly higher pay and more specialized training. The Regional Director never, however, performed the analysis that *PCC Structurals* requires to determine whether these limited shared interests outweigh the interests shared with the rest of the employees at the Plant. For example, he failed to weigh the fact that FRTs and FRTIs regularly transfer on a temporary basis to other areas of the Plant to perform the work of other Operations or Quality teammates, respectively, against the fact that FRTs never temporarily transfer into FRTI positions, or vice versa.

Ultimately, the Regional Director's failure to engage in the required analysis in *PCC Structurals* led to the approval of an "arbitrary grouping of employees" that will "impede rather

than enhance the collective bargaining process." *Amalgamated Clothing Workers of Am. v. NLRB*, 491 F.2d 595, 598 (5th Cir. 1974). This outcome is inimical to the purposes of the Act. Therefore, it is imperative that the Board act here to correct the Regional Director's decision in order to ensure that the return to the traditional community of interest standard re-established in *PCC Structurals* is the law of the land. Such direction will provide clarity not just to the Board's Regional Directors, but to employers, employees, and unions, as well.

2. The Regional Director's Decision Ignores the Board's Long-Standing Presumption in Favor of Wall-to-Wall Bargaining Units in Manufacturing Plants.

The Regional Director's decision also cannot be reconciled with the Board's substantial body of decisions regarding appropriate units in manufacturing facilities. If not reversed, the Decision will create both uncertainty and the potential fracturing of integrated manufacturing facilities nationwide.

In analyzing whether employees share a community of interest, the Board is aided by a number of presumptions of unit appropriateness. *Specialty Healthcare*, 357 NLRB at n.16; *see also PCC Structurals*, 365 NLRB No. 160, at *9 n.44 ("[T]he Board will continue to apply existing principles regarding bargaining units that the Board deems presumptively appropriate."). These presumptions apply to particular categories of proposed units that meet specific criteria. The majority of these presumptions come from the language of Section 9(b) of the Act, which specifically lists as appropriate units: "the employer unit, craft unit, plant unit, or subdivision thereof ..." 29 U.S.C. § 159(b). Where a statutory presumption exists in favor of a bargaining unit, the Board has found that "'a community of interest inherently exists among such employees.'" *See Airco, Inc.*, 273 NLRB 348, 349 (1984) (quoting *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136 (1962) (discussing application of statutory presumption of appropriateness to plant-wide unit)).

In the manufacturing setting, the Board consistently has held that a plant-wide bargaining unit is presumptively appropriate. *See Airco, Inc*., 273 NLRB at 349 (cited with approval in *Int'l Bedding Co*., 356 NLRB No. 168 (2011)); *RTW Indus.*, 296 NLRB 910, 912 (1989); and *J.P. Stevens & Co*., 268 NLRB 63, 76 (1983). This presumption recognizes that when all manufacturing employees are working toward the common goal of producing a finished product, certain groups should not be artificially segregated from their co-workers simply because they may focus on one step of the unitary production process. *See, e.g.*, *Buckhorn, Inc*., 343 NLRB 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Clinton Corn Processing Co*., 251 NLRB 954, 955 (1980) (finding only a wall-to-wall unit appropriate due to the "highly integrated production process" in which "if any one of [its] functions becomes inoperable, 'The process must stop; goes down'"); *Avon Products, Inc*., 250 NLRB 1479, 1482 (1979) (reversing regional director's decision that failed to account for employer's "highly integrated process"); *Chromalloy Photographic Indus.*, 234 NLRB 1046, 1047 (1978) (finding unit of all production and maintenance employees—including "repair" technicians—was appropriate given that the employer was engaged in a single highly integrated process); *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); and *Kalamazoo Paper Box Corp*., 136 NLRB at 136 (applying the presumption to preserve a single unit of all production and maintenance employees, instead of severing an isolated unit of drivers proposed by union).

Under this long-standing Board precedent, the Board must approve a plant-wide unit in the manufacturing sector unless the presumption in favor of such a unit is rebutted by detailed evidence demonstrating that the unit is inappropriate. Specifically, the party objecting to a presumptively

appropriate unit, such as the plant-wide unit here, bears the burden of "demonstrat[ing] that the interests of a given classification are so disparate from those of other employees that they ***cannot*** be represented in the same unit." *Airco, Inc*., 273 NLRB at 349 (citing *E. H. Koester Bakery*, 136 NLRB at 1011) (emphasis added) (rejecting the attempt of the employer, a manufacturer of industrial gases, to exclude plant operators from the petitioned-for unit of all production and maintenance employees at a single manufacturing facility); *Wheeling Island Gaming, Inc*., 355 NLRB 637, 637 n.2 (2010) (stating that the Board must "determin[e] whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit"); *see also Newton-Wellesley*, 250 NLRB at 411–412 (Board must determine "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.").

In his Decision, the Regional Director noted in passing the presumption in favor of plantwide units. Decision at p. 24. Nevertheless, the Regional Director performed none of the analysis required to rebut the presumption before he found that the fractured unit composed of FRTs and FRTIs was appropriate. That is, he failed to even consider whether the interests of the FRT and FRTI classifications "are so disparate from those of other employees that they cannot be represented in the same unit." *Airco, Inc*., 273 NLRB at 349. Indeed, given the union's prior, failed attempt to represent all production and maintenance employees at the Plant, including FRTs and FRTIs, the Regional Director could not have concluded that the FRTs and FRTIs "cannot be represented" in the same unit as the other production and maintenance employees. As the petitioning union conceded in seeking the initial election, all production and maintenance employees at the Plant clearly can be represented in one unit, and, thus, under long-standing Board precedent, a plantwide unit is the only appropriate one under the NLRA.

By failing to properly apply the presumption in favor of plantwide units, the Regional Director's Decision, if applied broadly, threatens to create fractured units not only in the Boeing plant but also in manufacturing facilities throughout the country.

3. The Regional Director's Decision Disregards the Board's Prior Holding that a Plantwide Unit at Another Boeing Operation was Appropriate.

The Regional Director also inexplicably failed to even cite to a prior Board decision that addressed an almost identical petition for a fractured unit in *another* Boeing operation.

In *Charleston AFB*, the union petitioned for a unit of employees in the "recovery and modification (RAM) group" that worked on the flight line of the Charleston Air Force Base, where Boeing maintained and repaired C-17 cargo aircraft. 337 NLRB 152, 152 (2001). The RAM group, which included mechanics, tools and parts attendants, and quality assurance employees, was "responsible for repairing, inspecting, and maintaining the engines of C-17 aircraft" on the flight line. *Id*. The petitioned-for unit excluded, however, two groups that worked primarily in nearby buildings: the "engine support equipment (ESE) group," which primarily maintained and repaired the support equipment used by the RAM group; and the "repair of repairables (ROR) group," which stored and delivered parts and materials needed for C-17 repairs. *Id*.

As in this case, the Regional Director found that the flight-line-based unit of RAM employees was appropriate. However, the Board reversed, finding that "the smallest appropriate unit must include all production and maintenance employees at the Charleston Air Force facility." *Id*. at 152. The Board held that, even though the RAM employees worked on different equipment, in separate areas, under separate supervision, and had minimal contact or interchange with the ESE and ROR groups, these distinctions "are offset by the highly integrated work force, the similarity in training and job functions … and the comparable terms and conditions of employment" of the excluded employees. *Id*. at 153.

Here, as in *Charleston AFB*, any similarities among the FRTIs and the FRTs are more than offset by substantial factors weighing in favor of plantwide unit, particularly, the highly integrated workforce at the Plant. Indeed, as Boeing argues in its brief, support for a fractured unit in this case is even weaker than it was in the *Charleston AFB* case. *See* Request for Review, at p. 23. For instance, while the FRTIs and the FRTs at this Plant are in different departments (with other quality and operations production and maintenance employees) and lack a common supervisor, all of the petitioned-for employees in Charleston AFB reported to the same direct supervisor. *Id.* Thus, the Regional Director's Decision is plainly contrary to the Board's holding in *Charleston AFB* and should be reversed on the same grounds.

4. The Regional Director's Decision Improperly Draws a Distinction Between "Testing" and Other Production Functions at the Plant.

The Regional Director's Decision disregards well established Board precedent holding that employees engaged in testing, like FRTs and FRTIs, are essential to an integrated workforce and thus are appropriately part of a plantwide unit composed of all production and maintenance employees. *See Airesearch Manufacturing Co.*, 137 NLRB No. 84 (1962).

In his Decision, the Regional Director found it significant that "FRTs and FRTIs test and inspect the airplane for the first time after it becomes fully operational." Decision at p. 28. However, as the Board recognized in *Airesearch*, in a manufacturing facility, "the testing function and the instrumentation utilized therein is an integral part of, and inextricably related to, the total production process." *Id.* at *3. Accordingly, even assuming that "testing" employees perform different functions than other production and maintenance employees, the Board explained that these employees should not be placed in a separate unit due to their work functions. *Id.* ("[E]mployees engaged in testing are not by reason of their duties and functions such a distinct and homogeneous group as would justify constituting them a separate appropriate unit."); *see also*

Tracerlab, 158 NLRB 667, 669-70 (1966) (excluding technical employees who perform research and testing from a wall-to-wall unit was inappropriate because they "form an integral part of, and are inextricably related to, the Employer's production process").

Again, by disregarding this binding precedent, the Regional Director opened the door to the unwarranted and dangerous fracturing of an integrated operation based on a factor that the Board has specifically instructed should be given little—if any—weight.

For all the above reasons, the Regional Director's Decision directly conflicts with the Act and well-established Board precedent and should be reversed.[4]

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[4] In its Opposition to Boeing's Request for Review, the Union relies on inapplicable Board law to argue that the Regional Director's Decision should be upheld. For instance, the Union relies heavily on *In re Bartlett Collins Co*., 334 NLRB No. 76 (2001) for the presumption that "[t]he Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications." *Id*. at *1. However, if anything, the Board's decision in *Bartlett* supports Boeing's position in this case. In *Bartlett*, the Board considered whether a petitioned-for unit of mold-repair employees in a glass tableware manufacturing plant was appropriate. After considering the traditional community of interest factors, the Board found that the petitioned-for unit was not appropriate as it was not a "readily identifiable homogenous group, or departmental group, with a community of interest separate from that of certain excluded employees." *Id*. at *2. Specifically, the Board found that the mold-repair employees were not a "craft" and that the smallest appropriate unit must, at the very least, include mold-cleaning employees, who are "located in close physical proximity to the mold-repair employees," supervised by the same manager, receive the same benefits, are subject to the same employer policies, and function as a "highly integrated" work force. *Id*. at *2.

As Boeing has argued, in this case, the FRTs and FRTIs work in physical proximity to the other production and maintenance employees, share high-level supervision, receive largely the same benefits as other employees, are subject to the same policies, and, most importantly, function as a "highly integrated" workforce. Thus, under the analysis in *Bartlett*, a separate unit of FRTs and FRTIs is plainly inappropriate. Furthermore, the fact that the Board in *Bartlett* did not find a plantwide unit to be the only appropriate unit is not dispositive. Unlike in this case, the Board in *Bartlett* explained that "the mold-repair and mold-cleaning employees, as a group, essentially perform integrated functions distinct from those performed by the other unrepresented employees." *Id*. In other words, unlike at the Boeing plant at issue in this case, the entire facility in *Bartlett* did not operate as a single integrated unit. Thus, the presumption in favor of a plantwide unit arguably was inapplicable, or at the very least, could easily be rebutted.

The other cases the Union cites are equally inapplicable. For instance, the Union's reliance on *American Cyamid, Co*., 131 NLRB 909 (1961) is entirely misplaced. There, the Board specifically found that "[t]he record in this case fails to establish that the Employer's operation is so integrated, as alleged herein, that maintenance has lost its identity as a function separate from production, and that maintenance employees are not separately identifiable." *Id*. at 910. Specifically, the Board found that "the function performed by production workers in such circumstances is incidental to the preparation of the equipment for the repairs made by the maintenance employees. While minor adjustments are made by some production workers on their own machinery this is incidental to their production operation." *Id.* Here, in contrast, the function performed by the FRTs and FRTIs are not "incidental" but rather central to the production of Boeing's 787 aircraft. That is, without proper testing, these aircraft cannot make it to market. *See also Crown Simpson Pulp Company*, 163 NLRB 796, 797 (1967) ("At those times, when the maintenance

B. The Regional Director's Decision Will Have a Particularly Unwarranted, Adverse Impact on the Manufacturing Industry and its Employees.

The Regional Director's Decision, if not reversed, will have far-reaching consequences on all employers in the United States, particularly those in the manufacturing sector. First and foremost, the Decision will frustrate manufacturers' ability to remain both flexible and efficient in a highly-competitive, ever-changing economy. Second, the Decision will incentivize gerrymandering of the kind the Union performed in this case, thus undermining employees' rights to "refrain" from collective bargaining and providing unions multiple opportunities to unionize an uninterested workforce. Third, the Decision, which emphasized the specialized training the FRTs and FRTIs receive, is out of step with the modern economic reality in manufacturing, where efficiency and innovation *require* a highly sophisticated, well-trained workforce that freely moves from one duty to another.

1. Fractured Bargaining Units Lead to Lack of Efficiency and Flexibility in a Functionally Integrated Plant

The manufacturing sector requires the integrated effort of employees using different skills and abilities toward a common end. In many manufacturing settings, employees perform tasks in a variety of different departments and settings in order to develop their skills and knowledge base. As a result, production operations can involve a high degree of interchange among job classifications. Boeing's operations are no different.

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 expectations via flexible staffing, as employees generally may not and cannot perform work assigned to another

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employees work in conjunction with production employees, the function performed by production workers is incidental to the preparation of the equipment for the repairs made by the maintenance employees.") (emphasis added).

unit. Employees would be limited to fractured units and the job duties assigned to that particular unit, thus reducing skill building, training, and job opportunities as cross-training, promotions, and transfers would be hindered by barriers created by multiple smaller bargaining units. Further, "upward mobility" of entry level and other lower compensated employees can be significantly hindered as unions typically obtain bargaining unit seniority in their contracts, thus making it more difficult for employees outside of such unit to obtain positions in the unit. Indeed, such fragmentation could have adverse equal employment opportunity consequences for plant and maintenance employees who are not in the petitioned-for unit. With the artificial "Flight Line employee" group created by the Regional Director, there is an even greater limitation on possible cross-training and flexibility within the "Flight Line," to say nothing of the impact on the facility as a whole. Decision at pgs. 5, 19, 22.

Board Member Johnson's dissent in *DPI Secuprint, Inc.*, 362 NLRB No. 172 eloquently discusses these issues, explaining:

> Multiple units in a functionally integrated workplace with a linear production process like this one erect artificial barriers separating employees and departments that can only impede an employer's ability to retain needed flexibility and respond quickly to industry change ...
>
> An employer ... cannot function effectively if various interdependent tasks become fixed in stone within discrete units—fixed not because of anything inherent in the work itself, but because a union has only organized some subset of the employees who, together with nonorganized employees, share in one linear production process. Workflow management becomes driven not by efficiencies and the demands of the work but by artificial barriers dividing functionally integrated production workers into separate units so that the simplest of changes may require negotiation with multiple and sometimes competing representatives and then the agreement of all of them. And in an organization where complex decisionmaking occurs both at the micro, or departmental level and on a macro, or organization-wide level, a need to bargain efficiencies and needs of each department with separate bargaining representatives can grind an operation to a halt.

The Regional Director's decision itself confirms this fear. Repeatedly throughout the decision, the Regional Director refers to "Flight Line employees" when discussing the perceived

differences in working conditions between the FRTs and FRTIs and the rest of the facility. Importantly, the Regional Director repeatedly glosses over the other "Flight Line employees" in this analysis, namely the eight ECBV production control employees, the 11 DCTJ painters, and the 10 DCTL fabrication specialists that are also assigned to the nine stalls on the Flight Line. This artificial distinction, drawn by the Regional Director in his own decision, highlights the fractured nature of the petitioned-for unit. The Union has not even petitioned for the entirety of the "Flight Line employees" as artificially defined by the Regional Director.

In addition, manufacturers and their HR departments will likely have to contend with multiple collective bargaining agreements (e.g., different agreements for maintenance employees; production employees, perhaps segmented by shop; quality control employees; shipping and receiving employees; etc.), in which the unions may insist on different or conflicting work rules, pay scales, benefits, bargaining schedules, vacation and holidays, grievance processes, and layoff and recall procedures. Juggling the administrative tasks associated with multiple bargaining agreements could overwhelm businesses and HR to the point of paralysis. For example, 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. Indeed, the potential for jurisdictional work disputes increases dramatically when fragmentation occurs in an integrated workplace setting.

Multiple unions representing multiple bargaining units within a single manufacturing facility could also lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits, fighting about overtime, seniority, and differing layoff and job bid procedures 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.

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 Shipbuilding Inc.*, 357 NLRB 2015 (2011), slip op. at 9 (Hayes, dissent).

2. The Regional Director's Decision Will Lead to Improper Gerrymandering of Bargaining Units in the Manufacturing Setting.

The Regional Director's analysis invites unions to gerrymander, *DPI Secuprint*, 362 NLRB No. 172, at 9 (Member Johnson, dissenting), and thus undermines an employee's right to "refrain" from collective bargaining activities. The Decision, therefore, sits in substantial tension with the guarantee of employee self-determination reflected in § 7 of the NLRA, which provides:

> Employees shall have 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, ***and shall also have the right to refrain from any or all such activities ...***

29 U.S.C. § 157 (emphasis added); *Superior Prot., Inc*., 401 F.3d 282, 288 n.7 (5th Cir. 2005) (stating that the right to organize and the right to refrain from organizing are to be guarded "'with equal jealousy'" (citation omitted)).

In fact, the decision here invites not just gerrymandering by classification, department, building, or segment of the manufacturing process, the Regional Director's decision here invites gerrymandering within a subsection of employees within an artificial construct of "Flight Line

employees" while ignoring the remainder of the "Flight Line." Repeatedly, the Regional Director's decision refers to differences between the Flight Line and other production and maintenance employees, but the Decision does not explain how these same differences that equally affect the other employees on the Flight Line do not mean they must be included in the unit. The Regional Director's construct is wholly devised to avoid the tenets of *PCC Structurals* and provide the Union with a gerrymandered unit. *See PCC Structurals*, 365 No. 160 at *5 ("The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or 'fractured' – that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit. . . .").

This kind of fragmentation will lead to absurd results in bargaining unit determinations that make no operational or labor policy sense. Rather than being forced to persuade employees that share common interests in a broader unit, a union may simply seek out a targeted group of employees where it knows it has the upper hand. In practice, this means that "unions [will] engage in incremental organizing in the smallest units possible." *Specialty Healthcare*, 357 NLRB at 952 (Member Hayes, dissenting); *see also Lundy Packing Co.*, 68 F.3d 1577, 1579 (1995). This effectively disenfranchises other employees who, though they may be in the majority in defeating a larger unit, find themselves marginalized within the petitioned-for unit or excluded altogether from having a voice in the petitioned-for unit election.

Indeed, this case is the perfect example of gerrymandering based solely on the Union's efforts to organize. The procedural history of the case establishes conclusively that the unit of

FRTs and FRTIs was drawn based on one overriding factor—the extent of union organization. The union tried, and failed, to organize the entire Plant. In fact, it specifically agreed in Case Nos. 10-RC-148171 and 10-RC-191563 that the production and maintenance employees together comprised an appropriate unit. Only after the union lost the election did it adjust its focus to the FRTs and FRTIs. Thus, it is clear from the record that, while the union's intention is to organize the entire plant, its petition in this case is limited to a gerrymandered group that does not track Boeing's departmental lines and which plainly does not share a separate community of interest.

By organizing this fractured unit, the Union has effectively disenfranchised those employees who voted against unionization in the initial election. Furthermore, the Regional Director's Decision gives unions in the manufacturing sector the opportunity to take multiple bites at the apple — that is, if a union fails to organize a plantwide unit, it can continue to hold elections, one after the other, each representing a smaller section of the workforce, until it obtains a majority vote. Section 9(c)(5) of the Act specifically prohibits this type of gerrymandering, stating, "[i]n 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***." 29 U.S.C. § 159(c)(5) (emphasis added). Accordingly, the Regional Director's Decision, which allowed the Union in this case to fashion a unit based solely on its ability to organize, represents a profound disregard of both the Board's disapproval of fractured units and the plain language and congressional intent of the Act.

3. Additional Costs of Increased Specialization.

The Regional Director's focus on specialized training is especially problematic in today's economy, and, in particular, threatens manufacturers' ability to modernize and remain flexible in an ever-changing economy. As new technology makes manufacturing more efficient, more employees on the production line will hold specialized jobs. It is particularly important for

employees with such specialized training and skills to have flexibility to move throughout the plant to provide training and guidance to the entire production line. In this case, the Regional Director focused on additional training that FRTs and FRTIs have, including an Airframe and Powerplant license as well as other training including Aircraft Towing and Aircraft Marshaling. Decision at pgs. 8-9. While the Regional Director relied heavily on the requirement that FRTs and FRTIs hold a particular FAA license, he willfully ignored that this license is neither unique to FRTs and FRTIs, nor necessary to any task performed by them. Decision at pgs. 26-27.

Under the Regional Director's analysis, employees who receive this type of specialized training will more often be certified as a separate, fractured unit, thus disrupting operations throughout the plant. This will have far-reaching consequences on the manufacturing sector as it becomes more technologically advanced. The Regional Director's analysis could be used to create fractured units throughout manufacturing facilities, especially as high-performance work systems and other integrating processes become more and more popular. Increased flexibility in the workforce has led to a focus on increased pay for increased training and skills throughout manufacturing. The Regional Director's decision could be used, for example, to determine that loading dock employees constitute a separate, appropriate unit if they have forklift training and licenses, apart from the production employees in a facility. In most manufacturing environments, quality control specialists utilize additional training and computer skills to test parts and finished products, and under the Regional Director's reasoning they too would be an appropriate unit. The Regional Director's decision penalizes employers for hiring and training skilled production employees to work in an integrated manufacturing environment.

The fact that FRTs and FRTIs have certain skills distinct from the remainder of the workforce does not impact their functional integration with the remainder of the workforce.

Maintenance employees have additional skills from the remainder of employees in almost every manufacturing environment, yet they do not per se or automatically create an appropriate, separate unit. Here, the Regional Director completely glosses over the rework and temporary transfers of FRTs and FRTIs to other areas of the facility. It is not the distinct skills that matter, but the manner in which the employer sets up its business to utilize the skills in an integrated, efficient manner. The FRTs and FRTIs' additional training and specialization makes them *more* integrated with the remainder of the workforce, not *less*.

IV. CONCLUSION

In *PCC Structurals* the Board properly returned to its long-established and accepted traditional community of interest standard for bargaining unit determinations. As described above, if the Board accepts the Regional Director's Decision in this case, it undermines *PCC Structurals* by improperly certifying a *Specialty Healthcare*-like fractured unit. Such a result would be troubling for all employers and particularly troubling for manufacturing employers, where fractured units reduce employers' abilities to optimize flexibility and efficiency in a hyper-competitive economy and could lead to unstable labor relations.

For all of these reasons, amici respectfully request that the Board grant Boeing's Request for Review and hold that the union's petitioned-for unit is not an appropriate unit under the Act.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to File Amicus Brief was filed electronically through the Board's website and has been served on this date, July 16, 2018 upon the persons shown below by emailing a copy thereof to:

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